

# Reconsideration Order

STATE OF SOUTH CAROLINA FILED CLERK'S OFFICE IN THE COURT OF COMMON PLEAS  
ANDERSON SC

COUNTY OF ANDERSON 2013 NOV 8 AM 9 57 Civil Action No. 2009-CP-04-4482

Anderson County,

COMMON PLEAS AND  
GENERAL SESSIONS  
Plaintiff,

vs.

Joey Preston and the South Carolina  
Retirement System,

Defendants.

ORDER

This matter comes before the Court on three motions. They include: a post-judgment motion to amend ("Motion to Amend") filed by Anderson County ("Plaintiff" or "the County"); a motion to intervene filed by putative intervenor, Richard Freemantle ("Intervention Motion"); and a motion to reconsider ("Reconsideration Motion") filed by the County. For the reasons stated herein, the Court denies all three (3) motions.

The County's Motion to Amend

The Motion to Amend seeks to add a new claim for relief bottomed on a theory that the severance agreement ("Severance Agreement"), executed by the County and Preston in November of 2008, arose from a vote where Plaintiff now contends no quorum ("Quorum Claim") of County Council existed. The County filed its Motion to Amend on July 15, 2013: nine (9) months after trial, two (2) months after the Court issued its judgment in this case, and two (2) months after the County filed its Reconsideration Motion.

The County failed to preserve the proposed Quorum Claim, as the issue was never presented to the Court. At trial, Plaintiff actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast. Allowing

*ASL*  
*P'*

Plaintiff to amend its pleading, at this stage, would impermissibly allow the County to try the instant case twice using discrepant legal and factual theories of relief, the latter of which the County only raised after the Court issued judgment on May 3, 2013.

Even if the Quorum Claim had merit, which the Court rejects *infra*, the County unduly delayed in seeking the Quorum Claim amendment. The County had more than adequate opportunity to pursue the amendment: from the case's inception; during the three (3) years leading up to trial; following Waldrep's and C. Wilson's depositions; in connection with the previous amendment of Plaintiff's Complaint (which was by consent on March 29, 2012). The County could also have pursued the amendment: on or before the first day of trial; during the trial; contemporaneous with the submittal of its November 16, 2012 written summation following trial; or during the six (6) month window between trial and issuance of judgment. The County failed to identify any legitimate basis, legally or factually, for its delay in pursuing the Quorum Claim.

Permitting the County's proposed amendment—following a lengthy trial and after judgment issued—would require the Court to re-open proof in this case. Such result would highly prejudice Preston. Absent re-opening proof, Preston would lose:

- The opportunity to develop facts and introduce evidence of prior usage and to assert the same as an affirmative defense (Third Davis Aff., ¶¶12-14);
- The opportunity to develop facts and introduce evidence regarding other affirmative defenses such as (*inter alia*) the rule of necessity doctrine, ratification, waiver, and estoppel (*Id.* at ¶¶30-31);
- The opportunity to develop facts and introduce evidence refuting the non-existence of a quorum (*Id.* at ¶¶14-19);
- The opportunity to introduce expert testimony concerning the Quorum Claim (*Id.* at ¶¶20-21);

Handwritten signature or initials, possibly "All" and "12", written in black ink.

- The opportunity to pursue different litigation and trial strategies, based upon claims actually asserted (*Id.* at ¶¶22-24);
- The opportunity to develop and introduce evidence pertaining to counter-theories that the entirety of the lawsuit constituted an unauthorized act. (*Id.* at ¶¶33-39.)

By contrast, if the Court allowed the County to re-litigate the case by re-opening proof, Preston would:

- Re-incur duplicative discovery and trial expense after trial (*Id.* at ¶¶17-19);
- Incur an unfair disadvantage inasmuch as it would allow the County to try the case under one theory, absent certain risks, and upon losing, re-open the record to re-try the case under a new theory (*Id.* at ¶¶17-19, 33-36);
- Incur an unfair disadvantage as to litigation decisions, trial strategies, and the presentation of evidence which Preston showed were made based upon the framing of the issues (as then framed), which cannot now be undone (*Id.* at ¶¶23-28);
- The loss of the procedural right under Rule 15(b), SCRCP, which would have permitted Preston to seek a continuance during trial, had the County timely pursued the instant amendment (*Id.* at ¶¶37-38).

Accordingly, due to the County's undue delay and the resulting prejudice to Preston, the Court denies Plaintiff's Motion to Amend.<sup>1</sup>

The Court also finds the County's proposed amendment proves futile.<sup>2</sup> First, the Court finds the County's position errs as Anderson County's Code itself establishes what constitutes a

---

<sup>1</sup> See Rule 15(a), SCRCP (disallowing amendment resulting in "prejudice [to] any other party"); 6 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, §1488 (2011) ("[I]n keeping with the purpose of Rule 15(a), which is to facilitate a determination of the action on the merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent."); see also *McCann v. Hall & Co., Inc.*, 109 F.R.D. 363, 364-65 (N.D. Ill. 1986); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1167 (10th Cir. 2009) (denying motion to amend because delay in asserting new allegations would re-open discovery and render prior filings of the defendant as "worthless."); *Royal Indem. Co. v. King*, 532 F. Supp. 2d 404, 417 (D. Conn. 2008) ("[A]n amendment clearly will not be allowed when the moving party has been guilty of delay in requesting leave to amend and, as a result of the delay, the proposed amendment, if permitted, would have the effect of prejudicing another party.")

quorum based upon presence at the meeting site and not on voting ability.<sup>3</sup> Second, as to Preston's Severance Agreement, the County's Code did not require a majority of Council to vote on an issue for the vote to be a valid vote, but rather a majority of those present and voting to carry the question.<sup>4</sup>

Third, the County's prior interpretation and usage under its own Code (which the Code, in turn, obligates the County to follow) allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site.<sup>5</sup> Fourth, the County Code expressly incorporated FOIA and the State Ethics Act—both of which define quorum without reference to

---

<sup>2</sup> The County's quorum argument heavily relies upon the decision of *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998). However, the County's Motion omitted the following operative language from *Garris*: "In the absence of any statutory or other controlling provision . . ." *Id.* at 453, 511 S.E.2d at 59. As explained below, the Court finds positive law, controlling provisions (*i.e.*, the Anderson County Code, FOIA, and the State Ethics Act) exist with respect to defining a quorum of Anderson County Council.

<sup>3</sup> See ACC §2-37(d) ("Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum.") Thus, consistent with other provisions cited herein, the only instances wherein the Anderson County Code contemplates the loss of a quorum relate to the physical absence of members, not their voting qualification or recusal issues. See also *Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (Noting the canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*; the express inclusion of one thing implies the exclusion of another).

<sup>4</sup> See ACC §2-37(g)(3)("[A] majority vote of those members present and voting shall decide all questions, motions, and other votes.") Inclusion of this less onerous voting formula evidences an intent to permit governmental action on a vote less than a majority of a quorum, which the County Code uses elsewhere. See, e.g., ACC §2-36.

<sup>5</sup> Compare ACC §2-37(g)(12) (Interpretation of County Code "shall be guided by the previous usage of county council. . .") with *First Davis Aff., Ex. F* (Anderson County Meeting Minutes August 19, 2009), 13:33-40) (County Attorney: "Under the County Code it...requires a majority of the council to be present for there to be a quorum"; disqualified voters could "still be present...and we would have a quorum of council at that point..."; "then it would require a majority of those present and voting to carry the motion."); see also ACC §1-2 (Defining the term shall: "The word 'shall' is mandatory.")

*Adell*  
p4

voting disqualification--into County meeting procedures.<sup>6</sup> Accordingly, the Court denies the County's Motion to Amend, as the proposed amendment is futile.<sup>7</sup>

The County alternatively seeks to amend pursuant to Rule 15(b), SCRCF contending the Parties tried the Quorum Claim by consent during trial. As noted above, the Court rejects the County's contention that the Quorum Claim was raised during trial or even before judgment issued. The County's argument improperly conflates the issue concerning the disqualification of C. Wilson's and Waldrep's votes under ethics provisions with the issue of whether a quorum existed. The issues are legally and factually distinct, as they involve different provisions of the

---

<sup>6</sup> Compare ACC §2-37(d) ("A quorum shall consist of a majority of the council"), ACC §2-37(a) ("County council will conduct its meetings in accordance with the South Carolina Freedom of Information Act, as amended, and the state ethics laws, as amended, and the requirements of those acts and laws, as amended, shall apply to all notices, agenda, minutes, and other aspects of such meetings."); ACC §2-676 (Mandating compliance with FOIA); ACC §2-352 ("[S]hall comply with the provisions of the South Carolina Freedom of Information Act") with S.C. Code §30-4-20(c) ("'Quorum' unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body."); South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997) (Analyzing substantially similar facts and concluding: "[D]isqualification under the Ethics Reform Act does not affect the existence of a quorum."); see also *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 500, 685 S.E.2d 600 (2009) (South Carolina courts accord substantial deference to the State Ethics Commission's interpretation of its own enabling legislation.); South Carolina Municipal Association, Frequently Asked Questions, <http://www.masc.sc/newsroom/uptown/June%202012/Pages/Frequently-asked-questions-Quorums.aspx> (last visited on Oct. 30, 2013) ("How would a recusal or abstention affect the quorum? The quorum is unaffected. Once established, the recusal or abstention of one or more council members in attendance at the meeting does not break the quorum. In such a case, a simple majority of the voting members governs the vote's outcome.")

