**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

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Opinion No. 5490 (S.C. Ct. App. withdrawn, substituted, and refiled August 16, 2017)

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Anderson County.....Petitioner,

v.

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

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# ANDERSON COUNTY'S PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner Anderson County certify that Anderson County petitioned for rehearing to the Court of Appeals and that the Court of Appeals finally ruled on this petition on August 16, 2017.

## QUESTIONS PRESENTED

Anderson County challenged the validity of a $1.1 million Severance Package granted to the County Administrator by a friendly, lame duck County Council. The Court of Appeals agreed the Severance Agreement should be invalidated, but rejected certain other arguments of the County and did not provide a remedy.

1. Where the Court of Appeals agreed the Severance Agreement was void and that Anderson County was entitled to equitable relief, did the Court of Appeals err in failing to fashion a remedy, or at least remanding with explicit instructions to fashion a remedy?

2. Did the Court of Appeals err in holding rescission was unavailable?

3. To the extent a complete remedy is not fashioned on appeal, did the Court of Appeals err in failing to give Anderson County leave to amend its Complaint to address expressly the lack of quorum on which the Court of Appeals based voiding of the Severance Agreement?

4. Did the Court of Appeals err, on the particular facts of this case, in finding that one tainted vote did not require invalidation of the Severance Agreement?

5. Did the Court of Appeals err in declining to hold that the Severance Agreement was unreasonable and capricious; a product of fraud and abuse of power; and void as against public policy?

6. Given that Preston – who was still employed as County Administrator – was plainly aware of the disqualifying conflicts of interest facing two Council members who voted for his Severance Package, did the Court of Appeals err in finding that Preston had no duty to speak concerning those conflicts and that his silence during the November 18, 2008 meeting did not constitute breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation?

7. Did the Court of Appeals err in declining to hold that this lawsuit, seeking to invalidate the Severance Agreement, was not itself a breach of the Severance Agreement?

8. Did the Court of Appeals err in declining to hold that Preston is not entitled to any award of attorney's fees under S.C. Code § 15-77-300 because Anderson County's lawsuit was substantially justified and an award of fees would be unjust?

## STATEMENT OF THE CASE

### I. Procedural History

Anderson County filed its Complaint on November 12, 2009, seeking to invalidate a $1.1 million Severance Package given to Joey Preston. (R. pp. 84-96) Preston filed an Answer and Counterclaim on August 10, 2010. (R. pp. 109-122) Anderson County filed its Reply to Counterclaim on September 7, 2010. (R. pp. 123-126) On December 12, 2011, the case was designated as complex, and on February 28, 2012, it was assigned for all purposes to the Honorable Roger L. Couch. (R. pp. 80 & 81) Anderson County filed an Amended Complaint on March 30, 2012. (R. pp. 127-159) Preston filed an Answer to the Amended Complaint and Counterclaim on May 3, 2012. (R. pp. 160–228) Anderson County filed its Reply on June 29, 2012. (R. pp. 229-237)

Certain of Preston's counterclaims – arising out of his arrest for driving under the influence and allegations concerning an investigation of Preston in 2009 – were settled by agreement and dismissed by stipulation filed on October 23, 2012. (R. pp. 247-248)

The parties filed cross-motions for summary judgment, which were heard on October 16-17, 2012, and denied in all respects as to both parties by Order dated October 23, 2012. (R. pp. 82-83) The matter was tried without a jury to Judge Couch from October 29, 2012 through November 2, 2012. Judge Couch made his rulings in an Order dated May 3, 2013. (R. pp. 1-43)

Anderson County filed its Motion to Alter or Amend Judgment on May 13, 2013. (R. pp. 3163-3176) Anderson County also filed a post-trial Motion to Amend Complaint, in light of Judge Couch's disqualification of four votes, on July 15, 2013. (R. pp. 3245-3270) Both of those motions were denied by Order filed November 8, 2013. (R. pp. 44-79) Anderson County filed its Notice of Appeal on November 22, 2013.

The Court of Appeals heard oral argument on June 11, 2015. The original opinion of the Court of Appeals was filed May 31, 2017. Anderson County filed its Petition for Rehearing on June 14, 2017, and Preston filed his Petition for Rehearing on June 15, 2017. On August 16, 2017, the Court of Appeals withdrew its May 31, 2017 opinion and filed a substituted opinion. The Court of Appeals denied both parties' Petitions for Rehearing on the same date.

