THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001898
Lower Court Case No. 2009-CP-04-04482

Anderson County,.....Petitioner-Respondent,

v.

Joey Preston and the South Carolina Retirement System, Defendants,
Of whom Joey Preston is the .....Respondent-Petitioner,

And the South Carolina Retirement System is the .....Respondent.

BRIEF OF PETITIONER-RESPONDENT ANDERSON COUNTY

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STATEMENT OF ISSUES ON APPEAL

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 Package should be invalidated, but rejected certain other arguments of the County and did not provide a remedy. This Court has granted *certiorari* to review the following questions:

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 in the alternative failing to remand with explicit instructions to fashion a remedy?

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

3. 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?

4. 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?

5. 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?

6. 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?

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

Anderson County filed its Complaint on November 12, 2009. (R. pp. 84-96) Preston filed an Answer and Counterclaim on August 10, 2010. (R. pp. 109-22) Anderson County filed its Reply to Counterclaim on September 7, 2010. (R. pp. 123-26) 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. 127-59) 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. 229-37)

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. 247-48)

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. 3163-76) 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. 3245-70) 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. (R. pp. 3501-28) Anderson County filed its Petition for Rehearing on June 14, 2017, and Preston filed his Petition for Rehearing on June 15, 2017.

(R. pp. 3529-39, 3540-3668) On August 16, 2017, the Court of Appeals withdrew its May 31, 2017 opinion and filed a substituted opinion. (R. pp. 3669-96) The Court of Appeals denied both parties' Petitions for Rehearing on the same date. (R. pp. 3669-70)

Anderson County and Preston each filed a Petition for Writ of Certiorari with this Court on September 15, 2017. This Court granted each party's Petition by order dated March 29, 2018.

STATEMENT OF FACTS

I. 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 of County Council 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.

Michael Thompson, who chaired the meeting at which the Severance Package was approved, was actively courting Preston for a County job at the time of the vote. The daughter of the chair of the Personnel Committee – who negotiated the Severance Package and introduced it onto the agenda with the statement that he was the only Council member who had read it – had only two weeks before received from Preston a ridiculously beneficial contract obviously designed to tie the hands of any future Council that might want to terminate her contract.

The primary justification offered by Preston at trial for his golden parachute was that his friends on County Council could legitimately pay Preston whatever amount they chose – without judicial scrutiny – because the political atmosphere in Anderson County was "toxic." To prove this "toxicity," Preston pointed to an amalgam of events that occurred years before, anonymous acts not attributable to the County, and predictions of future legislative action by persons not yet in office. It is noteworthy, though, that Preston endured this purported "toxicity" until the voters of Anderson County elected a new County Council. What Preston wanted to call a "breach" was nothing more than a change in the political landscape. It was utterly arbitrary for the outgoing Council to use public money to pay Preston over a million dollars, fully funding his retirement, because he might – in the future – face a difficult political landscape, in what is plainly a political job.

II. Preston's Tenure and His Employment Contract

Joey Preston was the County Administrator of Anderson County from 1996 through most of 2008. (R. pp. 912-13) In July of 1998, Preston obtained an Employment Agreement with the County. (R. pp. 1891-99) 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.

III. 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. 310-12; pp. 925-28) 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. 935-36; pp. 1187-88) 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. 310-12)

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. 312-13; 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 on Preston's behalf. Hoskins first wrote to County Council on September 25, 2008 – that is, before the general election in

November. (R. pp. 1914-15) 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: "[i]t has come to Mr. Preston's attention that certain existing Council Members have made statements that they and certain newly elected Council Members ***intend, after January 2009***, to prevent him from carrying out his duties as County Administrator." (*Id.*; emphasis added) Thus, Preston's anticipatory breach claim was based on a forecast in September 2008 that future actions of a future Council would "render[] his ability to serve the people of Anderson County beyond January 1, 2009 impossible." (*Id.*) Despite all the discussion at trial of the "toxic" environment, the simple fact was that the ***only*** event that led to Preston's claim of "breach" was a free election; Anderson County never took any official action affecting Mr. Preston's contract or his employment status.

IV. The Lame Duck Council's Response to Preston's Demand

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. 685-87) The Personnel Committee hired an employment attorney – Tom Bright – to advise it. (R. pp. 2003-2006; p. 338, lines 5-25; pp. 441-42; 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. 340-41; 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. 477-79)

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. 2026-28) 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.* In fact, though, Preston's demand was not calibrated to those tort wrongs, but was ***expressly*** calculated to allow Preston to retire immediately with a full pension. *Id.*

Hampered by the outgoing Council's determination to settle, Bright had little negotiating leverage. (R. pp. 464-65, 468-72) 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. 1002-03; pp. 1985-89; pp. 2026-28; pp. 2037-39)

V. 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. 1918-59; p. 1983)

[1] Had Preston not received this Severance Package, he would not have been entitled to receive retirement payments until he turned sixty. (R. pp. 1287-92; pp. 251-52 at ¶¶ 5-10; pp. 253-55 at ¶¶ 5, 11-14)

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.