<sup>7</sup> See *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (disallowing amendment due to futility); see also *Coral Gables v. Palmetto Brick Co.*, 183 S.C. 478, 191 S.E. 337, 339 (1937) ("The court will not do a useless and futile thing, by allowing an opportunity for setting up a new cause of action by amendment, which is barred by the statute of limitations.")

Anderson County Code and concern different factual inquiries.<sup>8</sup> While the former issue was raised at trial and before,<sup>9</sup> the Quorum Claim was not.

The County's arguments fail under Rule 15(b), SCRPC for two additional reasons. First, as noted *supra* and incorporated by reference, amendment of Plaintiff's Complaint to add the Quorum Claim would highly prejudice Preston if allowed. See *Nat'l Time Shares, Inc. v. Maritime Ltd. P'ship*, 297 S.C. 43, 47, 374 S.E.2d 678, 680 (1988) (Rule 15(b) allows "amendment of the pleadings to conform to the proof where the opposing party is not prejudiced.") Second, even if amendment under Rule 15(b) otherwise proved proper, such amendment was clearly not express and "implied consent will not be found if all the parties did not recognize [the issue] as an issue at trial, even if evidence in the record exists to support the amendment." *Armstrong v. Collins*, 366 S.C. 204, 227-228, 621 S.E.2d 368, 380 (Ct. App. 2005); see also *Davis Aff.*, ¶¶41-42 (County never raised any argument causing Preston to conclude it was asserting quorum issues as basis for relief). Accordingly, the Court denies the County's Motion to Amend under Rule 15, SCRPC.

#### FREEMANTLE'S MOTION TO INTERVENE

As an initial matter, Freemantle's Intervention Motion proves facially defective for four (4) reasons. They include: (1) the Intervention Motion violated Rule 11(a), SCRPC; (2) the Intervention Motion violated Rule 7(b), SCRPC; (3) the Intervention Motion violated Rule 24(c), SCRPC; and (4) granting the Intervention Motion would violate Rule 12(b)(8), SCRPC. The Court addresses each in turn.

---

<sup>8</sup> If, as the County contends but the Court otherwise rejects, the disqualification of Waldrep's and C. Wilson's votes standing alone implicated quorum requirements, the County's position, in this regard, confirms Plaintiff had an opportunity to raise the issue during trial but did not. As noted above, the County instead elected to pursue a different theory altogether.

<sup>9</sup> See Order, 6, n. 4 (May 3, 2013).

First, Freemantle failed to comply with Rule 11(a), SCRCF, as Freemantle neither consulted with Preston's counsel before filing nor did he attach to the Intervention Motion a certification confirming consultation would serve no useful purpose. See Rule 11(a), SCRCF (Non-compliant motion "shall be stricken unless it is signed promptly after the omission is called to the attention of the . . . movant") (emphasis added); Second Davis Aff., ¶44.<sup>10</sup> Accordingly, the Court must deem the Intervention Motion, as stricken, and not properly before the Court. *Jackson v. Speed*, 326 S.C. 289, 310, 486 S.E.2d 750, 761 (1997) ("The penalty for noncompliance [with Rule 11(a), SCRCF] is to strike the motion . . .").

Second, pursuant to Rule 24(c), SCRCF, Freemantle was required, but did not, attach a proposed "pleading setting forth the claim or defense for which intervention is sought." Rule 24(c), SCRCF.<sup>11</sup> Without a proposed pleading, Freemantle procedurally failed to interpose a proper motion under which intervention could be granted. Thus, even if the Court were so inclined, it could not grant Freemantle's Motion.

Third, Freemantle's Intervention Motion violates Rule 7(b)(1), SCRCF, as it fails to state the grounds supporting the same. Rule 7(b)(1), SCRCF (Motion "shall state with particularity the grounds therefor . . ."); see also *Summer Place of Myrtle Beach Homeowners Ass'n, Inc. v.*

<sup>10</sup> Preston raised Freemantle's non-compliance with Rule 11(a), SCRCF in his July 25, 2013 response. Freemantle thereafter failed to take any action to cure the deficiency during the ensuing forty-five (45) day period leading up to the September 9, 2013 hearing on his motion. Accordingly, Freemantle failed to promptly cure the deficiency.

<sup>11</sup> See H. Lightsey & J. Flanagan, *South Carolina Civil Procedure*, (2d ed. 1985) ("Since [South Carolina's] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."); *Dillard v. City of Foley*, 166 F.R.D. 503, 506 (M.D. Ala. 1996) (denying intervention motion for purposes of pursuing an appeal of Court Order due to ninety (90) day delay and failure to attach proposed pleading and noting, "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor." ) (citing *WJA Realty Ltd. P'ship v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989).)

*Knight*, 298 S.C. 241, 243, 379 S.E.2d 724, 725 (Ct. App. 1989).<sup>12</sup> In this regard, the Court finds the Intervention Motion's vagueness substantially prejudices Preston.<sup>13</sup> The resulting prejudice is further compounded due to Freemantle's decision to delay filing the Motion for nearly forty (40) months after learning of the County's lawsuit. *See infra*. Accordingly, the Court denies the Intervention Motion, as violative of Rule 7(b)(1), SCRCF.

Fourth, Rule 12(b)(8), SCRCF similarly bars Freemantle from intervening in this case. Rule 12(b)(8) disallows litigants from pursuing more than one action, for the same claim, between the same parties. Freemantle previously asserted a claim under the South Carolina Freedom of Information Act in another, pending lawsuit. *See Freemantle v. Preston, et al.*, No. 2009-CP-04-4528 ("Freemantle Lawsuit").<sup>14</sup> The South Carolina Supreme Court has previously

---

<sup>12</sup> Among other things, Freemantle's Intervention Motion fails: to specify whether Freemantle sought to intervene as a matter of right or permissively; to specify what claims Freemantle sought to assert against Preston; to specify what relief Freemantle seeks against Preston; to specify what personal interests Freemantle possessed as to the County's claims; to specify how the County's lawsuit impaired or impeded his personal interests; to specify what questions of law and fact are in common with the County's claims; to specify whether Freemantle sought to intervene as a Plaintiff or Defendant; to attach a proposed pleading delineating the particulars of his putative claims; and to identify why the County's efforts to do not already protect the public interest. (*See Freemantle Mot. to Intervenc.*)

<sup>13</sup> Such prejudice includes: preventing Preston from discerning the claims Freemantle seeks to assert (*Second Davis Aff.*, ¶¶42-44); preventing Preston from discerning whether Freemantle seeks to intervene of right or permissively (*Id.*); preventing Preston from discerning what relief Freemantle seeks in this case (*Id.*); preventing Preston from discerning whether Freemantle seeks to join as a Plaintiff or Defendant (*Id.*); preventing Preston from discerning why Freemantle contends the County cannot protect its interests (*Id.*); preventing Preston from discerning what interests Freemantle claims in the County's lawsuit (*Id.*); preventing Preston from discerning what common legal questions and factual issues Freemantle contends exist (*Id.*); causing Preston to defend against a "moving target" and creating an unfair disadvantage (*Id.*); causing Preston to incur undue expense and delay in final adjudication (*Id.*).

<sup>14</sup> Freemantle also cannot now assert new FOIA claims arising from allegations occurring in 2008, as such claims would prove untimely under FOIA's one year time limit. *See S.C. Code Ann.* §30-4-100(a) (requiring action to commence "no later than one year following the date on which the alleged violation occurs.").

determined Freemantle lacked standing to assert claims relating to Preston's Severance Agreement, other than those arising under FOIA's declaratory and injunctive relief provisions. *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012). Freemantle cannot intervene in this lawsuit to allege the identical claim he has already asserted in the Freemantle Lawsuit—the only claim for which he has standing to bring—without violating Rule 12(b)(8), SCRPC.

Freemantle's Intervention Motion also suffers from a series of substantive defects. As an initial matter, Freemantle's Motion proves untimely. Regardless of whether of right or permissively, under "Rule 24, SCRPC, a party may intervene only upon timely application." *State v. ex rel. Wilson*, 391 S.C. 565, 580, 707 S.E.2d 402, 410 (2011). South Carolina Courts utilize a "four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial."<sup>15</sup>

Freemantle's Intervention Motion fails all four (4) criteria. The evidence of record confirms (and Freemantle does not contest) that he knew of the County's Lawsuit for over forty (40) months before pressing the instant Motion.<sup>16</sup> Freemantle also waited approximately eight (8) months after trial and sixty days after judgment before filing his Motion.<sup>17</sup> No legal or factual

---

<sup>15</sup> See also *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991).