## II. Factual Summary

***Introduction.*** On November 18, 2008, Joey Preston and a lame duck County Council controlled by his political allies abandoned any pretext that they were public servants with fiduciary obligations to the citizens of Anderson County. They were so intent on thwarting what – they were sure – the incoming majority had planned that they ignored fundamental rules of conflict of interest, and their obligation to deal prudently with public money.

The result was an unjustifiable $1.1 million payout to a public servant (the "Severance Package" or "Severance Agreement"). The purported basis for the payment was settlement of a logically impossible claim that Preston's existing employment contract (the "Employment Agreement") had been "anticipatorily breached." This claim was plainly without merit, since the Employment Agreement provided that Preston could be terminated at any time, without cause, and because the purported "breach" was a prediction of future political action by persons who were not in office and so could not act for the County. In fact, Preston was in no danger of termination by the existing Council, which included a solid majority of his supporters. The Severance Package further offended rationality by giving a public official far more than the severance to which he would have been entitled under his Employment Agreement under any scenario – including a $7,600 per month public pension for life, starting at age 45, courtesy of the taxpayers.

***Preston's Tenure and His Employment Contract.*** Joey Preston was the County Administrator of Anderson County from 1996 through most of 2008. (R. pp. 912-913) In July of 1998, Preston obtained an Employment Agreement with the County. (R. pp. 1891-1899) The Employment Agreement was favorable to Preston. It purported to have an initial term of three years, and to renew perpetually for an additional year at the close of each contract year. (R. p. 1892)

Importantly, the Employment Agreement expressly allowed termination without cause. Thus, termination itself – with or without cause – could not be a breach.

> A. The Administrator serves at the pleasure of Council, and nothing in this Agreement shall prevent, limit, or otherwise interfere with the right of Anderson County Council to terminate the services of the Administrator at any time, subject only to the provisions set forth in Section 3, paragraphs A, B, and C of this Agreement.

(R. p. 1892 at Sec. 2.A) In the event of termination without cause, the Employment Agreement included a provision for severance pay of up to thirty-six months of salary. (R. p. 1893 at Sec. 3.B) While the Employment Agreement was generous, contrary to Preston's view, it provided him no guarantee of employment for life.

***Election of a New Council, and Preston's Claim of "Anticipatory Breach."*** In Anderson County, the entire County Council stands for re-election every two years. (R. p. 307, line 18-p. 308, line 1) In June of 2008, challengers won primary elections against several incumbent County Council members who were friendly to Preston. (R. pp. 310-312; pp. 925-928) Because those primary victors would not face an opponent in the general election, the practical effect was that they would very probably take office as part of a new County Council in January 2009. (R. pp. 935-936; pp. 1187-1188) Some of the new Council members, along with two returning Council members, had run on platforms calling for examination and possible reform of the financial and governance practices of the Preston administration. (R. pp. 310-312)

It is important to emphasize that this new Council would not be sworn in before January 2009, and that until then the old Council – a majority of which was vigorously supportive of Preston – remained in office. (R. pp. 312-313; pp. 1199-1200) Preston recognized this and acted swiftly to exit on favorable terms before the potential investigation could get underway. Preston engaged attorney Rob Hoskins to assert a claim against the County for him. Hoskins first wrote to County Council on September 25, 2008 – that is, before the general election in November. (R. pp. 1914-1915) In that letter, Hoskins asserted on behalf of Preston that the ***intent*** of the ***incoming*** majority-elect to examine the Preston legacy amounted to an "anticipatory breach" of Preston's Employment Agreement.

