

THE STATE OF SOUTH CAROLNA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

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Appellate Case No.: 2013-002499

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Anderson County, .....Appellant,

v.

Joey Preston and the South Carolina Retirement System, .....Respondents.

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INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA RETIREMENT SYSTEM

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## **STATEMENT OF THE ISSUE ON APPEAL**

MUST ANY REQUEST FOR RELIEF AGAINST A RETIRED MEMBER OF THE SOUTH CAROLINA RETIREMENT SYSTEM THAT WOULD ATTACH OR OTHERWISE REDIRECT HIS RETIREMENT BENEFITS FROM THE SYSTEM COMPLY WITH THE ANTI-ALIENATION AND OTHER BENEFIT DISTRIBUTION PROVISIONS OF THE RETIREMENT CODE?

## **STATEMENT OF THE CASE**

By a complaint filed on November 12, 2009, Appellant Anderson County (“County”) initiated this matter, in which it seeks to rescind a severance agreement entered into between the County and Respondent Joey Preston (“Preston”) in connection with the termination of Preston’s employment as the county administrator for the County in November 2008. As part of that severance agreement, the County agreed to, and did, pay a sum of money to Respondent South Carolina Retirement System (“SCRS” or “System”) to purchase service credit for Preston in the System. The County has not alleged that SCRS acted improperly or was otherwise responsible for any wrongdoing in connection with that service purchase, but has named SCRS as a defendant in this matter “only for the purposes of recovering funds paid to it by Anderson County on behalf of the defendant Preston.” (Compl. ¶ 3.) On January 14, 2010, SCRS filed an Answer and Cross-Claim Against Defendant Preston in response to the County’s complaint. The County subsequently filed an Amended Complaint on March 30, 2012, which did not materially change any of the County’s allegations related to SCRS.

On September 14, 2012, SCRS filed a Motion for Summary Judgment, in which it contended that there were no genuine issues of material fact regarding the claims asserted against SCRS in this matter, and that, as a matter of law, (1) the extent of any potential liability of SCRS to the County is limited to the amount of the County’s service purchase

payment that has not been exhausted through the payment of retirement benefits to Preston, and (2) once that amount is exhausted in its entirety, SCRS should be dismissed as a party from this case because it would no longer be a stakeholder of the funds in dispute. By an Order filed October 23, 2012, the Honorable Roger L. Couch denied the System's motion for summary judgment. Although the court "determined the South Carolina Retirement System's liability should be limited," the court further found that there were remaining questions of fact regarding the exact amount of the remaining liability, such that the System's motion for summary judgment should be denied. (Summary Judgment Order at 2.)

This case was tried without a jury before Judge Couch from October 29, 2012, through November 2, 2012. Because SCRS did not have a position on the underlying merits of the dispute between the County and Preston regarding whether his severance package should be rescinded, SCRS requested to be, and was, excused from appearing at the trial of this case. In lieu of an appearance by SCRS and any witnesses from the System, the parties submitted written stipulations to the court for the admissibility of certain evidence related to SCRS, including two affidavits executed by SCRS employees regarding Preston's retirement benefits. (Stipulations as to Evidence Related to Defendant South Carolina Retirement System ¶¶ 1-4.) By a Final Order and Judgment dated May 3, 2013, Judge Couch ruled in favor of Respondent Preston as to all causes of action asserted by the County. In particular, because the court did not find that the severance package should be rescinded or otherwise invalidated, it concluded that the County's cause of action seeking to impose a constructive trust upon Preston's retirement

benefits “no longer remain[ed] viable” and ruled in Preston’s favor on that cause of action. (Final Order and Judgment at 29.)

Appellant Anderson County filed a Motion to Alter or Amend Judgment on May 13, 2013, and a post-trial Motion to Amend Complaint on July 15, 2013. By an Order dated November 7, 2013, Judge Couch denied both of the County’s post-trial motions. Notably, the court found that the County “was required [to], but did not, prove fraud, as an ‘essential element’ to establish a constructive trust” on Preston’s retirement benefits. (Post-Trial Order at 31.) By a Notice of Appeal filed on November 22, 2013, the County appealed Judge Couch’s Final Order and Judgment and his Post-Trial Order to this Court, resulting in the instant proceeding.

### **FACTS**

Respondent Joey Preston was employed by Appellant Anderson County as county administrator between 1996 and 2008. At a county council meeting on November 18, 2008, the County approved a Severance Agreement and Release of All Claims between the County and Preston under which the County awarded Preston a \$1.1 million severance package in return for Preston relinquishing his position as county administrator as of November 30, 2008. As part of the severance agreement, the County agreed to pay \$359,258.00 to SCRS in order to purchase service credit in the System for Preston so that he could retire. The retirement benefits obtained by Preston in connection with the severance agreement, and the County’s claims against those retirement benefits, are set out in detail below.