<sup>16</sup> See Second Davis Aff., Attach. Ex. A (Motion to Dismiss (January 19, 2010) (seeking its dismissal from Freemantle Lawsuit, in part, due to the County's Lawsuit)).

<sup>17</sup> Freemantle thereafter refrained from serving the Intervention Motion on either Preston or the County until July 22, 2013. (Second Davis Aff., ¶10.)



bases justify Freemantle's delay in seeking intervention nor has Freemantle offered any. Accordingly, the Court finds Freemantle's Motion fails the first three (3) timeliness criteria. *Id.*

As to the last criterion, the Court finds Preston would incur substantial prejudice if Freemantle's untimely intervention were permitted.<sup>18</sup> The County did not assert FOIA-based claims in the case *sub judice* and, as such, Preston did not allege defenses to FOIA claims. None of the discovery, which Preston and the County conducted for over three (3) years before trial commenced, related to un-alleged FOIA claims. (Davis Aff., ¶¶23-45.) For Freemantle to interject such claims into the instant lawsuit—after judgment—would unfairly and improperly deprive Preston of the right to defend himself regarding claims never alleged by the County, including the right to assert additional affirmative defenses, to assert counterclaims, to pursue different discovery, to pursue different trial strategies, to cross-examine witnesses, and to present different trial evidence. (*Id.* at ¶40.) Granting Freemantle's Motion would also result in undue delay and needless expense. (*Id.* at ¶¶40-41.)

Similarly, no basis exists for Freemantle to intervene as a matter of right pursuant to Rule 24(a), SCRCp. No statute confers upon Freemantle "an unconditional right to intervene," see Rule 24(a)(1), SCRCp, and Freemantle cannot demonstrate any particularized interest arising out of Preston's Severance Agreement. See *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012) (rejecting Freemantle's claims, other than under FOIA, due to a lack of particularized interest and therefore no standing).<sup>19</sup> Under South Carolina law, only a party with standing *and*

---

<sup>18</sup> "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Wright & Miller, §1916.

<sup>19</sup> The doctrine of collateral estoppel bars Freemantle from re-litigating the standing and real party in interest issues. See *Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012).

who constitutes the real party in interest can properly intervene in a lawsuit. *Bailey v. Bailey*, 312 S.C. 454, 458 (1994) ("Therefore, we hold that respondents lack standing to intervene in appellants' lawsuit.");<sup>20</sup> see also Rule 17(a), SCRPC (requiring: "Every action shall be prosecuted in the name of the real party in interest.")<sup>21</sup> Accordingly, Freemantle cannot intervene as a matter of right in this case.<sup>22</sup>

<sup>20</sup> See also *Beaufort Realty Co., Inc. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) ("A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.")

<sup>21</sup> Ample authority supports such analysis. See, e.g., *Envil. Def. v. Leavitt*, 329 F.Supp.2d 55, 66 (D.D.C. 2004) ("[A]pplicant for intervention as of right must demonstrate that it has standing by showing injury-in-fact."); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 316-17 (6th Cir. 2005) (Party could not intervene to appeal negotiated settlement because it had no cognizable legal interest in the subject matter of the zoning litigation.); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) (*cert denied*) (An interest in the collateral estoppel effect of an action, in which a party is not a party in interest to the transactions underlying the action, is not a sufficient interest in the action to support intervention as of right); *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343 (9th Cir. 1977) (A person with a potential claim against a party in a class action has no right to intervene simply because the outcome of the suit may increase or decrease the collectability of his claim.); *In re Franklin Nat'l Bank Secs. Litig.*, 92 F.R.D. 468, 470-71 (D.C.N.Y. 1981) (The nonprofit group was not entitled to intervene as of right in an action brought by FDIC to challenge order of confidentiality relating to settlement, as it had "no 'significantly protectable interest' in the [ ] litigation."); *Liberty Mut. Ins. Co. v. Pac. Indem. Co.*, 76 F.R.D. 656, 660 (D. Pa. 1977) (Plaintiff could not intervene in declaratory action relating to insurance coverage as plaintiff had not yet obtained a judgment.)

<sup>22</sup> Freemantle, in part, contends he should be allowed to intervene in the instant case so as to preserve his remedies in the Freemantle Lawsuit. However, South Carolina precedent expressly disallows intervention bids for purposes of preserving a possible, future remedy. See *Ex parte Reichlyn v. Columbia Organic Chem. Co., Inc.*, 310 S.C. 495, 498, 427 S.E.2d 661, 663 (1993) (Merely claiming a general interest in a lawsuit so as to preserve remedy in another lawsuit is not a "direct or legally protectable interest" in the subject of the lawsuit in which intervention is sought) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989) (merely claiming an interest in a lawsuit to preserve potential indemnification rights fails to support intervention)). See also *Washington Elec. Coop, Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable will not satisfy the rule" (internal citations omitted)).

Freemantle's Intervention Motion likewise fails to show, as required, that the County has failed to protect the legal interests relating to the Severance Agreement. Rule 24(a), SCRPC (providing intervention of right is disallowed if "applicant's interest is adequately represented by existing parties.") To the contrary, the County, to date, has expended well over double the amount of severance monies paid to Preston in seeking the Severance Agreement's rescission. (See Order, at 22 (May 3, 2013).) Merely because Freemantle may have a "difference of opinion concerning the tactics with which litigation should be handled does not [render] inadequate the representation" of the County as to the interests embraced by the instant lawsuit. 7C Wright and Miller, Fed. Practice and Procedure: Civil §1909. And, even a decision not to take an appeal falls within the County's discretion and would not render the representation inadequate.<sup>23</sup>

Freemantle similarly fails to satisfy permissive intervention requirements. No statute affords Freemantle the "conditional right to intervene," see Rule 24(b)(1), SCRPC,<sup>24</sup> nor does any "claim or defense" of Freemantle involve a "common" "question of law or fact" with the instant action. Rule 24(b)(2), SCRPC. As noted *supra*, the County has alleged no claims arising under FOIA in this case. No issues, then, overlap with the sole remaining claims (*i.e.*, the FOIA claims) in the Freemantle Lawsuit.

<sup>23</sup> See, e.g., *Little Rock School Dist. v. North Little Rock School Dist.*, 378 F.3d 774, 780–81 (8th Cir. 2004) ("We presume that the government entity adequately represents the public . . . It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests . . . [T]hat the Bollen Group has asserted its interest with arguably greater fervor than has the state and would have made different procedural choices, including a decision to appeal, does not" change the analysis.); *Dekalb Cnty. v. Post Props., Inc.*, 245 Ga. 214, 219, 263 S.E.2d 905, 909 (1980) ("[W]here the interest of the intervenor is identical to that of a governmental body or officer who is a named party, it will be assumed that the intervenor's interests are adequately represented, absent a 'concrete showing of circumstances in the particular case that make the representation inadequate' . . . Even a decision not to take an appeal" falls "within the discretion of the representative" body. (quoting 7A Wright & Miller, Fed. Practice and Procedure: Civil 519, 529–32, § 1909)).

<sup>24</sup> Freemantle has not cited any statute for purposes of intervention under Rule 24(b), SCRPC.

Rule 24(b), SCRCF requires the Court to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b)(2), SCRCF. Here, for the reasons cited above, the Court finds Freemantle's intervention will both unduly delay the adjudication of the instant case and prejudice Preston. Accordingly, the Court denies Freemantle's Intervention Motion under Rule 24(b), SCRCF.

Finally, during the September 9th, 2013 hearing, Freemantle's counsel articulated certain motivations prompting the filing of the Intervention Motion. Freemantle's counsel indicated the Motion was intended, in part, to obstruct or prevent a potential settlement of the case by the County and Preston. Counsel also expressed Freemantle's desire to appeal the case if County Council, in its discretion as a governing body, elected not to do so. The Court finds such motivations are improper reasons to seek intervention and the Court will not allow intervention for those reasons. Accordingly, for the reasons set forth above, the Court denies Freemantle's Intervention Motion.

#### The County's Motion to Reconsider

Plaintiff's Reconsideration Motion raises fifteen (15) grounds asking the Court to reconsider its Order dated May 3, 2013 (hereinafter as "Order").<sup>25</sup> Both the County and Preston

---

<sup>25</sup> In ruling upon the Reconsideration Motion, the Court incorporates by reference its factual and legal findings from its Order dated May 3, 2013, which further militate in favor of denying the Motion. In addition, the Order notes: "To the extent an argument has not been deemed worthy of discussion by the Court, it should be deemed as having been fully reviewed and rejected by the Court as without legal basis under the facts *sub judice*." (Order, at 4 n. 2.)

filed lengthy submittals in connection with the Motion. After careful review, the Court denies the County's Motion.