The sitting Council referred Preston's claim to its Personnel Committee, chaired by Ron Wilson. (R. p. 334, lines 10-19; p. 1189, lines 3-15; pp. 989-990) Wilson – who has since pled guilty to operating a multi-million-dollar Ponzi scheme – was a Preston supporter. (R. p. 316, lines 17-20; pp. 685-687) The Personnel Committee hired an employment attorney – Tom Bright – to advise it. (R. pp. 2003-2006; p. 338, lines 5-25; pp. 441-442; p. 1190, lines 10-24) Bright advised the committee and Council that Preston did not at the time have a claim for "anticipatory breach," and that Council had the option of doing nothing. (R. pp. 458-460; pp. 340-341; p. 1198, lines 1-23) Bright also advised the committee that Preston's Employment Agreement might be wholly invalid under *Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995), because the Agreement purported to extend beyond the term of the County Council that approved it. (R. p. 459, lines 12-18; p. 471, line 24-p. 472, line 3; pp. 477-479) Ignoring this advice, the Personnel Committee instructed Bright to negotiate a settlement with Preston – he was told to "try and get the best deal you can." (R. p. 464, line 21-p. 465, line 17)

On October 23, 2008, Preston's lawyer sent Bright a letter making a demand for $1,276,081.00: $827,222.00 for the "total value of the money and benefits due" under Preston's Employment Agreement (as calculated by Preston's lawyer); $356,087.00 to purchase service credits to allow him to retire immediately on a full pension; and $92,772.00 to fund a health reimbursement account. (R. pp. 2026-2028) The letter acknowledged that Preston's demand was for more than Preston was due under his Employment Agreement, calculating the total amount due under the Employment Agreement as $827,222.00. *Id.* Hoskins justified this by alluding to unspecified "tort claims" that Preston would assert against current and incoming Council members – presumably those pledged to investigate his regime. *Id.*

Faced with the outgoing Council's determination to settle, Bright had little negotiating leverage. (R. pp. 464-465, 468-472) The final Severance Package called for payments of approximately $1.1 million, which included full severance under the Employment Agreement ***plus*** purchase of service credits to give Preston a lifetime pension at age 45.[1] (R. pp. 1002-1003; pp. 1985-1989; pp. 2026-2028; pp. 2037-2039)

***County Council's Series of Votes on the Severance Package.*** The Severance Package was considered at the scheduled November 18, 2008 meeting of County Council. The meeting was video-recorded and transcribed. (R. pp. 1918-1959; p. 1983) The videotape (R. p. 1983) is impossible to watch without seeing that Preston's supporters made a choreographed effort to ram through approval of the Severance Package with no notice to those who would oppose its passage and with as little time for deliberation and public comment as possible.

[1] Had Preston not received this Severance Package, he would not have been entitled to receive retirement payments until he turned sixty. (R. pp. 1287-1292; pp. 251-252 at ¶¶ 5-10; pp. 253-255 at ¶¶ 5, 11-14)

All seven Council members were present for the vote on Preston's Severance Package on November 18, 2008. Five were friendly to Preston. The other two – Bob Waldrep and Cindy Wilson – had supported investigation of his administration. (R. pp. 2170-2226; p. 420, lines 13-21; pp. 1199-1200; p. 921, lines 14-24; pp. 1327-1329, 1331-1332)

Despite prior, coordinated groundwork by certain Council members to locate funding for the Severance Package and to orchestrate its passage, consideration of the Severance Package was not placed on the agenda distributed in advance of the November 18 meeting. (R. pp. 1916-1917; pp. 344-346; pp. 546-547; p. 821; pp. 1202-1222) Instead, on Ron Wilson's motion the agenda was amended – toward the end of the meeting – to add the matter. (R. pp. 1940-1941; p. 1983) When he introduced the Severance Package, Ron Wilson said that "no one has seen this except Mr. Bright and myself." (R. p. 1965, lines 1-3; p. 1983) Despite this, there was essentially no discussion of the details of the Settlement Package, Preston's asserted claim, or the value of the Package. After truncated debate, Bill McAbee moved to end debate. (R. pp. 1963-1968; p. 1983) That motion passed, and the Severance Package was approved by a vote of 5-2, with Cindy Wilson and Waldrep voting against. (R. p. 1968; p. 1983)

After a vote on funding the Severance Package – in a truly remarkable moment – Councilwoman Floyd asked "Do we need to vote to reconsider this?" (R. p. 1949, lines 2-3; p. 1983) This showed that the majority had planned a strategic series of votes for the Preston Package. After this reminder, a motion was made to reconsider the funding transfers. (R. p. 1949; p. 1983) That passed, and after another truncated debate that was primarily squashed by Chairman Thompson on a point of order, McAbee moved to end debate. (R. p. 1950; p. 1983) The funding package was then re-approved on reconsideration. (R. p. 1951; p. 1983)