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. 1327-29, 1331-32)

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. 1916-17; pp. 344-46; pp. 546-47; p. 821; pp. 1202-22) Instead, on Ron Wilson's motion the agenda was amended – toward the end of the meeting – to add the matter. (R. pp. 1940-41; p. 1983) This occurred even though there remained other scheduled Council meetings in 2008 when the Severance Package could have been placed on the agenda in advance. (R. pp. 344-46; 349-54, p. 1223) 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. 1963-68; 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)

This, however, did not end the matter. Councilman Greer revealed he had consulted in advance with County employees to identify "an area [of the general fund budget] in which they

could locate this amount of money." (R. p. 1969, lines 1-11; p. 1983; p. 2044; pp. 2047-48) Greer passed out a previously prepared document showing how the Preston Settlement Package could be funded. (R. p. 1946; p. 1983; pp. 1990-92) The motion to approve budget transfers to fund the Settlement Package passed. (R. p. 1946, line 11 to 1948, line 45; p. 1983)

At that point – 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. In fact, Greer testified that he had a working copy of Preston's severance agreement in advance of the November 18, 2008 meeting (R. p. 1210, lines 3-9); that he never shared that copy with Council members Cindy Wilson or Waldrep (R. p. 1210, lines 14-17); and that he spoke with each of the other four members of Council who voted with him in favor of Preston's severance agreement before the November 18, 2008 Council meeting because he was interested in "knowing, in advance of the November 18th meeting, whether or not [he] had sufficient votes to approve the severance agreement for Mr. Preston." (R. p. 1210, line 22 to 1211, line 19)

After Councilwoman Floyd's 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 have the measure reopened, 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. 628-29)

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) Immediately after that vote, the Council took up a motion to hire a new administrator. (R. pp. 1953-59; p. 1983). Floyd had a proposed contract for the new administrator already with her, again confirming the majority had orchestrated this series of votes in advance. (R. p. 1953, lines 12-35; p. 1983) At that point, despite several agenda items that remained undiscussed, Thompson solicited a motion to adjourn and Council adjourned without conducting any further business. (R. p. 1959, lines 15-42; 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)

Moreover, the approval of the Severance Package was done by simple motion, not an ordinance. (R. p. 1983) Under the Anderson County Code, an "ordinance" requires (among other formalities also not present here) three separate readings on three separate days. Anderson County Code of Ordinances § 2-38.

VI. The Terms of the Severance Package

The Severance Agreement contained these key provisions (R. pp. 1985-89):

- 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.

VII. 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 in themselves 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. 2026-28; pp. 2037-39)

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 presiding over 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. pp. 778, line 25 to 779, line 15; pp. 783, line 3 to 784, line 4; p. 785, lines 6-22; pp. 791-98; pp. 815-28; pp. 1985-89; pp. 2072-75; p. 2076; pp. 2079-81; pp. 2082-83; pp. 547-52; pp. 1015-17; pp. 1022, line 19 to 1023, line 9; pp. 1026-31; pp. 1036-44) 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. 1940-41; 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 benefited Wilson's daughter and her company. (R. pp. 2158-61; pp. 1769-74; pp. 1057-58; pp. 1069-71) 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. 1068-69)[2]

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. 1038-39, 1057-58, 1069-71) 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. 1918-59; 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 public 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. Preston seeks a ruling that there is no judicial remedy for what transpired here. The courts are not so powerless in the face of blatant wrong.

INTRODUCTION AND SUMMARY OF 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

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[2] In addition to the Thompson and Ron Wilson votes challenged by Anderson County, both the Circuit Court and the Court of Appeals held that the votes of Bob Waldrep and Cindy Wilson (cast against the Package) were improper because of the release of claims contained in the Severance Agreement. As the Court of Appeals held, the impact of invalidating four votes in total was to deprive County Council of the quorum necessary to approve the Severance Package. (R. pp. 3683-89)

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. Despite concluding that the Severance Agreement was invalid, the Court of Appeals did not fashion an equitable remedy to redress this invalidity.

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.

Beyond the grounds the Court of Appeals relied upon to invalidate the Severance Agreement, Anderson County presented additional grounds for invalidation below. Specifically, Anderson County argued that under the facts of this case, a single tainted vote cast in favor of the Severance Agreement was a sufficient reason for invalidation; that the Severance Agreement was a product of fraud and abuse of power, was unreasonable and capricious, and violated public policy; and that by failing to disclose conflicts of interest on the part of two Council members who voted in favor of the Severance Agreement, Preston had breached his fiduciary duty and engaged in fraud, constructive fraud, and negligent misrepresentation. Each of these grounds standing alone constitutes a separate basis for invalidation of the Severance Agreement, but they need be addressed only if this Court disagrees with the rationale for invalidation in the decision of the Court of Appeals.

Should this Court reject both the rationale of the Court of Appeals and Anderson County's additional grounds for invalidation of the Severance Agreement, determining instead that the Severance Agreement is not null and void, this Court should nevertheless clarify that Anderson County's lawsuit seeking invalidation was not itself a breach of the Severance Agreement, and that Preston is not entitled to any fee award in this matter.