## **I. Preston's Retirement Benefits**

At the time of the termination of his employment with the County on December 30, 2008, Preston had accrued 21 years, 9 months, and 2 days of earned service credit in SCRS as a result of his employment with the County and several other local governmental entities, beginning with his enrollment in the System in April 1987. (Nichols Aff. ¶¶ 4, 5.) By checks dated November 19, 2008, and December 11, 2008, the County paid a total of \$355,848.95 to SCRS to purchase 7 years, 7 months, and 23 days of additional service credit in the System for Preston. (Nichols Aff. ¶ 6.) With the combination of his earned service, the service purchased for him by the County, and 4 months and 15 days of service credit for his unused sick leave, Preston had a total of 29 years, 9 months, and 10 days of credited service in SCRS as of the end of December 2008. (Nichols Aff. ¶ 7.) Based upon that service credit, Preston was eligible to, and did, retire from the System on a service retirement allowance on January 3, 2009, at the age of 45. (Nichols Aff. ¶ 3.) Notably, without the service credit purchased for Preston by the County, Preston would not have been eligible to retire in January 2009, because he would not have had the 28 years of credited service required for retirement under SCRS at his age. (Nichols Aff. ¶ 8.)

As the result of the County's service purchase on Preston's behalf and his subsequent retirement, SCRS became legally obligated to pay a monthly retirement annuity to Preston for the rest of his life. (Nichols Aff. ¶ 9.) Upon his retirement in January 2009, Preston's monthly retirement benefit was \$7,371.16, and, by the time of trial, that monthly retirement benefit had increased to \$7,688.07 as the result of cost-of-living adjustments awarded in the intervening years. (Nichols Aff. ¶ 10.) Consequently,

by October 2012, SCRS had paid Preston accumulated monthly benefits totaling \$344,937.38. (Stipulations as to Evidence Related to Defendant South Carolina Retirement System ¶ 4.) Those benefits would not have been payable at that time and in that amount if not for the service credit purchased by the County for Preston. (Nichols Aff. ¶ 8.) Further, with the issuance of Preston's monthly benefit check for December 2012, SCRS had paid more in retirement benefits to Preston than the County paid to SCRS for the service purchase that made him eligible to retire. (Nichols Aff. ¶ 11.)

## **II. The County's Claim Against Preston's Retirement Benefits**

In the first through ninth and the eleventh causes of action stated in the County's amended complaint, the County alleges that the severance agreement between the County and Preston should be invalidated and rescinded based upon various forms of alleged misconduct committed by members of the county council and Preston and that all monies paid to Preston and SCRS pursuant to the severance agreement should be returned to the County. (Am. Compl. ¶¶ 35-36, 38-39, 45-46, 52-53, 60-61, 69-70, 73-74, 76-77, 79-80, 86-87.) In the tenth cause of action, the County alleges that "[t]he amounts paid to [SCRS] pursuant to the Severance Agreement were wrongfully paid" by the County and that "[i]t would therefore be inequitable for those amounts to remain in the possession of the System, or to be held for the benefit of Preston." (Am. Compl. ¶¶ 82-83.) As relief for this cause of action, the County requests that a constructive trust be imposed on the amounts paid by the County to SCRS on Preston's behalf and that those amounts be repaid to the County. (Am. Compl. ¶ 84.) It is important to note that the County has not alleged that SCRS acted improperly or is otherwise responsible for any wrongdoing in connection with these transactions. To the contrary, in its complaint the County

emphasizes that it has named SCRS as a defendant in this matter “only for the purposes of recovering funds paid to it by Anderson County on behalf of the defendant Preston.” (Am. Compl. ¶ 3.)

However, because the funds that the County initially sought to recover from SCRS in its complaint have now been entirely transferred to Preston through the payment of his monthly retirement benefits (Nichols Aff. ¶ 11), the County is no longer seeking the immediate return of the funds paid to SCRS by the County on Preston’s behalf in a lump sum. In fact, the County has consistently stated that it is not seeking any relief in this matter that would harm SCRS, such as the fiscal harm that would result if SCRS were required to refund monies to the County that had already been expended in paying a retirement benefit to Preston. (Plaintiff’s Post-Trial Memorandum at 37 (“The County is not seeking any relief in this case that would put SCRS in a worse position than it is currently in. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay.”); Initial Brief of Appellant at 51 (“None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay.”).) In lieu of such an immediate return of the service purchase amounts, the County is now seeking to have Preston’s monthly retirement benefit from SCRS placed in a constructive trust to be paid to the County as a means for Preston to make restitution to the County for the amounts paid to him or on his behalf pursuant to the severance agreement. (Plaintiff’s Post-Trial Memorandum at 38; Initial Brief of Appellant at 59-60.)