Promptly thereafter, McAbee moved to reconsider the Severance Package. (R. p. 1951; p. 1983) McAbee acknowledged that he made this motion ***not*** out of a desire to see the measure fail, but as a "parliamentary tactic" designed to insulate the approval against any later attack – based on his understanding that once a matter has been reconsidered once, "it precludes any further reconsideration." (R. pp. 628-629)

Immediately after his motion to reconsider was passed – within about ***12 seconds*** – McAbee moved to end debate on the matter he wanted reconsidered. (R. p. 1951, line 10-p. 1953, line 9; p. 1983) The motion to end debate passed, but only by 4-3, with Greer joining Waldrep and Cindy Wilson in voting against. (R. p. 1952, lines 34-37; p. 1983)

The final Council vote on the Severance Package followed. Waldrep abstained, having earlier explained an abstention with the statement that he "can't figure out what in the world" Council was doing. (R. p. 1951, lines 33-35; p. 1952, line 34-p. 1953, line 9; p. 1983) In the meeting minutes, the final recorded vote was 5 in favor, 1 against, and 1 abstention. (R. p. 1953, lines 6-9; p. 1983)

A few points arising from analysis of the videotape of this extraordinary event are worth emphasis: (i) the time from distribution of the proposed Severance Agreement (which supposedly no one but Ron Wilson had seen) to the initial vote on it was about 11 minutes; (ii) the time from passage of the motion to reconsider the Severance Package to McAbee's motion to end debate on reconsideration was about 12 seconds; (iii) only a minuscule portion of the debate was devoted to the merits of Preston's claims, whether they should be settled, or the terms of the Settlement Agreement. (R. p. 1983)

***The Terms of the Severance Package.*** The Severance Agreement contained these key provisions (R. pp. 1985-1989):

- Preston agreed to relinquish his position as County Administrator effective at the close of business on November 30, 2008. That is, Preston ***voluntarily resigned*** before the new majority that supposedly "breached" his contract even took office.
- The County agreed to pay Preston $1,139,833.00 (less withholdings):
    - $359,258.00 to be paid to the South Carolina Retirement System to purchase "service credits";
    - $780,575.00 paid in cash to Preston;
    - The County also gave Preston the title to his then-current County vehicle, a 2006 GMC Yukon Denali.

***Facts Supporting Invalidation of the Severance Package.*** The core facts that require invalidation of the vote to pay Preston $1.1 million in County funds are not subject to doubt.

First, the terms of the Severance Package itself are sufficient to invalidate it. The County purported to pay Preston for "anticipatory breach" at a time when the sitting County Council was in his corner, and the majority that he expected to terminate him had not taken office. There had been no County action that constituted anticipatory breach. Moreover, Preston's Employment Agreement made it clear that he could be terminated by Council "at any time." (R. p. 1892 at Sec. 2.A) Thus even termination could never be a "breach" of the Employment Agreement. The Severance Package was not a true response to an actual breach; it was a political bailout from political allies, to spare Preston the discomfort of dealing with a new Council not as favorably disposed toward him. This is confirmed by the fact – established in demand letters from Preston's own lawyer – that Preston was ***paid more than he was owed*** under his contract. (R. pp. 2026-2028; pp. 2037-2039).

Second, as outlined in the decisions of both the Circuit Court and the Court of Appeals, at least two of the votes cast for the Severance Package came from Council Members with blatant and disqualifying conflicts of interest. Briefly, Council Chair Michael Thompson – at the very