**Issue 1:**

As to the Court's finding of unclean hands, the County first questions whether the Court properly distinguished Plaintiff from Council members. (Pl.'s Mot. at 2, ¶1.)<sup>26</sup> In raising the issue, Plaintiff cites page 4 of the Order and pages 32 through 34. Addressing the cited passages in turn, page 4 only relates to the factors supporting the Court's finding that a toxic political environment existed in Anderson County in the months leading up to the November 18, 2008 vote, a fact which Plaintiff conceded both before and at trial. (See Order, at 3-5 (discussing political environment in Anderson County).)<sup>27</sup>

Pages 32-34 contain eight bullet points supporting the Court's finding of unclean hands in this case. Each bullet point outlines conduct involving either sitting County Council members acting alone or acting in concert with Council-elect in an effort to interfere with Preston's role as County Administrator in violation of the Home Rule Act.<sup>28</sup> Moreover, in a ninth bullet point, the Court referenced a series of actions (appearing in Exhibit A to the Order), which the Court found did not constitute conduct properly attributable to the Plaintiff. (Order, at 34.) The County's Motion overlooks that the Court, in fact, made such distinctions, which were the exact distinctions Plaintiff asserts as unmade. In so doing, the County's Motion fails to explain why

---

<sup>26</sup> In its first argument, the County also references issues relating to its contentions Preston's Severance Agreement was arbitrary and capricious. The Court addresses such issues below.

<sup>27</sup> No exception to the doctrine of *respondeat superior* exists merely because the entity constitutes a public entity. Moreover, in the tort context, the Tort Claims Act mandates the substitution of the public entity as the named defendant when individual public officials and employees are named as a defendant. See S.C. Code Ann. §15-78-70(c).

<sup>28</sup> Notably, Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63. (See First Davis Aff., Ex. F, at 17.)

the distinctions made by the Court were improperly drawn. After careful review, the Court finds the distinctions were properly made.

Issue 2:

The County's second ground urging reconsideration relates to the Quorum Claim addressed *supra* at pp. 1-6.<sup>29</sup> As noted *supra*, before filing its Reconsideration Motion, the County failed to preserve the quorum issue as the issue was not presented to the Court.<sup>30</sup> Indeed, the County argued the exact opposite position of what it now posits in both its Reconsideration Motion and Motion to Amend.<sup>31</sup> Accordingly, the County has waived this issue and cannot purport to change the complexion of this case, after judgment, by interjecting a new claim for relief requiring additional discovery and proof.<sup>32</sup>

---

<sup>29</sup> The Court incorporates its prior discussion of the quorum issue (above) herein by reference.

<sup>30</sup> The County's Motion appears to suggest it raised the quorum issue in its written summation. (See Pl.'s Mot., at 5.) The Court has reviewed the passage cited by the County and it does not relate to the quorum issue. The actual argument, which the Court rejected (*see* Order, at 11 n.6) contended that all Council members received the same release conferring the same benefit and, as a result, if Preston's argument was accepted "no one should have voted." (Pl.'s Post-Trial Memo., at 17.) After searching the County's written summation, the Court notes the word "quorum" appears nowhere in the submittal, nor was the issue otherwise raised.

<sup>31</sup> Notably, the County's Reconsideration Motion suggests, "The prospect of destruction of a quorum was not present in this case until the Order invalidated four votes." (Pl.'s Mot. to Recons., at 5.) By contrast, the County's Motion to Amend simultaneously suggests the Court tried the issue by consent. (Pl.'s Mot. to Am., at 5.) The Court rejects both contentions. As noted above, the issue of the disqualification of Waldrep's and C. Wilson's votes is factually and legally distinct from the issue of whether a quorum existed. However, to the extent the County predicates its quorum analysis on the disqualification of Waldrep's and C. Wilson's votes, the Court heard such issues at trial but the County failed to raise the Quorum Claim when they arose.

<sup>32</sup> See *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial."); *Anderson Mem'l Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) ("A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not."); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) (issue not preserved where party raised argument for the first time in motion for reconsideration); *Wilder Corp. v. Wilke*, 330 S.C.

As to the substantive merits of the County's quorum analysis, the Court rejects the same. The Court analyzed such issues above and expressly incorporates its previous findings herein. (See *supra* at 3-5.) Accordingly, the Court rejects the second ground raised by the County as substantively incorrect.

The County also incorrectly urges the disqualification issue of Waldrep's and C. Wilson's votes were not properly raised and preserved. (Pl.'s Mot. to Recons., at 4, n.4.) The Court disagrees for the following reasons:

- The County's own pleading first put the voting disqualification of the 2008 Council's members at issue. (See Am. Compl., ¶35; see also Order, at 6.)<sup>33</sup>
- Preston's Ninth Affirmative Defense specifically pleads the decision of *Baird v. Charleston Cnty.*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) (treated as "Baird"). (See Order, at 6 n.4.)<sup>34</sup>
- The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims the County alleged in seeking to invalidate Council action.
- The Parties otherwise tried the issue of disqualifying Waldrep's and C. Wilson's votes pursuant to Rule 15(b), SCRCP. (See Pl.'s Mot. to Am., at 5.) The Court allowed the evidence at trial and addressed the same on page 6 of its Order.<sup>35</sup>

---

71, 76 497 S.E.2d 731, 733 (1998); see also Jean Hoefler Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002) (outlining requirements for preserving issues at trial: the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised with sufficient specificity.)

<sup>33</sup> Having placed the issue in contention, the County cannot complain when the Court's decision embraces and decides what it has raised by contention at its own hand. See *State v. Brown*, 344 S.C. 70, 76, 543 S.E.2d. 552, 555 (2001) (petitioner cannot complain of prejudice from evidence he has brought before the jury); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d. 404, 408 (1991) (a party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door).

<sup>34</sup> The *Baird* holding specifically requires an analysis of whether disqualified votes would cause a vote to fail. Analyzing how many votes were cast and analyzing what votes warrant disqualification when tallying whether a disputed measure passed by majority vote falls squarely beneath the *Baird* holding and squarely beneath Preston's Ninth Affirmative Defense.

Accordingly, the Court rejects the County's contention that the disqualification of Waldrep's and C. Wilson's votes were not properly raised and preserved.

Issue 3:

Under its third issue, the County asserts the Court failed to "address the county's showing of a business connection between McAbee and Amy Plummer, and of the travel and commission benefits she received and operated to disqualify him." (Pl.'s Mot. to Recons., at 6.) The Court rejects the County's third contention as unfounded. The County neglects the following findings in the Order:

- "After considering all evidence of record...McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same." (Order, at 7.)
- "[N]either the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety." (Order, at 7.)
- "No evidence linked McAbee's travel to Preston's Severance Agreement or the surrounding issues." (Order, at 8.)

---

<sup>15</sup> The Court notes that if the County believed the issues were not raised by the pleadings, it could have moved for a continuance pursuant to Rule 15(b), SCRCP. No such motion was made. Moreover, the evidence of record reflects the issue had arisen and was factually developed during the discovery phase. During her deposition, C. Wilson was examined about: the tort claims asserted by Preston, which she confirmed referred to her and Waldrep (C. Wilson Tr. Test. (Depo.) 59:14-18; 60:13-18); the scope of the release in the Severance Agreement (*Id.* at 65:20-25; 66:1-11); the lawsuit brought by Preston and the injunction granted against C. Wilson (*Id.* at 70:1-25); C. Wilson's understanding that she could not vote on an item where her personal interest exceeds that of the general public, which she confirmed (*Id.* at 74:24-25; 1-24); whether C. Wilson voted on the Severance Agreement containing a release when she previously was put on notice of tort claims personally against her, which she admitted (*Id.* at 75:1-14); and C. Wilson's provision of a confidential settlement agreement to Rick Freemantle in violation of ACC §2-288, which she confirmed. (*Id.* at 75:23-25; 76:1-77:8; 81:1-15.) The County also called Waldrep and C. Wilson in their case-in-chief and elected not to question either about potential disqualification issues.

- "The evidence established McAbee's economic development travel occurred over an extended period of time and did not relate to Preston's Severance Agreement." (Order, at 8.)

The Court notes that by finding no evidence linked McAbee's travel to the Severance Agreement, any allegations concerning Plummer are necessarily subsumed by the Order's finding, since only McAbee, not Plummer, served on Council. Throughout the trial, the County broadly referenced a "business connection" between McAbee and Plummer but failed to introduce any evidence establishing a connection between such a relationship and Preston's Severance Agreement. The lack of evidence introduced by the County, in this regard, warranted no further discussion beyond what is found in the Order.<sup>36</sup> Indeed, the Court cannot discuss evidence the County did not present.