Respondent SCRS takes no position in this matter on the underlying merits of the dispute between the County and Preston regarding whether Preston’s severance package

should be rescinded. Rather, the sole concern of SCRS in this matter is to ensure that any relief awarded to the County with regard to Preston's retirement benefits does not violate the provisions of applicable state law pertaining to the distribution of his benefits. Specifically, if the County prevails on its claim against Preston and seeks to attach or otherwise redirect Preston's retirement benefits as relief for its claim, SCRS contends that any such relief must be consistent with the anti-alienation provisions of S.C. Code Ann. § 9-1-1680 (Supp. 2013) and the other distribution provisions of Chapter 1 of Title 9 of the South Carolina Code of Laws.

### ARGUMENT

**ANY REQUEST FOR RELIEF AGAINST A RETIRED MEMBER OF THE SOUTH CAROLINA RETIREMENT SYSTEM THAT WOULD ATTACH OR OTHERWISE REDIRECT HIS RETIREMENT BENEFITS FROM THE SYSTEM MUST COMPLY WITH THE ANTI-ALIENATION AND OTHER BENEFIT DISTRIBUTION PROVISIONS OF THE RETIREMENT CODE**

As noted above, Respondent SCRS takes no position in this matter on the underlying merits of the dispute between Appellant Anderson County and Respondent Joey Preston regarding whether Preston's severance package should be rescinded. Nevertheless, although SCRS has no position on the merits of the underlying dispute in this matter, if the County prevails on its claims against Preston, SCRS has two concerns regarding any relief that may be awarded on those claims related to SCRS. First, as set out in its Motion for Summary Judgment, SCRS contends that, if the County prevails on its claim that the severance agreement between the County and Preston should be rescinded, SCRS no longer has any liability *as a stakeholder* to return funds to the County because the full amount of the County's service purchase payment made to SCRS on Preston's behalf has now been exhausted through the payment of retirement benefits

to Preston. Second, if the County prevails on its claim against Preston and seeks to attach or otherwise redirect Preston's retirement benefits as relief for its claim, SCRS contends that any such relief must be consistent with the anti-alienation provisions of S.C. Code Ann. § 9-1-1680 (Supp. 2013) and the other distribution provisions of Chapter 1 of Title 9 of the South Carolina Code of Laws. Because the County is no longer seeking the immediate, lump-sum return of the amount of the service purchase payment made to SCRS, but is now only seeking the imposition of a constructive trust upon Preston's monthly retirement benefit as means of collecting restitution from Preston, this Brief will only address the second of these two concerns.

As part of its requested relief in this matter, the County seeks to have Preston's monthly retirement benefit from SCRS placed in constructive trust and redirected to the County in order recoup the amounts paid to Preston or on his behalf pursuant to the disputed severance agreement. (Plaintiff's Post-Trial Memorandum at 36-38; Initial Brief of Appellant at 51-52, 60.) However, as explained below, any relief against Preston that would attach or otherwise redirect his retirement benefits from SCRS must comply with the anti-alienation and other benefit distribution provisions of the Retirement Code.

As a general matter, retirement benefits payable under SCRS are statutorily exempt from being attached by legal process. The SCRS anti-alienation provision, found at Section 9-1-1680 of the Retirement Code, broadly exempts a member's retirement benefits, including "the right . . . to an annuity or a retirement allowance," from levy, garnishment, attachment, or any other legal process and prohibits the assignment of any such benefits. See S.C. Code Ann. § 9-1-1680 (Supp. 2013). And, although there are certain exceptions to this general anti-alienation provision for matters such as domestic

relations orders, child support obligations, and income tax levies, the only such exception that might be applicable in this matter is the portion of the statute that provides that the right of a member to a benefit under SCRS may be “subject to the doctrine of constructive trust ex maleficio.” Id. South Carolina courts have defined a “trust ex maleficio” as

a trust by operation of law which arises against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience to hold and enjoy.

Briggs v. Richardson, 288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986). Because such trusts are based essentially upon a finding of fraudulent activity, the burden of proof for establishing a constructive trust ex maleficio is one of clear and convincing evidence, not merely a preponderance of the evidence. Id.