time he was chairing the County Council's decision to pay Preston $1.1 million and voting repeatedly in favor of Mr. Preston's interests – was ***actively seeking County employment for himself from Preston***. (R. p. 778, line 25-p. 779, line 15; p. 783, line 3-p. 784, line 4; p. 785, lines 6-22; pp. 791-798; pp. 815-828; pp. 1985-1989; pp. 2072-2075; p. 2076; pp. 2079-2081; pp. 2082-2083; pp. 547-552; pp. 1015-1017; p. 1022, line 19-p. 1023, line 9; pp. 1026-1031; pp. 1036-1044). Similarly, Councilman Ron Wilson was chair of the Personnel Committee which oversaw the negotiation of Preston's Package, and Councilman Wilson made the motion that Council approve Preston's Package. (R. pp. 1940-1941; p. 1983) On November 1, 2008, while Preston's claims were before the Council and being negotiated by Councilman Wilson's Personnel Committee – and approximately one week after Preston's lawyer sent his October 23 demand for just over $1.2 million – Preston caused the County to enter into a new contract with a consulting company owned and operated by Wilson's daughter. The new contract significantly and gratuitously improved the benefits to Wilson's daughter and her company. (R. pp. 2158-2161; pp. 1769-1774; pp. 1057-1058; pp. 1069-1071) In addition to raising hourly rates and fixing a three-year term, the new contract contained a truly extraordinary provision, giving Wilson's daughter the right to "liquidated damages" calculated at her hourly rate multiplied by 30 hours per week for the remainder of the three-year term if the County terminated the contract before the end of three years; this was despite the fact that the company was not anticipated to, and never did, work more than about 20 hours per week. (*Id.*; R. p. 1758, lines 3-8; p. 1761, lines 20-24; pp. 1068-1069).

Next, Preston plainly was aware of these conflicts of interest because he was immersed in them. He knew Chairman Thompson was pursuing him for a job, and he knew he had upgraded the contract of Councilman Wilson's daughter. (R. pp. 1038-1039, 1057-1058, 1069-1071)

Preston was also present in Council chambers while these individuals debated and voted on his Severance Package, and yet he said nothing about these improper votes. (R. pp. 1918-1959; p. 1983; p. 997) He had a duty to speak up, as an employee and as a public servant.

Finally, it bears emphasis that this is not a private contract case. The matter involves the Court's authority to undo an improper ***public*** action. Preston's allies were not owners of a business, deciding how to spend their own money. They were charged with the public interest, and they were bestowing public funds with no justification.

"Corruption" is the abuse of entrusted power for private gain. The key facts of this case are not subject to serious dispute, and they render the Preston Severance Package plainly and deeply corrupt. The courts are not so powerless in the face of blatant wrong.

## ARGUMENT

This case presents a clear question: May a public official retain a severance package, paid with public funds: (i) whose value substantially exceeds the severance provided by contract; (ii) when there was no breach that would justify any settlement payment at all; (iii) where the vote was choreographed and run by officials who should not have voted or participated at all; and (iv) where the beneficiary, himself a non-elected official of the County, sat silently with the knowledge the vote was improper. The Circuit Court concluded that all this was acceptable.

In its opinion, the Court of Appeals reversed the Circuit Court in part, determining that the Severance Agreement was invalid because four of the seven members sitting on the Council that approved the Agreement had conflicts of interest and therefore that the quorum required to act was absent. The Court of Appeals also reversed the Circuit Court's findings that Anderson County acted with unclean hands and could not invoke the court's equitable powers, that

equitable relief was unavailable because an adequate remedy at law existed, that the County had breached the Severance Agreement, and that a constructive trust was not available to recoup Preston's retirement benefits. The Court of Appeals otherwise affirmed (or declined to reach) the findings of the Circuit Court, including the Circuit Court's determination that rescission was unavailable and that Preston's conduct did not constitute breach of duty, fraud, constructive fraud, or negligent misrepresentation. The Court of Appeals did not, however, fashion an equitable remedy to redress the invalidated Severance Agreement.

Anderson County agrees with some of the core decisions of the Court of Appeals: that the Severance Agreement is null and void, that Anderson County is entitled to invoke equity, that a constructive trust may be placed on Preston's retirement fund payments flowing from Anderson County's payments under the void Severance Agreement, and that Anderson County did not breach the void Severance Agreement by suing to challenge its validity.

However, the Court of Appeals erred in failing to fashion an equitable remedy. Preston received a large payout pursuant to this void Severance Agreement, and he continues to receive monthly checks from the State Retirement System that are attributable solely to payments made under the Severance Agreement. This is inequitable, and it can be and should be addressed on appeal.

Anderson County also petitions for *certiorari* on several of its alternative grounds for invalidation of the Severance Agreement, which were raised below and rejected by the Court of Appeals. While these alternative grounds need not be reached if the Supreme Court leaves in place the invalidation of the Severance Agreement on the grounds relied on by the Court of Appeals, Anderson County anticipates that Preston will challenge that determination in this

Court. We are accordingly petitioning on these bases as well, to ensure that all grounds for invalidation of the Severance Agreement are before this Court.