ARGUMENT

I. Standard of Review

In this equitable matter, this Court reviews the record *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 396, 709 S.E.2d 650, 658 (2011) (Toal, C.J., concurring) (recognizing that "in numerous equitable matters before this Court pursuant to a grant of a writ of certiorari, the Court has applied a *de novo* standard of review").

II. The Court of Appeals Should Have Fashioned an Equitable Remedy

The Court of Appeals correctly determined that the Severance Agreement was invalid, but it erred in failing to take the logical and necessary next step and fashion an equitable remedy. This Court should now do so.

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. Without question Anderson County requested such relief,[3] and case law makes clear the Court of Appeals had authority to grant it.

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

[3] Each cause of action in Anderson County's First Amended Complaint asked the court to "invalidate and rescind" the Severance Agreement and to "direct defendants to return all monies received" thereunder. (R. pp. 133-140) In addition, the prayer for relief sought "such other relief as [is] just and appropriate." (R. p. 140)

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 (Ct. App. 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)). As this Court has previously held,

> The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) (quoting *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006)).

The value of the Severance Package was $1,139,833.00 (less withholdings). (R. p. 1986) It is clear that Preston has been receiving, and continues to receive, State pension payments that he would not receive but for the Package. Anderson County submits that an appropriate remedy[4] would consist of (i) a directive that the Retirement System pay to Anderson County all benefits otherwise payable to Preston until Preston reaches age 60; (ii) a directive that the Retirement System thereafter pay to Anderson County the marginal benefits that would be paid to Preston by virtue of the Severance Package; (iii) a directive that Preston pay to the County those State pension benefits that he received from the effective date of the Package through the effective

[4] If this Court determines that some remedy other than that proposed here would provide Anderson County complete relief and make it whole, the County respectfully requests that the Court fashion such remedy.

date of this Court's order; and (iv) to the extent that the foregoing amounts, on an actuarial basis, do not make the County whole, that Preston make up the difference.[5]

The Court of Appeals left judicial business unfinished. It held that the Severance Agreement is invalid and that Anderson County may obtain equitable relief, but it did not provide that relief or adequate guidance as to how to fashion it. This Court should now provide that remedy or, in the alternative, remand the case to the Circuit Court with explicit instructions for that court to promptly fashion an equitable remedy.

III. Rescission is Available Here

The Court of Appeals incorrectly 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*. 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, for at least three reasons.

First, it is long established that a defendant may not assert a change-of-circumstances defense to rescission where the defendant himself is at fault for inducing the initial wrongful payment. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011) ("The defense [of change of position] is therefore unavailable to a conscious wrongdoer or to a recipient who is primarily responsible for his own unjust enrichment."); *Admiral Ins. Co. v. Am. Nat'l Sav. Bank, F.S.B.*, 918 F. Supp. 150, 156 (D. Md. 1996) (the change of circumstances defense is only available "if the recipient was no more at fault for its receipt of the payment than

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[5] Anderson County presented detailed testimony at the time of trial on the values of Preston's pension payments and the resulting available fund. (R. pp. 249-63; pp. 1280-96) The passage of time may necessitate a further proceeding for the limited purpose of updating these calculations.

was the payor"); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002) (change of circumstances defense "will not be strictly enforced where the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing"). That is precisely the case here. It is Preston who provided benefits to those voting on his Severance Package, and Preston who sought far more than even his generous Employment Agreement provided. He cannot invoke changed circumstances.

Second, the fact that Preston cannot be returned to the position of County Administrator is irrelevant. Courts have recognized that equity is flexible enough to allow rescission in a situation like this, even where a former position has been filled. *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"; court also recited unappealed ruling by district court that reinstatement would not be ordered because prior position was already filled); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007) (where severance agreement was obtained by misrepresentation (and at a meeting with one commissioner absent), rescission appropriate even though fire chief argued he was not returned to status quo because he lost benefits when out of office). *See generally* 17B C.J.S. *Contracts* § 652 ("The parties, upon rescission of a contract, generally must be placed only in substantially the same condition or position as they were when the contract was executed, or as near to it as possible. The exact, absolute, or literal return of the parties to the status quo is not required, and such restoration as is practicable and demanded by the equities of the case is sufficient. The status quo rule requires practicality in adjusting the rights of the party."). Especially given that it is now clear as a matter of law that Preston's

Employment Agreement was invalid, *see Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013)[6], it makes little sense to say that the inability to return Preston to that post should be a barrier to 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. The decision of the Supreme Court of New Jersey in *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007) is noteworthy in this regard. In that case a mayor who received a tainted settlement secured by political allies with conflicts of interest argued – as does Preston – that his ill-gotten settlement money was gone and thus that rescission was unavailable. The *Atlantic City* court gave this argument short shrift:

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

Id. at 442 (emphasis added).

The Court of Appeals took too narrow a view of equity in general, and rescission in particular, in holding rescission always requires a full return to the *status quo ante*. It does not,

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

and this is a prime case where rescission is available despite the foreclosing of some avenues by the passage of time.

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. Two principle arguments support this contention, one grounded in a persuasive line of case law from other jurisdictions discussing the one-tainted-vote rule, and the other stemming from the procedural steps used to pass the Severance Agreement.