**Issue 4:**

According to the County, the Court failed to address the fact "that Preston was aware—at the very moment [County Council voted] for his Severance Package—that Thompson and Ron Wilson should have been disqualified." (Pl.'s Mot., at 6, ¶4.) Yet, even though the County shouldered the burden to prove the same by clear and convincing evidence, the County introduced no such evidence.<sup>37</sup>

---

<sup>36</sup> Notably, the only commission McAbee ever received occurred in April of 2008, over five (5) months before Preston's employment dispute arose in September of 2008 and over seven months before the Severance Agreement vote in November of 2008. (Order, at 8.) The trial testimony and exhibits further revealed McAbee recused himself from every vote relating to the transaction, which arose out of a real estate contract originating years before. (Order, at 8; Def. Ex. 58; Def. Ex. 59; Def. Ex. 60.) No evidence of record reflected Preston had anything to do with the commission received by McAbee. (Order, at 8.) And, the trial testimony failed to establish McAbee received any part of any commission from the properties listed by Plummer or involving the County.

<sup>37</sup> See *Kahn Constr. Co. v. S.C. Nat'l. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980); *Baptist Found. for Christian Educ. v. Baptist College*, 282 S.C. 53, 59-60, 317 S.E.2d 453, 458 (Ct. App. 1984); *Smothers v. Richland Mem'l Hosp.*, 328 S.C. 566, 570, 493 S.E.2d 107, 109 (Ct. App. 1997).

In raising this issue, the County's Motion improperly attempts to convert factual knowledge into knowledge of a "legal conclusion." According to the County, Preston had knowledge that the alleged interests of Thompson and Wilson disqualified their votes by operation of law (*i.e.*, the Anderson County Code of Ordinances and the State Ethics Act). The County's analysis errs for three (3) reasons:

- First, the County presented no evidence showing Preston knew Thompson's and Wilson's votes warranted disqualification due to legal constraints. In fact, the only testimony at trial about the same (that of Preston) showed the exact opposite.
- Second, as stated in the Order, "impacted elected officials possessed positive legal duties to disclose any issues implicating ethical matters." (Order, at 25.) The Anderson County Code expressly confers such duty, first on the individual Council member, and then if doubts persist, on the County Attorney.<sup>38</sup> Neither at trial nor in its Reconsideration Motion does the County explain or present evidence why Preston, a lay person, possessed a duty as County Administrator to furnish legal opinions concerning ethics laws during County Council meetings.<sup>39</sup>
- Simultaneously, the County seeks to transfer a duty conferred to the County Attorney on Preston under factual circumstances where Preston was represented by counsel and openly adverse to the County. (See Order, at 25.)

For these reasons, the Court rejects the fourth ground raised by the County's Motion.<sup>40</sup>

---

<sup>38</sup> Anderson County Code §2-352(b) states: "It shall be the responsibility of members, individually and collectively, to become familiar with the provisions of [the Ethics Act] and conduct themselves accordingly." (ACC §2-352(b).) In turn, ACC § 2-289 states in material part: "When an official . . . has doubt as to the applicability of a provision of this division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given." ACC §2-289.

<sup>39</sup> Moreover, misrepresentations as to matters of law cannot support claims for constructive fraud or fraud. See *Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Cl. App. 1987); *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945).

<sup>40</sup> The County's argument is also misplaced since it overlooks a number of findings in the Court's Order, including: "As to Thompson and R. Wilson, the County failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement." (Order, at 25.); "Plaintiff failed to prove such disclosures were material to the outcome . . . even if made." (Order, at 25.); "[T]his Court has invalidated any tainted votes and the result of the voting remains unchanged." (Order, at 25.); "No evidence proved the [Schaum] Contract's renewal was in any way material or related to the County Council's decision to approve Preston's Severance Agreement." (Order,

Issue 5:

As a fifth ground, the County contends two passages in the Order concerning R. Wilson are inconsistent. (Pl.'s Mot. to Recons., at 6-7.) The two passages appear on page 9 of the Order and on pages 26 and 27 respectively. The passage on page 9 relates to R. Wilson's knowledge of the Services Contract's extension when he voted, while the passage on pages 26 and 27 discusses the fact that it was well known Schaum had a Services Contract before any contract extension and well before Preston asserted any claims against the County. The Court finds the passages do not conflict.<sup>41</sup>

As to the passage from page 9, the County did fail to prove Wilson had knowledge of the "Services Contract's *extension* when he voted." The only evidence introduced about the issue came from Allison Schaum, who testified she never told her father of the Services Contract's extension. No evidence of record demonstrated otherwise and the Court rejects the County's contention that a reasonable inference could otherwise be drawn.

As to the passage from pages 26 to 27, the Services Contract was a public file, *see* S.C. Code §30-4-40(a)(5)(A), which the County nowhere disputes Preston had a duty to disclose.<sup>42</sup>

---

at 27.); "The evidence further failed to prove County Council would not have approved the Severance Agreement, regardless. Indeed, the Court finds the evidence of record proves otherwise." (Order, at 27.)

<sup>41</sup> Compare Order, at 9 ("No evidence establishes R. Wilson knew of the Services Contract's extension when he voted.") with Order, at 26-27 ("[T]he Court finds the Services Contract was a public file and Preston had no duty to inform Council of public information. *See, e.g.,* S.C. Code Ann. §30-4-40(a)(5)(A). It had been widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County. Schaum's relationship with R. Wilson was likewise known.")

<sup>42</sup> The fact that the file was public does not prove R. Wilson knew about the Services Contract's extension when he voted.

Moreover, the evidence of record established it had "been widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County."<sup>43</sup> (Order, at 26-27.) The trial evidence similarly confirmed it was widely known that Schaum was R. Wilson's daughter. Accordingly, the Court finds both passages are accurate, supported by the evidence at trial, and consistent.

**Issue 6:**

As to the sixth ground, the County contends the Court failed to address "the available inference of knowing impropriety" arising out of Preston's subsequent investment of severance proceeds. The Order does not address the issue because no such available inference exists. No trial evidence demonstrated R. Wilson contemplated soliciting an investment from Preston at the time of the Severance Agreement vote.<sup>44</sup>

Preston's testimony was the only evidence introduced at trial regarding the issue. Preston testified he did not consider investing with R. Wilson until months after he left his post as County Administrator. Moreover, Preston testified that he had been duped, just like countless other investors. The County introduced no evidence to suggest otherwise and its Motion cites none.

**Issue 7:**

The County next contends the Court failed to address the factors the County argues as distinguishing this case from the holding in *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). (Pl.'s Mot. to Recons. at 7.) The Court analyzed the *Baird* decision at length in its Order and finds no error in *Baird's* application to the instant case. (See Order, at 12-16.)

---

<sup>43</sup> The sentence does not relate to the Services Contract's extension but rather to the fact that Schaum had a contract with the County, which had existed since September 4, 2007. (See Am. Compl., ¶26.)

<sup>44</sup> Moreover, the Order discounted R. Wilson's vote on other grounds. (Order, at 9.)

Moreover, the County overlooks the numerous decisions cited by the Order, which also support its findings. (See Order, at 13 n.10). The County also overlooks the Court's analysis discussing the superiority of the approach adopted by *Baird*. (Order, at 14 n.12 (noting the County's urged approach would up-end the finality of legislative action and injure the public interest.)) By contrast, the distinctions the County attempts to draw have no foundation in South Carolina law, prove unpersuasive, and simply ignore South Carolina law as stated in *Baird's* holding.

Nonetheless, contrary to the County's assertions, the Order did address and rejected the distinctions the County misreports as overlooked:

- "No South Carolina authority supports the County's premise wherein it argues that South Carolina courts should weigh the potential sway of participating individuals when reviewing the validity of governmental votes. To the contrary, here, all elected officials owed the same legal duties to their constituents. The Court treats each public official equally and finds their respective votes warrant equal weight and independence." (Order, at 14.)
- "The County characterizes County Council's approval of the Severance Agreement as judicial in nature. The Court rejects the County's distinction in this regard. The 'appointment and removal of a public officer is a governmental function . . . .' *Piedmont Pub. Serv. Dist. v. Cowart*, 324 S.C. 239, 241, 478 S.E.2d 836, 837 (1996). Indeed, it is a statutory power conferred upon County bodies to exercise within their legislative discretion. S.C. Code Ann. §4-9-620." (Order, at 14 n.13.)
- "In addition, the County also characterizes the Severance Agreement as conferring solely an 'individual benefit.' The Court likewise rejects this characterization. The evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. Some of the rationales included *inter alia*: a desire to avoid a significant downside risk to the County, to avoid further political infighting that had proved deleterious to the County, to help the County move forward with County business, which had been stymied, and to help ensure the County could hire competent County Administrators later." (Order, at 15.)
- "The Court, therefore, rejects Plaintiff's premise that because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence overwhelmed the independent judgment of the County Council's remaining elected officials. Indeed, even if such inquiry proved appropriate, the evidence of record establishes otherwise." (Order, at 15.)