## I. The Court of Appeals Should Have Fashioned an Equitable Remedy.

As noted, Anderson County agrees with the invalidation of the Severance Agreement by the Court of Appeals. However, we believe the Court of Appeals erred in failing to provide a remedy, and we ask this Court to take that next step and fashion an equitable remedy.

The record is clear on the benefits that Preston received because of the Severance Agreement, which the Court of Appeals voided. Over and above the lump sum payment that was made to Preston pursuant to the Severance Agreement, the clearest extra-contractual excess in the Severance Package was the payment of over $350,000 to the South Carolina Retirement System ("SCRS") to allow Preston to begin drawing a full pension at age 45; Preston has been receiving those pension payments, and continues to receive them. At trial, Anderson County presented unrebutted expert testimony that, along with the unrebutted testimony from SCRS, demonstrated that Preston would not have been entitled to draw any pension before age 60 in the absence of that payment, and that the excess payments that Preston received, and will receive, from January 1, 2009 through the day he turns 60 (the amount of which will total approximately $1,333,000) could be redirected from Preston to the County as part of a remedy upon invalidation of the Severance Package. (R. pp. 251-252 at ¶¶ 5-11; pp.253-255 at ¶¶ 5-7, 11-14; pp. 2671-2681; p. 1290) As the affidavits submitted by SCRS demonstrate (R. pp. 249-263), the lump sum payment from the Severance Package allowed Preston to receive payments he would not have received otherwise before age 60, and also increased his prospective benefits after that time. The record here is clear, and ripe for a remedy.

As noted, the purchase of retirement service credit on Preston's behalf also means that Preston will receive benefit amounts after the age of 60 that will exceed what he would have

received without such a purchase. The unrebutted testimony was that this could be expected to total $833,000 of additional benefits to Preston (with a present value at time of trial of $180,000). (R. p. 1290) Anderson County should have a right to these future excess payments as well, at least to the point at which its outlays under the Severance Agreement have been recouped. *See* S.C. Code Ann. § 9-1-1680 (allowing a constructive trust on retirement fund proceeds). In equity, Preston should not be allowed to retain the payments made directly to him – and in particular those that have not yet been made – under an agreement that is null and void.

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, the Court of Appeals erred in failing to fashion an equitable remedy. The power and vast discretion of courts sitting in equity to redress a recognized wrong with an appropriate remedy is unquestioned. *See State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937) ("[E]quity abhors a wrong without a remedy."); *Watson v. Am. Colony Ins. Co.*, 179 S.C. 149, 152, 183 S.E. 692, 693-94 (1936) ("[T]he law endures no injury, from which damage has ensued, without some remedy; but directs the application of principles already established to every new combination of circumstances that may be presented for decision."); *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."); *Holland v. Florida*, 560 U.S. 631, 650 (2010) ("The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." (internal quotation marks omitted)).

At a minimum, in the absence of fashioning a remedy itself, the Court of Appeals should have remanded the case to the Circuit Court with explicit instructions for that court to promptly fashion an equitable remedy on the basis of the invalidation of the Severance Agreement.

## II. Rescission Is Available Here.

The Court of Appeals held that rescission is not available, in part based on that Court's conclusion that the parties cannot be returned to the *status quo ante*. This decision is incorrect and should be revisited. While the Court's general equitable powers are sufficient to fashion a remedy here, rescission should remain available as one form of relief. 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). The Court of Appeals erred in allowing Preston to avoid rescission by arguing he could not be returned to the *status quo*, given his own improper conduct. Second, equity is simply not so limited in fashioning remedies. The Court of Appeals agreed with Anderson County that Preston received over $1.1 million of public money under a void contract. There must be clarity that equity, through rescission or otherwise, 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, the Court of Appeals' 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.

## III. To the Extent This Court Does Not Render Complete Relief, Anderson County Should Be Allowed to Amend Its Complaint to Seek Invalidation of the Severance Agreement on the Basis of the Invalidation of Four Votes.