A. Numerous Courts Have Recognized That, in the Particular Circumstances Presented Here, a Single Tainted Vote is Fatal

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 extraordinary cases like this one. The Court of Appeals was wrong to reject this authority, and wrong to conclude, relying on *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), that South Carolina has considered and rejected such a rule.

We would emphasize from the start that Anderson County is ***not*** advocating for a general rule that duly enacted legislation can be overturned by evidence of a single tainted vote. Cases with as many egregious circumstances as this case presents are going to be exceedingly rare. Accordingly, we urge this Court to follow courts that have recognized that cases like this one, which involve extreme irregularities, appropriately apply a one-tainted-vote rule. Courts have

struck down enactments because of one tainted vote in the presence of only one or two of these factors; the Preston Severance Agreement is extraordinary in the sheer number of improprieties it presents.

Benefit to a Single Individual. First, the Package conferred a special benefit on one individual; it was not a law of general application. It thus did not have the dignity of generally applicable legislation that affects all, and that can be addressed in subsequent political cycles. *See Thompson v. City of Atlantic City*, 921 A.2d 427, 438 (N.J. 2007) (invalidating settlement with mayor approved by 5-1-1 vote of city council, given conflict of single councilman who had been offered job by mayor, even though that councilman did not vote on reconsideration); *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"); *Stevens ex rel. Kuberski v. Haussermann*, 172 A. 738, 741-42 (N.J. Super. 1934) (act of council in voting to accept or reject resignation of councilman is a "judicial act," as distinguished from a "legislative act," and necessitates lack of personal interest on part of each councilmember voting on such matter); *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 298 (Neb. 2003) (type of case where one-tainted-vote rule is not appropriate includes "making a law" of general applicability).

Simple Motion Rather Than an Ordinance. This "private benefit" rule is reinforced by the fact that the Package was passed by a simple motion – not in the form of an ordinance that would require public notice and three readings. A simple motion does not have the same procedural protections, and thus is more readily subject to abuse. *See generally Dep't of Transp. v. Brooks*, 328 S.E.2d 705, 717 n.14 (Ga. 1985) ("Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly. In deference to the function of the General Assembly in state

government, the standard of judicial review customarily has been 'relatively relaxed.' Ordinances are examined for reasonableness; acts of the General Assembly are reviewed for constitutionality." (citations omitted)).

Procedural Irregularity. Courts apply the one-tainted-vote rule where the matter was not announced in advance or extensively debated, or the procedure surrounding enactment was otherwise suspect. "Suspect" aptly describes the procedure by which Preston's Severance Package was approved. *See 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 "not exactly kosher" and that "the process seemed hurried up."); *Piggott v. Borough of Hopewell*, 91 A.2d 667, 670 (N. J. Super. Ct. Ch. Div. 1952) ("[a]s a result of this ***special meeting***, the borough council adopted [the tainted resolution]" and "it is to be noted, too, that despite the solicitor's recommendation made at the council meeting that action be deferred to a later period ... [tainted voter's] counter-proposal paved the way for action forthwith" (emphasis added)). Preston's proponents similarly hid the vote from the public, added it to the agenda at the last minute, and used procedural mechanisms to hurry consideration and to stifle dissent.

Particularly given the obvious coordination among Preston's supporters in the procedural theater characterizing this vote, one way to think of this rule is that it imputes to the other participants in the irregularity the taint of those voters who have an overt conflict. In effect, they all become co-conspirators in the irregularity. Viewed through this lens, the procedural irregularity extends the taint to the other votes cast in favor of the Severance Package, further justifying invalidation.

Hidden Conflicts of Interest. The one-tainted-vote rule has been applied where the conflicts of interest were kept hidden by the interested party. The most interested party on November 18, 2008, was Preston, and he was aware of the problems with the votes being cast. *See 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."); *Dowling Realty*, 85 P.3d at 721 (holding council would have to "redo the entire process since it was tainted from the very beginning" because a tainted voter "never filed a disclosure of interest form"); *Hanig v. City of Winner*, 692 N.W.2d 202, 210 (S.D. 2005) ("The basis of granting a new hearing is first and foremost that one of the council members had an indirect pecuniary interest" especially since tainted voter "did not disclose the conflict"; "the necessity to disclose a conflict cannot be over emphasized"). Preston's promise of employment to Thompson, and his upgrade of the contract with Ron Wilson's daughter, should have been disclosed during the debate. Preston is not entitled to an inference that full disclosure would not have affected the course of the debate.

Corrupt Leadership. One bad vote is enough where that bad vote comes from a key leader. In this case, two bad votes came from the Chair of County Council and the chair of the Personnel Committee. *See Buell v. City of Bremerton*, 495 P.2d 1358, 1362 (Wash. 1972) (tainted voter "in his role as chairman . . . could not be expected to hear the weak voices as well as the strong, and most certainly could not appear to the public to be able to do so"; accordingly the chairman's self-interest "infected the action of the other members of the commission regardless of their disinterestedness."); *Brooks*, 328 S.E.2d at 716 (fact that council member with conflict of interest chaired first planning commission hearing on the application was sufficient to support finding of fraud and to invalidate the action). Because of the behind-the-scenes

maneuvering before the Package was brought to a vote, it is impossible to estimate what influence was exercised by these leaders outside of meetings. Further, it is obvious from the way that Chairman Thompson presided over the sham process to ramrod approval of the Severance Package that a tainted vote from a leader in the process infects the entire action beyond the impact of that single vote. Here again, the tainted votes of leaders can be seen as being multiplied, as they can be imputed to those who followed their lead.