- As discussed at length above and below, Preston testified he believed no conflicts existed. None could be kept hidden because no conflicts were believed to exist. Moreover, the Court specifically found the County failed to prove the existence of such conflicts was material: "Plaintiff has not shown such disclosures, even, if made, would have changed the votes of McAbee, Greer, and Floyd. Indeed, the evidence of record supports an opposite conclusion." (Order, at 25.) The Court discounted those votes for which it found an appearance of impropriety existed. And, the measure still passed.
- "See also *Griggs v. Hodge*, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) ("As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency."); *Schroeder v. O'Neill*, 179 S.C. 310, 184 S.E.2d 679, 684 (1936) ("The court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious"); *Phunkett v. City of Aiken*, 159 S.C. 97, 108-09, 156 S.E. 245, 249 (1931) ("The exercise of that discretion, so long as it is not unreasonable or capricious, is a matter of policy with which the courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the city council, and we cannot sustain the decree of the circuit judge on this additional ground, as urged by the respondents.")" (Order, at 16 n.14.)
- "Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (See, e.g., McAbee Tr. Test.; Greer Tr. Test.; Floyd Tr. Test.) The County has not introduced any evidence to the contrary. Second, had such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement. As noted above, this did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. Third, adverse parliamentary rulings can be appealed under the Anderson County Code. See ACC § 2-37(g)(1). Here, no appeal occurred. (See Pl.'s Ex. 5.) Finally, South Carolina Courts do not review the parliamentary processes of legislative bodies. See *State v. Lewis*, 181 S.C. 10, 186 S.E. 625, 631 (1936) ("That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself."); *Smith v. Jennings*, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) ("That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself."); see also MASON'S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975) ("[C]ourts will not disturb a ruling on a parliamentary question made by a legislative . . . body having authority necessary to make rules for its government . . .")." (Order, at 17 n.15.)

Thus, the Order did address the distinctions drawn by the County, despite their lack of footing under South Carolina law. Accordingly, the Court rejects the County's seventh ground seeking reconsideration.

**Issue 8:**

As to the eighth ground, the County contends the Court did not address Plaintiff's argument that the Severance Agreement was arbitrary and capricious and violated public policy. (Pl.'s Mot. to Recons., at 8.) However, the Order discusses in detail both the County's arbitrary and capricious and public policy arguments for five (5) pages. (See Order, at 18-22.) The Order analyzed the trial evidence through the correct legal standards for evaluating whether the 2008 County Council's decision-making was arbitrary and capricious, which the County does not contest or cite any authority to the contrary. (Order, at 18-22.)

The County's eighth ground is misplaced as it overlooks the actual findings of fact made by the Court in concluding the 2008 Council amply satisfied the "fairly debatable" standard.<sup>45</sup>

---

<sup>45</sup> The County's Motion simply overlooks the numerous factual findings made by the Court in the Order. The Court incorporates such factual findings herein by reference. (See, e.g., Order, at 18-22: ("[T]he Court finds Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice." (Order, at 20)); ("The reasonability of County Council's decision-making proves especially true in light of the steps the Council-elect had leaked to the public as their intended course of action upon taking office." (Order, at 20)); ("[I]t is worth noting that Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement." (Order, at 20 n.16)); ("Thus, contrary to Plaintiff's suggestions, County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious." (Order, at 20 n.16)); ("By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council." (Order, at 21)); ("To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million (\$2,000,000.00) dollars." (Order, at 21)) ("Each of the Council members who the Court has found properly voted for the Severance Agreement provided independent and lucid reasons supporting their votes." (Order, at 21 n.18)); ("Also, it is noted that the *Cunningham* case has been allowed to go forward toward trial on issues relating to his wrongful discharge. These are some of the same issues that may have been asserted by Preston had the plan developed by the councilmen and councilmen-elect in the time leading up to this vote been allowed to proceed as had been planned." (Order, at 21)) ("It is noteworthy that, upon that upon taking office, Council-elect did take actions to initiate this litigation on similar issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this

The County instead complains the Court failed to address Plaintiff's arguments concerning the arbitrary and capricious nature of the Severance Agreement because it was "based on an asserted claim for 'anticipatory breach' that could not exist as a matter of law."<sup>46</sup> (Pl.'s Mot., at 8.) The Court rejects the County's contention for three reasons.

First, the Order did address the issue. After hearing all of the trial testimony and weighing the credibility of the same, the Court found, "[T]he issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It is clear to this Court that the matter had been prejudged by the majority of Council-elect." (Order, at 21.) The 2008 Council took reasonable actions to safeguard against imminent litigation, for which they had received notice and for which their employment attorney opined would expose the County to

---

litigation and the underlying investigation have exceeded the County employment attorney's 2008 estimate of two million dollars (\$2,000,000.00)." (Order, at 22)) ("The Court finds the witnesses supporting the Severance Agreement, specifically Gracie Floyd, Larry Greer and Bill McAbee, to be the more credible witnesses in the trial. Other testimony at trial was evasive and not credible concerning the emails between those parties that did not support the approval of the severance package untrustworthy." (Order, at 40)).

<sup>46</sup>The only authority the County has cited to support its argument is that of *Collins Holding Corp. v. Wasau Underwriters Ins. Co.*, 204 Fed. Appx. 208 (4th Cir. 2006). *Collins* was an unpublished opinion having no precedential value in this Court. *Council v. Catoe*, 359 S.C. 120, 127, 597 S.E.2d 782, 785 (2004) ("Further, as an unpublished opinion, *Locklair* has no precedential value." (citing Rule 220(a), SCACR)); *Lanham v. Blue Cross & Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) ("However, it should be noted unpublished opinions have no precedential value.") Moreover, *Collins* bears no resemblance to facts *sub judice*. *Collins* involved a dispute under an insurance contract between two private entities. The insurer paid *Collins* the sum of two hundred and ninety-six thousand dollars (\$296,000.00) and informed *Collins* no additional replacement cost amounts would be paid unless *Collins* completed repairs by a slated date. *Collins* did not make the repairs by the date specified by the insurer. Under such facts, the Court found no anticipatory breach of contract existed.

"estimated potential exposure, including attorney's fees and costs, of up to two million dollars (\$2,000,000.00)." <sup>47</sup> (Order, at 21.)

No authority exists to support the notion that elected officials must standby and idly watch as the County becomes entrenched in litigation. Legislative bodies routinely address issues in prospective fashion. Indeed, such is the very nature of the obligation to constituents.

Second, the County's argument misstates the reasoning expressed by the 2008 Council members for voting in favor of the Severance Agreement. Contrary to the trial evidence, the County attempts to reduce the basis for the 2008 Council's vote in favor of the Severance Agreement to a solitary issue—the "anticipatory breach" claimed by Preston. Yet, as discussed in the Order, the 2008 Council members expressed a host of interrelated reasons explaining their votes.<sup>48</sup> The Order correctly examined the evidence introduced at trial in its totality. (Order, at 18-22.)

Third, as the Order points out, Preston's demand letter also referenced tort claims against two members. (Order, at 20 n.16.) While the County now argues, "there was no evidence any such other claim was ever identified or could be valid," both Waldrep and C. Wilson confirmed

---

<sup>47</sup> If potential liability proved as speculative as the County's Motion suggests, the "County's employment attorney would not have identified a potential downside risk of up to two million dollars (\$2,000,000.00)." (Order, at 22 n.19.) Moreover, "the County's employment lawyer alluded to subsequent events before County Council acted upon the Severance Agreement." (Order, at 17 n.17.) And, the County's employment lawyer also conceded during trial testimony that public officials had to take into consideration additional factors relating to the public, which fell beyond his scope of knowledge and expertise.

<sup>48</sup> (Order, at 21, n.18) (hoping political infighting would end that had impaired the County's ability to do business for years; sought to avoid the potential downside risk of two million (\$2,000,000,00) dollars; sought to avoid risk to economic development; deemed it important to treat the County Administrator fairly so as not to impair County's ability to find another Administrator; believed the Severance Agreement was the honest and fair thing to do; believed it was important for the County to treat Preston honestly and fairly; sought to avoid deleterious situation to County; sought to remove impediment to County Council's ability to move forward.)

