THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County ..... Appellant,

vs.

Joey Preston and The South Carolina Retirement System ..... Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING OF APPELLANT ANDERSON COUNTY

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Appellant Anderson County submits this memorandum in support of its petition, pursuant to SCACR 221(a), for rehearing of certain aspects of the Court's Opinion in this matter No. 5490, filed May 31, 2017. Anderson County submits that each of the following grounds was overlooked or misapprehended by the Court.

I. Rather than Remanding, the Court of Appeals Should Have Fashioned a Remedy, Including Placing a Constructive Trust on the Flow of Pension Funds Secured with Anderson County's Money.

This Court reversed the Circuit Court's decision that Preston's retirement fund payments – including those flowing from Anderson County's payments under the void Severance Agreement – could not be placed in a constructive trust to be used as part of the repayment of Anderson County's huge outlay. Anderson County does not seek rehearing on that point. We do seek rehearing of the Court's remand to the Circuit Court to determine a remedy.

Because the record is clear, and because the passage of time makes certain remedies potentially less valuable to Anderson County with every monthly check mailed to Preston, we submit this Court should have fashioned the remedy, rather than remanding – and at a minimum should have provided an immediate remedy regarding Preston's retirement benefits. The retirement benefits previously and currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. The Record before this Court is sufficient to fashion an equitable remedy in this matter, and the Court should exercise its power to do so. Especially as to the amounts being paid to Preston before he turns 60 (starting at least at the time of trial), there is every reason to provide relief now, and no obstacle to doing so. *See* S.C. Code Ann. § 9-1-1680 (allowing a constructive trust on retirement fund proceeds).

II. This Court Should Clarify that Anderson County Did Not Violate the Severance Agreement, and No Fee Award Is Available to Preston, Whether or Not the Severance Agreement Is Voided.

The Court agreed with Anderson County that the voiding of the Severance Agreement meant that Anderson County could not have violated that Agreement. Anderson County does not seek rehearing of that ruling. Because of that ruling, this Court did not consider Anderson County's other arguments that there was no breach, and that Anderson County is not liable to Preston for attorney's fees. However, in light of the possibility of further proceedings, Anderson County seeks rehearing of this omitted point and seeks a ruling that – even if the Severance Agreement were not null and void – this lawsuit did not breach the Severance Agreement. The covenant not to sue in the Severance Agreement plainly was not intended to be some sort of "incontestability clause," and absent very clear intent in the language to create that kind of a barrier, one should not be inferred. Courts have declined to treat covenants not to sue as preventing a challenge to the validity of the document itself. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985). More generally, the covenant by its own terms is limited to claims "relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County." (Plf. Ex.7, ¶ 8) This lawsuit is not about Preston's "employment" or his actions taken "on behalf of the County," but instead about the terms of his Severance Agreement and the manner in which it was adopted.

For the same reasons, the Circuit Court should have made it clear that a fee award is not available against Anderson County in this case, regardless of voiding of the Severance Agreement, because this litigation was substantially justified and other factors would make a fee award unjust. *See* S.C. Code Ann. § 15-77-300. Anderson County seeks rehearing to establish this point.

III. The Court Should Rule in the Alternative That Anderson County May Amend Its Complaint to Seek Invalidation of the Severance Agreement on that Basis.

This Court accepted Anderson County's argument that the invalidation of four votes rendered the Severance Agreement null and void; we do not seek rehearing on that point. And because of that ruling, this Court had no need to reach Anderson County's alternative argument that the Circuit Court erred in denying Anderson County's motion to amend its Complaint to seek invalidation on the basis of absence of a quorum. However, in light of the possibility of further proceedings and to ensure issues are preserved, Anderson County notes that this Court did not rule on this alternative argument and seeks rehearing of this omitted point to establish that, if the ruling that the Severance Agreement is null and void is for any reason overturned, the denial of Anderson County's motion to amend its Complaint to make that argument should be reversed.

IV. The Severance Agreement Is Void Because it Was a Product of Fraud and Abuse of Power, it Was Unreasonable and Capricious, and it Violated Public Policy.

Courts have the authority to invalidate an enactment, even in the absence of tainted votes, "in cases of fraud or clear abuse of power, or where [the action was] unreasonable or capricious." *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (quoting *SCE&G v. South Carolina Pub. Serv. Auth.*, 215 S.C. 193, 212, 54 S.E.2d 777, 785 (1949)). A court may also invalidate a county council action that violates the public policy of the state. *Piedmont Public Serv. Dist. v. Cowart*, 319 S.C. 124, 136, 459 S.E.2d 876, 882-83 (Ct. App. 1995) (invalidating employment contract as *ultra vires* and contrary to public policy), *aff'd on other grounds*, 324 S.C. 239, 478 S.E.2d 836 (1996); *Thompson v. Atlantic City*, 921 A.2d 427 (N.J. 2007) (invalidating settlement and release agreement with city procured for mayor of that city by political allies because conflicts of interest inherent in negotiation violated public policy). The Court misapprehended these principles in rejecting this argument.

Preston's claim for "anticipatory breach" was premised on the prediction that the *incoming* County Council was likely to take some unspecified improper action toward him. The claim was objectively baseless and therefore could not support the Severance Agreement.