Insulation from the Political Process. The fact that approval of the Package was not subject to the normal process of political redress calls for application of the one-tainted-vote rule. A number of the majority's parliamentary maneuvers were designed to insulate this vote from the political process: (i) the failure to put the Package on the published agenda prevented public debate; (ii) the immediate vote to reconsider – and the signing of the Severance Agreement immediately after passage – prevented any effective political redress; (iii) the Package was further insulated from the political process by the fact that many of those who voted for the Package (including all who received special benefits from Preston) were leaving office. *See Keene*, 693 A.2d at 415 (acts of general applicability not as likely to be subject to one-tainted-vote rule because their "widely felt impact" allows aggrieved persons to "find an appropriate remedy . . . at the polls" (internal quotation marks omitted; ellipsis in original)). No political remedy was available here.

The Package is a perfect storm of the factors on which courts have relied to allow a single bad vote to invalidate an action. Its substance was an arbitrary and unreasonable benefit to a single individual; it was not a full-blown ordinance subject to multiple readings; the debate was hurried and irregular; the Package was not placed on the meeting agenda; the leaders of the debate should never have participated in it; Preston himself knew of those facts and said nothing;

and parliamentary and other maneuvers ensured there was never a prospect of political redress. The one-tainted-vote rule applies here. *See generally 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"); *Wilson v. Iowa City*, 165 N.W.2d 813, 820 (Iowa 1969) ("We hold a vote by a [conflicted] member of the council is void and that the result reached by the council in such a matter is also void, ***whether such vote determined the issue before the council or not.***" (emphasis added)); *Griggs v. Borough of Princeton*, 162 A.2d 862, 869 (N.J. 1960) ("Nevertheless, it is the ***existence of such interests which is decisive, not whether they were actually influential.***" (emphasis added)); *Keene*, 693 A.2d at 416 (action conferring specific benefit on one individual "is voidable if the disqualified member participates therein, ***without reference to the fact whether the result is produced by his vote.***" (emphasis added); *Piggott*, 91 A.2d at 669 (actions "which impose[] burdens or confer[] privileges in specific cases" are more closely scrutinized for conflicts of interest).[7]

B. This Court Did Not Reject the One-Tainted-Vote Rule in *Baird v. Charleston County*

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[7] As the *Piggott* court explained:

> [T]he concurrence of an interested member in the action taken by the body taints it with illegality. The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable. This is the general rule. It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. ***It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product.***

91 A.2d at 670 (emphasis added; citations & brackets omitted).

The Court of Appeals incorrectly concluded that this Court's decision in *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), had rejected the one-tainted-vote rule. (R. p. 3683) But *Baird* is not dispositive here, and no decided South Carolina case has rejected the one-tainted-vote-rule in a case like this one.

Baird involved an appeal from a lower court order that dismissed a challenge to a county ordinance approving a bond issue. Among the arguments made by the parties challenging the ordinance was the contention that one council member should not have voted because of a conflict of interest. The issue before this Court was "whether invalidation of the bond ordinance is a proper remedy for a violation of the State Ethics Act." 333 S.C. at 77, 511 S.E. 2d at 535. This Court concluded that invalidation of an ordinance was a proper remedy, and accordingly reversed dismissal of the lawsuit on that point and held that the challengers had stated a claim on which relief could be granted. In so holding, the Court noted in passing the "general" rule that a court may "invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote." 333 S.C. at 77-78, 511 S.E.2d at 535.

Baird is distinguishable from this case for several reasons. First and foremost, 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. *See* 333 S.C. at 77, 511 S.E.2d at 534 (challenged voter cast the "tie-breaking vote"). Nor did *Baird* involve any of the special circumstances involved here, where one vote is enough. *Baird* involved a law of general application – a bond ordinance – not a special benefit for a single individual. At issue, therefore, was true legislation – passed after multiple readings. 333 S.C. at 72, 511 S.E.2d at 524-25. Because of the multiple readings, the ordinance at issue in *Baird* was not protected from prior public scrutiny, and it does not appear

the conflict of interest at issue was kept secret. 333 S.C. at 77, 511 S.E.2d at 533-34 (council member obtained, but ignored, an informal ethics commission opinion on whether he should vote). Finally, unlike Thompson (council chair) and Ron Wilson (chair of Personnel Committee), it does not appear that the challenged voter in *Baird* had a place of special influence in the debate. In short, the precise factors that mean that Preston's Severance Package should be reviewed under the one-tainted-vote rule were absent from *Baird*. *Baird* does not address a situation like this one, and the one-tainted-vote rule was not presented or ruled on in *Baird*.