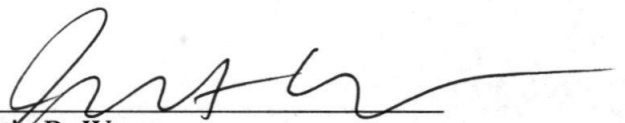
Therefore, in the matter at hand, even if a court finds for the County on its claims against Preston and rescinds the severance agreement, it cannot attach or otherwise redirect Preston’s retirement benefits from SCRS, unless it makes a further finding, by clear and convincing evidence, that his right to receive those benefits should be subject to a constructive trust ex maleficio. S.C. Code Ann. § 9-1-1680. Moreover, if a court does make such a finding and imposes a constructive trust upon Preston’s retirement benefits from SCRS, any redirected payments made to the County from Preston’s retirement benefits must still comply with the other distribution provisions of the Retirement Code.

For example, the County would not be entitled to any lump-sum distribution of the present value of Preston's benefits or any other special distribution, but would be required to receive monthly payments in the same form and same manner as such benefits were payable to Preston pursuant to his retirement. See generally S.C. Code Ann. §§ 9-1-1510, 9-1-1550(B), 9-1-1615, 9-1-1620 (Supp. 2013). Put simply, any payments to the County under such a constructive trust would have to come out of the monthly benefit amount that would otherwise be payable to Preston pursuant to his retirement under the SCRS pension plan.

### CONCLUSION

In sum, SCRS takes no position on the underlying merits of the dispute between the County and Preston regarding whether the severance agreement executed by those parties in November 2008 should be rescinded. Rather, as described above, it only requests that, if the Court finds in favor of the County on its claims, any relief awarded to the County does not require SCRS to return any funds that it no longer holds and does not violate the anti-alienation and distribution provisions of the Retirement Code.

Respectfully submitted,



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March 28, 2014

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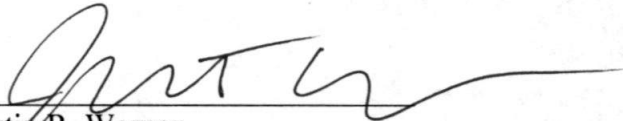
Joey Preston and the South Carolina Retirement System, .....Respondents.

RESPONDENT SOUTH CAROLINA RETIREMENT SYSTEM'S DESIGNATION OF  
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent South Carolina Retirement System concurs with the Designation of Matter to be Included in the Record on Appeal filed by Appellant Anderson County in this matter on February 26, 2014, except that Respondent South Carolina Retirement System also proposes that the following document be included in the Record on Appeal in this matter:

1. Defendant South Carolina Retirement System's Motion for Summary Judgment

I certify that this designation contains no matter which is irrelevant to this appeal.



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March 28, 2014

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CERTIFICATE OF SERVICE

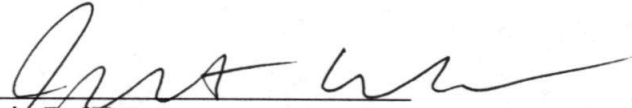
I hereby certify that, on this date, I served a copy of the Initial Brief of Respondent South Carolina Retirement System and the Respondent South Carolina Retirement System's Designation of Matter to be included in the Record on Appeal on all parties to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows:

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Travis J. Turner, CPA  
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March 28, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
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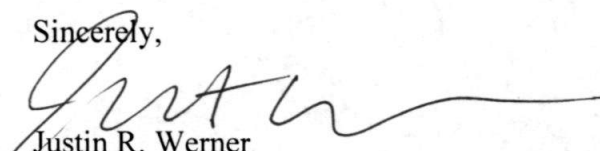
RE: Anderson County v. Joey Preston and the South Carolina Retirement System,  
Appellate Case No. 2013-002499

Dear Ms. Kitchings:

Please find enclosed for filing with the Court an original and one copy of the Initial Brief of Respondent South Carolina Retirement System, Respondent South Carolina Retirement System's Designation of Matter to be Included in the Record on Appeal, and a Certificate of Service in connection with the above-referenced matter. Please file the original documents and return a file-stamped copy of the documents in the enclosed self-addressed inter-agency mail envelope for our records.

Thank you for your assistance. If you have any questions or concerns regarding this matter, please feel free to call me at (803) 737-6894.

Sincerely,



Justin R. Werner  
Legal Counsel

Enclosures

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Candy M. Kern-Fuller, Esquire  
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Troy A. Tessier, Esquire  
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