Preston's demand letter referenced the assertion of tort claims against them personally. (See Waldrep, Tr. Test. (Day 1); Tr. Test. C. Wilson (Depo.), 59: 14-18; 75:1-8; Pl. Ex. 22.) Moreover, Preston introduced an unappealed Order from *Preston v. Waldrep & C. Wilson*, No. 2008-CP-04-2776, wherein the Court found, among thirty-one (31) findings in all, that: "The County Administrator's duty to supervise his employees is being intentionally and purposefully thwarted by [Waldrep and C. Wilson]," and "[t]he actions of Defendants have interfered with the County Administrator's ability to do his job." (Def. Ex., ¶¶27 & 29.)<sup>49</sup> Despite such evidence, the County asks the Court to reconsider its Order contending "no evidence" exists showing the tort claims referenced by Preston were "ever identified" or "could be valid." (Pl.'s Mot., at ¶8.)<sup>50</sup> Accordingly, the Court rejects the County's position as unfounded.<sup>51</sup>

The County next complains the Court Order does not address its allegations the Severance Agreement "violated public policy." (Pl.'s Mot., at 8.) However, the Order specifically finds: "As to the second cause of action, the Court finds that public policy renders

<sup>49</sup> At the time of the November 18, 2008 meeting, the Parties had already submitted filings and had participated in a hearing on the issues prompting the Court's Order.

<sup>50</sup> The Court rejects the County's arguments, in this regard, as without basis. As County Administrator, Preston did file a lawsuit against Waldrep and Wilson in their individual capacities seeking an injunction, attorney's fees and costs for interfering with his job. And, in his individual capacity, Preston gave notice of tort claims against Waldrep and C. Wilson in their individual capacities for interfering with his job. In both instances, the claims against Waldrep and C. Wilson were against them in their individual capacities, which is why the release operated to confer an economic benefit on them personally but not the other Council members.

<sup>51</sup> The County also disregards the Court's finding that: "County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious." (Order, at 20 n.16.) The Court cited three reasons for the same: Preston's demand asserted tort claims exceeding the four corners of the Master Employment Agreement; the release contained in the Severance Agreement exceeded the scope of the release contemplated by the Master Employment Agreement; and the Master Employment Agreement contained an indemnity provision, which survived the Agreement, but was terminated under the Severance Agreement. (Order, at 20 n.16.) The County's Motion does not refute any of the Court's findings in this regard.

neither the Severance Agreement nor the vote adopting the same as void as against public policy." (Order, at 18.) The Court also noted, "[P]aragraphs 37 through 39 of the Amended Complaint never specify how the Severance Agreement's approval violated public policy..." (Order, at 18.) Accordingly, the County's eighth exception to the Order has no merit.

The Order rejected the County's unspecified public policy claims, finding the exact opposite proved true. "The Court [found] greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body." (Order, at 18.) As the Court correctly found, "South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute." (Order, at 18.) South Carolina law mandates such deference so as to preserve the integrity of duly elected legislative bodies and proper observance of Separation of Powers constraints. (See Order, at 15, 18-19.)

**Issues 9 & 10:**

As to grounds nine and ten, the County contends the Order misapprehended its breach of fiduciary duty claim and the duty Preston owed to the County. The Court rejects the County's contentions in this regard. Whether and to what extent a party owes a fiduciary duty to another constitutes "an equitable issue for the judge to decide," see *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004), and requires the Court to "look to the particulars of the relationship between the parties." *Armstrong v. Collins*, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002).

To impose a fiduciary obligation to the matter under consideration, "the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the party so reposing." *Moore*, 360 S.C.

at 251, 599 S.E.2d at 472. Applying such principles to the case *sub judice*, the Order correctly found the facts and circumstances, as they related to the Severance Agreement, failed to support the imposition of a fiduciary duty. (See Order, at 23) ("[N]o evidence [exists] supporting Plaintiff's contention that Preston breached a fiduciary duty...")<sup>52</sup>

The Court correctly found and the County does not dispute, "It is clear to this Court that by October and November of 2008, Preston and County Council had assumed positions adverse to each other." (Order, at 25.)<sup>53</sup> Under these particular facts, the Order correctly concluded, Preston did not owe County Council a duty to furnish information adverse to his position. (Order, at 26; *see also supra.*) Plaintiff failed to introduce any plausible evidence entitling it to contend Preston should have acted on behalf of the County and not "his own behalf" as related to his employment claims. *Moore*, 360 S.C. at 251, 599 S.E.2d at 472.<sup>54</sup> Accordingly, the Order correctly found, as an adverse party, Preston owed no duty to the County.

---

<sup>52</sup> The Court specifically incorporated such analysis into its discussion of the County's breach of fiduciary duty claim. (Order, at 23 n.20.)

<sup>53</sup> As the Order reflects, Preston had: sued C. Wilson and Waldrep individually; retained personal counsel; furnished notice of his claim against the County; and furnished notice of tort claims he intended to bring against individual Council members. (Order, at 25.) Like Preston, the County, C. Wilson, and Waldrep had retained their own attorneys to protect their interests. (Order, at 25.) Thus, at the time of the Severance Agreement vote and earlier, "Preston was a claimant against certain Council members and Council itself" and the parties' "adversarial positions" were both "open and known" to both parties, as the parties had actively engaged in negotiations adverse to each other. (Order, at 25.)

<sup>54</sup> Moreover, while South Carolina courts have not yet addressed the issue, those courts from other jurisdictions addressing the issue have reached the same conclusion as this Court. *See e.g.*, *Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. Ct. App. 2006) ("[A]dverse parties who have retained professional counsel . . . do not owe fiduciary duties to one another."); *Gray v. Caldwell*, 904 So.2d 212, 215 (Miss. Ct. App. 2005) ("[I]n transactions of sale of their interests, cotenants do not stand in a relationship of mutual trust and confidence toward each other, but deal as adverse parties."); *Bender v. Wise*, Ca. No. 04-0521, 695 N.W.2d 335, at \*3 (Iowa Ct. App. Dec. 22, 2004) (Unpublished Opinion) ("Nothing in the relationship between adverse parties suggests the existence of a fiduciary duty."); *Smalley v. Smalley*, No. 09-11-00261, 2012 WL 1448433, at 5-6 (Tex. Ct. App. Apr. 26, 2012) ("[A]dverse parties who have retained professional counsel . . . do

Moreover, as discussed above and incorporated herein by reference, what the County contends Preston should have disclosed constitutes a legal opinion under State and local ethics laws. *See supra* at 19-20. Yet, under Anderson County Ordinance, such duties are expressly conferred to Council members and, if necessary, to the County Attorney, not the County Administrator. (*See ACC §§2-352 & 2-289; Order, at 25.*)

Finally, as discussed *supra* and incorporated herein, the Order correctly found no evidence supported Plaintiff's contention that Preston had knowledge of potential violations of ethics provisions. (*Order, at 23; see also supra at 19-20.*) The only testimony at trial concerning the issue came from Preston, who testified he did not realize Thompson, R. Wilson, or McAbee had a conflict of interest. No evidence demonstrated he believed otherwise. Accordingly, the Court rejects the County's ninth and tenth grounds for reconsideration.

**Issue 11:**

As to the eleventh ground, the County contends the Order fails to address the argument that Preston "continued to act" with respect to "the Heather Jones memoranda after he left office." (*Pl.'s Mot., at 10.*) The County is incorrect. The last sentence on page 27 of the Order (continuing on page 28) states: "Moreover, the County failed to prove that Preston executed any memoranda on or after December 1, 2008, as alleged." (*Compare Order, at 27-28 with Am. Compl., at ¶¶11(a), (b), & (c).*) Preston's Severance Agreement provided that Preston would serve as County Administrator through November 30, 2008. (*Pl.'s Ex. 1.*)

The County's eleventh ground also mischaracterizes certain evidence of record. For example, the County cites the Jones' memoranda as "Preston's forgery" completed "for the obvious purpose of deceiving his employer." (*Pl.'s Mot., at 10.*) The actual evidence at trial

---

not owe fiduciary duties to one another . . .") The County has supplied no legal authority to the contrary.

showed the memoranda simply replaced employment memoranda that previously existed in Jones' employment file but could not be found.<sup>55</sup>

**Issue 12:**

As to the twelfth ground, the County seeks reconsideration of the Order because the Court did not address its contention that Retirement System funds could be used in fashioning a remedy for constructive trust. (Pl.'s Mot. to Recons., at 10.) The County's argument overlooks page 29 of the Order where the Court specifically rejected Plaintiff's claim for a constructive trust. The Order states: "Given the remaining findings of the Court, as set forth in this decision, Plaintiff's cause of action for constructive trust no longer remains viable." (Order, at 29.) No reason existed for the Court to analyze a remedy under a claim the County failed to prove.