The County does not dispute the general rule stated by *Baird* that, with respect to full-blown legislation of general applicability, and absent the massive irregularities present here, one tainted vote may not be enough. But *Baird* does not hold that invalidation of votes equal to the margin of passage is the ***exclusive*** basis for invalidation, nor does it even consider any other possible basis.

Either of Thompson's or Ron Wilson's disqualifying interests is sufficient ***by itself*** to nullify approval of the Severance Agreement. Particularly given that Thompson was the chair of the entire Council and presided over the debate and vote, and that Wilson was the chair of the Personnel Committee that negotiated the Package, it is simply "impossible to estimate the influence" either member had "on his associates" who voted for the payout. *Winslow*, 480 A.2d at 117; *see Brooks*, 328 S.E.2d at 716 (influence of chair on debate). Indeed, it is apparent from the transcript and tape of the debate that others who voted for the Package (Greer, who had, in advance, found available public funds in the budget to pay Preston, and Floyd, who plainly knew the motions to reconsider were planned and who had the contract for the new administrator with her) were in some fashion "in on" the planned vote. It is impossible to estimate the full scope of the impact of Ron Wilson's and Thompson's participation in that planning.

This case does not present a request to invalidate a law of general application. The concerns attendant on judicial infringement of the role of a legislative body are not present. Instead, at issue is an extraordinary benefit voted to a single individual, in extraordinary fashion. The vote was presented surreptitiously, was completed in a matter of minutes, and involved procedural strong-arm tactics. In addition, the vote included key proponents who should have been disqualified – with the individual who benefited from the Package watching those improper votes being cast and saying nothing. Given all these factors, the one-vote rule makes sense here. The appearance of impropriety pervades the Package. The Package's architects insulated it from political accountability; in the absence of judicial intervention there is no prospect of a remedy. In these particular circumstances, it is just to let Preston bear the burden of his own impropriety, and to apply the rule that a single tainted vote invalidates the Package.

C. The Series of Votes Leading to Enactment of the Severance Agreement Included a 4-3 Vote

The Severance Agreement was not subjected to just one up-or-down vote. Instead, it was the product of a planned series of votes, each of which was necessary to its ultimate passage. One of those votes passed by a single-vote margin. Thus, while Anderson County disagrees (for the reasons just discussed) that the County is required to invalidate enough votes to wipe out the margin of passage, even if that were the applicable law, the Settlement Package should be rescinded, as even one tainted vote is enough to undo the action.

At first, the Council approved the Severance Agreement by a vote of 5-2. (R. p. 1916; p. 1983) However, thereafter the Council invalidated that vote by voting to reconsider the matter. (R. p. 1974; p. 1983) After the Council voted to reconsider, Councilman McAbee was almost immediately given the floor by Thompson, and McAbee moved to cut off debate and proceed to a second vote. (R. p. 1974, line 10-p. 1976, line 9; p. 1983) That motion to end debate passed

by a vote of only 4-3, with both Thompson and Wilson in the one-vote majority. (*Id.*) Thus, without the vote of either Thompson or Wilson, the Council would not have proceeded to the final vote on the Severance Agreement and its ultimate approval.

It cannot be assumed that the Council would have approved the Package – or that the margin of approval would have been the same – if debate and discussion had been allowed to continue; the purpose of debate is to attempt to change minds, and votes. The ultimate approval of the Package was dependent upon the prior 4-3 vote to terminate debate and proceed to the vote. Thus, each of the votes of Thompson and Ron Wilson – which were fatally tainted – was essential to the approval of the Package, and the invalidation of either one alone requires rescission.

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

The Court of Appeals erred in declining to hold that the Severance Agreement was unreasonable and capricious, a product of fraud and abuse of power, and a violation of 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. City of 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); *see also Berkeley Elec. Coop. v. Town of Mt. Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (invalidating franchise not created by ordinance); *Business Lic. Opposition Comm. v. Sumter Cnty.*, 311 S.C. 24, 426 S.E.2d 745 (1992) (invalidating ordinance adopted in violation of Freedom of Information Act). *See generally Dep't of Transp. v. Brooks*, 328 S.E. 2d 705, 717 n.14 (Ga. 1985) ("Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly. . . . Ordinances are examined for reasonableness; acts of the General Assembly are reviewed for constitutionality." (citations omitted)). Anderson County's second and seventh causes of action seek rescission on the basis of these authorities. (R. pp. 133-34, 138)

A. The Severance Package Was Unreasonable and Capricious on Its Face

1. The Claim of "Anticipatory Breach" Was Pure Pretense

Contrary to Preston's contention that the Package was a reasoned exercise in the public interest, the outgoing Council's casual generosity with public money was a fundamental violation of the public trust. The sheer wrongness of the Package is apparent from the point of its conception. There was never any sound justification for the Package; Preston's claim of anticipatory breach was a fiction. County Council had the absolute right to terminate Preston, without breaching his Agreement. Preston's Employment Agreement expressly states that Preston "serves at the pleasure of Council," and that the Council may "terminate the services of the Administrator at any time." (R. p. 1892 at Sec. 2.A) Moreover, there is no question that the sitting Council was well-disposed toward Preston and would not have acted to terminate him. Michael Thompson, Chair of the Council in the fall of 2008, confirmed in his testimony that Preston was in no danger of termination at that time:

Q. Well, while you were in control, or chair of the county council, did you sense that there was any danger to Mr. Preston that he was going to be terminated by your county council?