The Court of Appeals accepted Anderson County's argument that the invalidation of four votes rendered the Severance Agreement null and void; Anderson County does not seek *certiorari* on that point. Presumably because of that ruling, the Court of Appeals did not reach Anderson County's 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 at the County Council meeting.

After the Circuit Court issued its ruling injecting this quorum issue into the case for the first time, Anderson County moved to amend its Complaint to seek a remedy on the theory that the invalidation of four votes destroyed a quorum and rendered the Severance Agreement void. (R. pp. 44-49; pp. 3245-3270) While Anderson County believes a remedy can be fashioned on the current state of the record, amendment would further clarify this point.

In light of the possibility of further proceedings and to ensure issues are preserved, Anderson County asks this Court to clarify that, to the extent complete relief is not fashioned by this Court, the denial of Anderson County's motion to amend its Complaint should be reversed, and Anderson County should be given leave to amend its Complaint before any future proceedings in the case.

## IV. The Tainted Votes Cast in Favor of the Severance Agreement Require That It Be Voided.

The Court of Appeals agreed with Anderson County that the votes of Ron Wilson and Michael Thompson in favor of the Severance Agreement were tainted and improper. However, the Court of Appeals erred in holding that the impropriety of those two votes, standing alone, was insufficient to overturn the Severance Package because the final margin of the vote approving the Severance Package was greater than two votes. In the particular and extraordinary circumstances presented by this case, even one tainted vote is enough to overturn. [2]

Substantial and persuasive authority from other jurisdictions holds that a single tainted vote in favor of an agreement like the Severance Agreement 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. *See, e.g. Appeal of City of Keene*, 693 A.2d 412, 415 (N.H. 1997) (one-tainted-vote rule is appropriate where action does not have a "widely felt impact"); *Dowling Realty v. City of Shawnee*, 85 P.3d 716, 719 (Kan. Ct. App. 2004) (court applying one-tainted-vote rule noted that tainted voter had "strategy to put [the interested vote] on at the end of the meeting" to ensure that fellow members would "be tired and sail right through" and a fellow member noted that the proceedings were

[2] Anderson County seeks *certiorari* on this point, and on other arguments for invalidation of the Severance Agreement, to ensure that these alternative bases for invalidation, and for remedies, are before the Court in the event it grants *certiorari*.

"not exactly kosher" and that "the process seemed hurried up."); *Griswold v. City of Homer*, 925 P.2d 1015, 1029 (Alaska 1996) (where a decision could have passed even without the support of a tainted voter, but "the interest is undisclosed, the ordinance will generally be invalid."); *Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114, 117 (N.H. 1984) ("mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates").

The Court of Appeals erred in concluding that *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), rejected the one-tainted-vote rule proposed by the County. 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. *Baird* held only 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." *Id.* at 535, 511 S.E.2d at 77-78. The Court of Appeals erred in treating this as 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.

Anderson County does not contend that a single bad vote is always enough to overturn a legislative action. As the authorities we cite note, such a result is appropriate only in exceptional cases. But this is a truly exceptional case.

In addition, 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.

## V. The Severance Agreement Was a Product of Fraud and Abuse of Power, Was Unreasonable and Capricious, and Violated Public Policy.

The Court of Appeals erred in declining to hold that the Severance Agreement was a product of fraud and abuse of power, was unreasonable and capricious, and 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).

*Thompson v. Atlantic City*, out of New Jersey, is remarkably similar to this case. *Thompson* involved a court challenge to a settlement of a lawsuit filed by the Mayor (before his election), because friends of the Mayor had negotiated and voted for the settlement. Lorenzo Langford had sued Atlantic City, alleging his city job had been eliminated in retaliation for his protected political activities. While that lawsuit was pending, Langford was elected Mayor of Atlantic City. After he assumed office, Langford allowed his political appointees to recommend a substantial settlement in his favor to the city council. At the time of the city council vote,

moreover, one member of council had been promised a job by Langford, but still voted for the package. 921 A.2d at 438. The agreement was approved and signed, the proceeds were paid to Langford, and his lawsuit was dismissed.

The court rescinded the agreement. The court held that the "conflict-ridden actions" of the Mayor's appointees could "hardly be viewed as disinterested or inspiring confidence in government," and so the settlement agreement was "void as a matter of state law." 921 A.2d at 430. The court noted with approval the criticism one council member leveled at another who voted for the agreement: "you got a job from the Mayor and you're voting to give him a million dollars." 921 A.2d at 432. Substituting "administrator" for "Mayor," those words could easily have been uttered in this case.