Second, Preston's employment contract clearly provided that he served at the pleasure of County Council and could be terminated at any time and for any reason; the question was only whether he would be owed severance upon such termination. Preston's termination, in and of itself, simply could not have been a breach of contract.

Moreover, even if Preston could have claimed breach of his contract, Preston's own attorney admitted the "settlement" paid to Preston exceeded the maximum amount he could have claimed for breach. This was arbitrary.

Finally, the "debate" on the Severance Agreement was a sham, and based on fraud. The Agreement was added to the agenda by an amendment offered toward the end of the meeting and with no advance notice. The proposed Severance Agreement was then swiftly distributed, "debated," passed, "reconsidered," and voted on again – in addition to being funded in a separate action – all in a choreographed dance, with virtually no substantive debate. This was arbitrary, and an abuse of power. Meanwhile, Preston sat by with knowledge that the Agreement was being voted on by persons with clear and disqualifying conflicts of interest. This was fraud.

V. The Tainted Votes Cast in Favor of the Severance Agreement Require its Rescission.

Substantial and persuasive authority from other jurisdictions, cited to the Court in Anderson County's briefs, holds that a single tainted vote is sufficient to invalidate an action in cases like this one. Specifically, (i) where the enactment at issue confers a specific benefit for one individual rather than establishing a law of general applicability; (ii) where the action was not part of a County ordinance but instead was passed by a simple motion; (iii) where

consideration was marked by procedural irregularities; (iv) where tainted votes were cast by the chair or other key proponents of the action; *or* (v) where the matter was passed without notice or any opportunity for public comment or political redress, a single improper vote is sufficient to void the infected outcome. Here, not just one of these factors is present; they all are.

Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) is not dispositive here. The question of whether one tainted vote could support invalidation when the margin is larger was not even presented in *Baird*. To the contrary, *Baird* involved a one-vote majority, so the issue could not have arisen. Nor did *Baird* involve any of the special circumstances involved here, where one vote is enough. We request rehearing of this Court's holding that the statement in *Baird*, that "a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote," Opinion pp. 14-15, is the equivalent of a holding that a court *never* has jurisdiction to invalidate a vote on the basis of a smaller number of invalid votes. *Baird* did not address this question.

Second, even if Anderson County were required to invalidate a number of votes equal to the margin of passage of the Agreement, a single tainted vote would suffice. The passage of the Severance Agreement included a motion to reconsider – a parliamentary maneuver designed to prevent later reconsideration. The vote to end debate on the reconsidered motion was only 4-3. Because this one-vote margin was a necessary step in final approval, invalidation of a single vote is enough. The Court's rejection of these arguments misapprehended these points.

VI. Preston Had a Duty to Disclose the Facts That Required Disqualification of Thompson and Ron Wilson, and Preston Breached His Fiduciary Duty, and Engaged in Fraud, Constructive Fraud, and Negligent Misrepresentation When He Did Not Do So.

Preston was aware that Michael Thompson was soliciting a County job from him, and that he had just upgraded Ron Wilson's daughter's county contract for no good reason, and yet

he stood silently by and let them cast votes, thus implicitly and fraudulently representing to all present that their votes were proper, and breaching his duties to the County and its taxpayers. As a high-ranking employee, Preston had a duty to disclose the facts that made the Thompson and Ron Wilson votes improper. *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) ("Nondisclosure is fraudulent when there is a duty to speak.").

The conclusion that Preston was excused from his duty to Anderson County because he also had asserted claims against the County confuses Preston's private and public roles and misapprehends these points, and should be revisited. Certainly, Preston could negotiate with the County at arm's length concerning his claims. But he did not resign. Instead, he remained employed by the County, and thus voluntarily retained a duty to the County. As County Administrator present at a vote affecting his own interest, Preston had a duty to make those conflicts known. His failure to do so constitutes breach of duty of loyalty, fraud, constructive fraud, and negligent misrepresentation.

VII. Rescission Is Available Here.

This Court held rescission is not available, in part because the parties cannot be returned to the *status quo ante*. For the reasons set forth in Anderson County's briefs, this decision should be revisited – particularly in the event that future proceedings reopen this Court's decision that the Severance Agreement is void. The facts of this case paint a picture of gross disregard for the public welfare and the public purse. Rescission is appropriate in such a case.

This is so for three reasons. First, where – as here – the party opposing rescission is himself at fault, he cannot rely on the "changed circumstances" rule to block rescission. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011). Second, equity is simply not so limited in fashioning remedies. This Court has agreed with Anderson County that Preston received over $1.1 million of public money under a void contract. There must be clarity

that equity is available to the County to craft an appropriate remedy. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) ("in the event restoration to the status quo is impossible, 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"). Third, this ruling does not give sufficient weight to the public aspects of this case, and the fact that rescission is the appropriate remedy when a governmental action like this one is determined to be void; the considerations here are different from those that might apply in a purely private contractual setting. When public funds are expended under a void contract, it is imperative that an appropriate remedy be fashioned. The public interest must be given substantial weight in such a circumstance.

Anderson County respectfully requests rehearing on each of the foregoing grounds.

Respectfully submitted,

By: J. Theodore Gentry

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