A. No.

Q. His concern, it sounds like as it was relayed to you, was a concern that the incoming county council might do something to get rid of him?

A. Yes.

(R. p. 802, lines 8-16)[8] Preston's own demand letter – which based its claim on what "newly elected Council Members intend, after January 2009" – further confirms this. (R. pp. 1914-15)

The claim of anticipatory breach was a pretense. Regardless of what intention the incoming Council members might have harbored, they could not act until they were in office, so their intentions were irrelevant and could not constitute anticipatory breach. A repudiation or anticipatory breach requires a statement or action ***by a party to the contract allegedly being repudiated***. The other party to Preston's Employment Contract was Anderson County. Only a statement by the ***County itself*** could even conceivably constitute anticipatory repudiation, and the County – embodied in the still-sitting Council – had made no such statement. *See* RESTATEMENT (SECOND) CONTRACTS § 250 (1981) ("a repudiation is a statement ***by the obligor to the obligee*** indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" (emphasis added)); *see also Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 204 Fed. App'x 208 (4th Cir. 2006) (anticipatory breach must be "unequivocal," "unconditional," and a "final and absolute declaration that the contract must be regarded as altogether off"; applying S.C. law). Preston was safely in the care of his friends on Council, and the County had not taken any official action that constituted anticipatory breach.

[8] Other Council members agreed Preston was not at risk from termination by the sitting Council. (R. p. 313, lines 14-23; p. 328, lines 20-25; pp. 1199-1200)

It is also noteworthy that the claim of "breach" is utterly unspecific. Nowhere does the Hoskins letter set forth the specific threatened acts that constitute the alleged breach. The letter sticks to terms like "prevent him from carrying out his duties," "efforts will now escalate," "obstructionist scheme," and "the new assault he faces . . . is more than he can endure." (R. pp. 1914-15) Besides coming from people not in office and without power to act, the alleged "scheme" had no content. *See Hodgkiss v. Pierce Cnty.*, 100 Wash. App. 1066, at *9 (Wash. Ct. App. May 26, 2000; unpublished) (in overturning settlement by county, court noted municipal corporation "cannot make a gift of public monies nor grant releases from obligations under the guise of compromising an entirely unfounded claim against it" (citing *Edelstein v. City of Asbury Park,* 143 A.2d 860, 871-72 (1958))).

Preston felt threatened by a political event, not a contractual one. His friends on Council had lost primary races, but remained in office. It is hard to imagine public action more "unreasonable and capricious" than lavishing a seven-figure settlement on a public servant on the basis of a logically impossible legal claim.

2. The Severance Package Paid Preston Far More Than the Maximum Value of His Claim.

Preston's own lawyer acknowledged in negotiations that the total severance benefit in the Employment Agreement was worth no more than $827,222.00. (R. pp. 2026-28; p. 453) (The County showed the amount was even less. (R. pp. 2651-70; pp. 1283-86)) When it voted to give Preston over $1.1 million, County Council exceeded the maximum amount he could have obtained even if he had been terminated without cause.

The major component forming the difference between "full severance" and the amount Preston received was the payment of over $350,000 to the Retirement System to purchase over seven and a half years of extra service credit to qualify Preston for immediate full retirement.

(R. pp. 1985-89; pp. 456, line 2 to 457, line 16; pp. 1287-92; p. 251 at ¶ 6; pp. 2671-81) Plainly, Preston's Employment Agreement did not promise him employment all the way to retirement, nor did its severance provision provide for a pension for life. This payment – a gift by the County of a life pension starting at age 45 – is emblematic of the utter disconnect between the Severance Package and reality. Preston had no claim for such a pension. Yet his friends on County Council did not even blink in spending County money to confer that benefit. *Page v. MiraCosta Cmty. Coll. Dist.*, 102 Cal. Rptr. 3d 902, 922 (Cal. Ct. App. 2009) (payment by state agency of more than its maximum legal exposure improper, as "akin to payment of a wholly invalid claim").

Thus, the Severance Package was indefensible even if one assumes the validity of Preston's Employment Agreement. In fact, the Employment Agreement was not valid. Preston signed his Employment Agreement – which purported to be a three-year contract with an evergreen renewal feature, and severance benefits tied to that term – in 1998. When it was considering Preston's claims in 2008, County Council was advised by its employment counsel that Preston's Employment Agreement was probably subject to the rule that a contract with a political appointee may not extend beyond the term of the County Council in which the contract was entered. (R. pp. 458-59, 471-72, 477-79)[9] This would mean Preston's Employment Agreement should have expired when a new Council took office in 1999 – and certainly would have expired when the incoming Council took office in 2009. The capriciousness of paying

[9] The Court of Appeals has recently confirmed that advice, in a case involving Preston's successor, whose invalid contract was approved by County Council in the same session in which Preston's Severance Package was approved. *Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). The legal principle that decided *Cunningham* was known in 2008, and relied on by counsel for the County Council in advising regarding Preston's claim. (R. pp. 458-459, 471-472, 477-479)

Preston more than his maximum severance is magnified by the Council's disregard for the likely invalidity of Preston's Employment Agreement. (R. pp. 458-59, 464-65, 477-79)

B. The Severance Package Was Obtained Through Fraud and Abuse of Power

Under this Court's decision in *Moody*, the grounds for judicial invalidation of an enactment include "fraud or clear abuse of power." 319 S.C. at 186, 460 S.E.2d at 375. Both elements are present here.