Several facts in the record make it clear that the pretense of "settling" with Preston was pure cover for the outgoing County Council's decision to award Preston a handsome going-away present of taxpayer funds, simply because they liked him and they had the votes. First, 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, as the employment attorney had advised the Personnel Committee.

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. (R. p. 1892 at Sec. 2.A) Preston's termination (had it ever occurred), simply could not have been a breach of contract.

Moreover, even if Preston could have claimed breach of his contract, his own attorney acknowledged in negotiations that Preston's total severance benefit was worth no more than

$827,222 – some $300,000 less than the amount Preston ultimately received. (R. pp. 2026-2028) Paying Preston more than he could possibly have received had his employment been terminated – even assuming his employment contract was valid – 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. (R. pp. 1918-1959; p. 1983) 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.

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

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 Court of Appeals confused Preston's private and public roles when it held that he had no duty to speak concerning these clear conflicts. The Court appears to have interpreted the County's argument as a requirement that Preston not ***negotiate*** vigorously on his own behalf. This misapprehends Anderson County's position. Preston could, of course, negotiate at arm's

length with the County concerning his claims, having regard only for his own interests. In this sense, every employee operates in realms in which there is no duty to the employer – such as when negotiating salary. But this does not mean that other duties simply go away.

Preston was not negotiating during the vote approving his severance package, and the Court of Appeals erred in treating him as having no duty. Preston was present while the County Council of the county that employed him took a vote that he knew was improper. Preston remained employed by the County at that point, and because he had not resigned, he voluntarily retained all of his duties to the County and its taxpayers. This included a duty to speak. The fact he had asserted claims against the County did not, as the Court of Appeals concluded, excuse all duty to the County.

As County Administrator present at a meeting that he ***knew*** involved improper votes, Preston had a duty to make those conflicts known. His failure to do so constitutes a breach of his fiduciary duty of loyalty, and supports claims of fraud, constructive fraud, and negligent misrepresentation with respect to the Severance Agreement approved because of his silence.

## VII. This Court Should Clarify that Anderson County's Suit Seeking to Invalidate the Severance Agreement Did Not Violate the Severance Agreement, Whether or Not the Severance Agreement Is Voided.

The Court of Appeals agreed with Anderson County that the voiding of the Severance Agreement meant that Anderson County could not have violated that Agreement and thus, Preston has no valid counterclaim for breach of contract. Anderson County does not seek review of that ruling. Because of that ruling, the Court of Appeals 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. In light of the possibility of further proceedings, Anderson County seeks *certiorari* on 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.

## VIII. This Court Should Clarify that No Fee Award Is Available to Preston, Whether or Not the Severance Agreement Is Voided.

Similarly, Anderson County also seeks a ruling that a fee award is not available against Anderson County in this case, regardless of the voiding of the Severance Agreement. Preston has sought fees under S.C. Code Ann. § 15-77-300, which allows a party prevailing against a political subdivision of the State to recover fees if the political subdivision acted without substantial justification and no special circumstances would make the fee award unjust. Of course, if the Severance Agreement is invalidated, Preston would not be entitled to fees. However, Anderson County also asks this Court to clarify that Preston is not entitled to a fee award in this case, regardless of whether or not the Severance Agreement is ultimately invalidated. For the reasons set forth herein, Anderson County was substantially justified in seeking invalidation of this extraordinary Agreement, and it would be unjust to impose a fee award on Anderson County in this case. *See* S.C. Code Ann. § 15-77-300.

## CONCLUSION

The Severance Agreement awarded to Preston was an unjustifiable abuse of power. In essence, it amounted to a collusive political exit strategy, not a reasoned piece of legislation for the public good. The Court of Appeals' decision voiding that Agreement was sound, and should be upheld as far as it went. However, Anderson County is entitled to have an equitable remedy fashioned in this case, including placing a constructive trust on the Retirement System payments flowing to Preston from the void Agreement.

For the reasons and to the extent set forth in this Petition, the Supreme Court should grant *certiorari* to give Anderson County a just and equitable remedy.

Respectfully submitted,

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