Notably, the County was required, but did not, prove fraud, as an "essential element" to establish a constructive trust. *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559 (1987). The County failed to introduce any evidence establishing fraud let alone by "clear, definite,

---

<sup>55</sup> The eleventh ground of the County's Motion is also misplaced since it ignores the Order's factual findings regarding Jones. (Order, at 27) ("No evidence of record demonstrates that any document executed by Preston changed the County's existing contractual obligations to Jones."); (Order, at 27) (citing Jones Tr. Test. (Depo.) (relating to SUV allegations: 125: 9-19; 127: 20-25; 128: 1-13; 128: 24-25; 129: 1-5; 129: 18-25; 130: 1-4 Def. Ex. 66; Def. Ex. 138); (relating to Educational Reimbursements: 122: 5-20; 123: 10-12; 123: 17-25; 124: 14-25) ("The documents in question simply memorialized agreements that had been previously made and acted upon by all parties."); (Order, at 28) ("[T]he County failed to prove that Preston executed any memoranda on or after December 1, 2008, as alleged.") (Order, at 28.) ("[T]he Court finds none of the allegations relating to Jones breached the Severance Agreement, nor did the execution of Jones' employment memoranda harm the County in any way."); (Order, at 28) ("Even if Preston somehow breached the Severance Agreement, which is rejected as unsupported, the Court finds that any such breaches would not rise to the level of justifying a rescission of the contract."); (Order, at 28 n.23) ("The Court notes that the evidence demonstrated Jones had use of a County vehicle from December of 2006 until her departure in 2009, which was standard and necessary for her job."); (Order, at 28, n.23) ("Jones never submitted any educational reimbursements."); (Order, at 28 n.23 (citing Jones Tr. Test. (Depo.), 117:22-23) ("As to the travel memorandum, Preston never executed the memorandum and Jones never took the contemplated trip."); (Order, at 28 n.23) ("None of the Jones' allegations impacted the County whatsoever.")

unequivocal, and satisfactory evidence." See *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); see also *Whitmire v. Adams*, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979) (Evidence must leave "no reasonable doubt as to the existence of the trust."); *McNair v. Rainsford*, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct. App. 1998).<sup>56</sup> Accordingly, the Court rejects the County's twelfth ground.

**Issue 13:**

As to the thirteenth ground, the County complains the Order fails to address the availability of rescission due to "Preston's own culpability." (Pl.'s Mot., at 11.) The County thus concludes: "the changed circumstances" defense to rescission is not available where the one invoking the defense is at fault." (Pl.'s Mot., at 11.) However, the Court rejects the County's premise, as it failed to prove any of its claims and, thus, failed to prove the "culpability" it directs at Preston. The Court, therefore, rejects the County's twelfth ground as it again errantly assumes a conclusion it failed to prove.

Moreover, the Order cited ample South Carolina law to support the unavailability of rescission in this case. (Order, at 30-31.) Under South Carolina law, "In the absence of fraud which would justify shifting the loss to party who opposes rescission, rescission is appropriate

<sup>56</sup> The Order's finding regarding the unavailability of rescission proves entirely consistent with the law concerning constructive trust. As the Order correctly notes: "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984). Moreover, the County appears to suggest that it can simultaneously abrogate the Severance Agreement, a fully integrated contract acknowledging the Parties' respective obligations are conditioned upon performance of the covenants stated therein in (see Pl. Ex. 7, at 4, ¶¶14 & 17), while simultaneously preserving monies paid to the state retirement system but re-directing such payments to Plaintiff. But, the County neither pled partial rescission and "[i]t is a generally applied rule that an integrated or indivisible contract cannot be rescinded in part." See *BHP Petroleum Co., Inc. v. Okie*, 836 P.2d 873, 883 (Wyo. 1992); 17A Am.Jur. 2d *Contracts* §548 (1991)). Of course, the Court's Order did not need to pursue such in depth analysis, as the Court found the County failed to prove its claim for constructive trust.

only if both parties can be returned to the status quo prior to the contract." (Order, at 30 (citing *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984)). In turn, the Court specifically found the County failed to prove both its claims for fraud and constructive fraud. (Order, at 24-27.)

Citing *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004), the County argues rescission can occur even if restoration to the status quo *ante* proves impossible. The Court rejects this contention. First, *Griggs* does not apply South Carolina law and has no bearing on this case. Second, *Griggs* actually supports the Court's Order as it confirms the general rule disallows rescission unless the parties can be restored to their prior positions. *Id.* (citing Dan B. Dobbs, *Handbook on Remedies* § 9.4 at 622 (West 1973) ("The general rule . . . is that the adult plaintiff must make restoration of what he got under the contract in order to get rescission, and his inability to do so will not excuse such restoration. In such a case, he may be permitted to recover damages, but rescission will be barred by his inability to make restoration to the defendant.")).

Third, the *Griggs* decision does state: "rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief." *Id.* Yet, precisely for the reasons stated in the Order on pages 30 and 31, rescission (even if Plaintiff had proved its non-fraud based claims) cannot be granted in this case in a manner that does equity to both parties. Nor has the County ever explained how rescission could occur and do equity to both parties. The County seeks to retain all the benefit conferred by the Severance Agreement (*i.e.*, termination of employment, release, etc.) but Preston alone would return all benefits he received. This would not be equitable to both Parties. Accordingly, the Order amply addresses the rescission issues raised by the County.

Finally, the County repeats rescission as appropriate due to the public nature of the contract. The County cites no South Carolina authority to support its contention that a Court in equity should elevate a public body to a higher status than a private citizen. In its written summation, the County cited the decision of *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007) for the proposition that rescission is the proper remedy when "a public act has been taken improperly." As noted *supra* and incorporated herein, however, the Order found the holding of *Baird* controlling. (See Order, at 12-14; see also *supra* at 22-24.)<sup>57</sup> As a result, the Court rejects the County's thirteenth ground seeking reconsideration.

**Issue 14:**

As to issue 14, the County contends the Order misstates that a declaratory judgment action provides "an adequate remedy at law." (Pl.'s Mot. to Recons., at 12.) The Court rejects the County's contention. Not only does the declaratory judgment statute furnish litigants with a useful statutory vehicle to resolve disputes arising under contracts, it also enables South Carolina Courts to fashion further relief after a declaration of the parties' respective rights has been reached. South Carolina Code §15-53-120 states:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

S.C. Code Ann. § 15-53-120. Moreover, a declaratory judgment action proves inherently neither legal nor equitable in nature, but instead assumes the nature of the underlying issue. See, e.g., *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 140, 511 S.E.2d 692, 693

---

<sup>57</sup> Moreover, the *Thompson* decision involved unique issues under New Jersey's Faulkner Act, which have no application to the case at bar or under South Carolina law.

(Ct. App. 1999); *Elias v. Firemen's Ins. Co. of Newark, N.J.*, 309 S.C. 129, 132, 420 S.E.2d 504, 505 (1992). As the Order states, simply nothing prevented the County from pursuing a declaratory action and then, if appropriate, petitioning the Court for proper equitable relief consistent with the rights adjudicated by the declaratory judgment. (Order, at 36.)

**Issue 15:**

As to ground 15, the County takes exception that the Order did not note the 2009 County Council subsequently voted to dismiss the lawsuit Preston initiated against Waldrep and C. Wilson. What occurred after the 2009 County Council took office in January of 2009 has no bearing on whether Waldrep and C. Wilson had a special interest at stake when voting in November of 2008. Accordingly, the Court rejects the County's fifteenth ground.

The County again argues Waldrep and C. Wilson had no special interest in the Severance Agreement vote. (Pl.'s Mot. to Recons., at 12.) The Order addressed this issue for several pages, which the Court incorporates by reference. (Order, at 10-13) (finding Waldrep and C. Wilson had both direct financial interests and a substantial appearance of impropriety.) The Court also addressed the special interests of Waldrep and C. Wilson *supra* at 27-28, which the Court also incorporates by reference. The Court declines to restate its holding for a third time as the same analysis, incorporated herein, applies.<sup>58</sup>


---

<sup>58</sup> The County's Reconsideration Motion does misstate two items worthy of correction. First, the County suggests Preston's lawsuit "was premised on actions that took place years before..." (Pl.'s Mot., at 12.) The evidence of record at trial demonstrated Waldrep's and C. Wilson's interference with Preston's duties had begun several years prior but had continued to increase and peaked on or about the time of the Severance Agreement vote. Second, the County argues "the injunction awarded in that case gave Preston a remedy that undermines his claims in negotiating for a Severance Agreement of other 'unspecified torts.'" (Pl.'s Mot. to Recons., at 12.) This is inaccurate. At the time of the Severance Agreement vote the injunction had not even issued. So, the County's argument in this regard is misplaced. Moreover, while the subsequent injunction may have abated Waldrep's and C. Wilson's continued interference with Preston's contract, it

**CONCLUSION**

For the reasons stated above, the Court denies the County's Motion to Amend, Freemantle's Motion to Intervene, and the County's Motion to Reconsider.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
The Honorable Roger L. Couch  
Circuit Court Judge

November 7, 2013

FILED CLERK'S OFFICE  
ANDERSON SO  
2013 NOV 8 PM 9 57  
COMMON PLEAS AND  
GENERAL SESSIONS

---

would not have afforded Preston relief for harms he had already sustained and would not foreclose potential tort liability for the same.