1. Preston's Fraudulent Acts

We discuss below the County's independent causes of action for rescission based on fraud, fraudulent concealment, and negligent misrepresentation, but the same core facts also call for invalidation under *Moody*. As we detail in this brief – and both the Circuit Court and Court of Appeals agreed – Council members with financial ties to Preston voted to give him a severance package. But what is critical here is not that corrupt participation, but Preston's presence ***and silence*** in the face of that participation. Preston was present at the vote on his Severance Package. He plainly knew that Chairman Thompson was courting him for a job, and just as plainly knew he had given a sweetheart contract to Councilman Ron Wilson's daughter.

Preston had a duty to speak up, and his silence constituted a fraudulent representation that the vote was proper. The law demands probity from the actions of a public body – especially when what is at issue is a benefit for a public employee with close ties to the voting officials. The obvious and inherent conflicts here, and Preston's silence about those conflicts, constitute the type of fraud that justifies rescission.

2. *The "Debate" on, and Approval of, the Severance Package Reinforce the Conclusion That the Severance Package Was Arbitrary and a Product of Abuse of Power*

The lengths to which Preston and his allies went to shelter the vote on his Package from the democratic process cannot be appreciated without viewing the videotape of the November 18 meeting. (R. p. 1983) It is hard to do justice in words to the highly choreographed political theater that led to the votes for the Package.

The proposed Severance Package was shielded from public scrutiny until the last possible moment. The Package was added to the agenda only at the end of the meeting; distributed (but certainly not read); "debated"; passed; funded; had its funding reconsidered, debated, and passed again; and then was itself reconsidered, "debated" again, and passed a second time, all within a span of just over thirty minutes and with virtually no discussion of the merits or monetary value of Preston's claim or the settlement. While it is plain that some members of Council were aware of at least some of the provisions of the Severance Package, it is inconceivable that all had read the document before it was voted on. The proponents repeatedly used points of order to limit debate, and moved to "call the question" several times to truncate that debate. Councilman McAbee acknowledged that his motion to reconsider the Severance Package was not motivated by a desire to have the matter reconsidered, but that it was a "parliamentary tactic" to ensure the matter could not be reconsidered at a later date. (R. pp. 628-29)

The arbitrariness of the settlement itself, coupled with this theatrical process, leaves no doubt that consideration and adoption of the Package was the very opposite of an open process designed to discern and serve the interests of Anderson County. This was an exercise in raw political power, and it is subject to judicial correction. *See Peterson Outdoor Adver. v. Myrtle Beach*, 327 S.C. 230, 235-36, 489 S.E.2d 630, 633 (1997) ("When exercising discretion, a local

board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." (internal citations omitted)).

3. Preston's Proffered Justifications Do Not Rescue the Severance Package

Faced with the implausibility of his claim of anticipatory breach, and the unreasonableness of the amount he was paid, Preston seeks to justify the Severance Package on the basis of the "toxic political environment" in Anderson County. Again, though, as the Court of Appeals itself agreed, political posturing and rhetoric are not the same as an adverse employment action, and Preston had endured years of the "toxicity," until the 2008 primary presented him with the prospect of a new political landscape. (*See* R. pp. 3692-94)

Preston and the Circuit Court placed great weight on a series of meetings – which took place before the new Council was seated – involving Bob Waldrep, Cindy Wilson, the three Councilmembers-elect, and other interested citizens. (R. pp. 924-25, 933-34, 948, 950-55; pp. 5, 32-34) There is simply nothing impermissible about these meetings. Even assuming that these meetings included discussion of possible future action that might involve Preston, this would not constitute anticipatory breach. When the meetings occurred, those present were not empowered to act for the County. Preston's argument still reduces to a claim that he ***expected*** some actionable conduct by a new County Council in the future. It is as if he had written a demand letter claiming payment because "I expect to be hit by a County dump truck next year." However earnest the belief, that speculative claim of what might happen in the future would not justify a payment.

Preston's reliance on a statement prepared by Councilmember-elect Eddie Moore and presented by Bob Waldrep, calling for an audit of County finances coupled with a paid leave of absence for Preston, is similar. (R. pp. 1900-13; pp. 323-28, 383-85; pp. 942-47) The proposal

is just that – a proposal. The gathering was not a formal Council meeting, and the proposal was never acted on.

As further proof of "toxicity," Preston relies on a 2008 lawsuit he filed against Cindy Wilson and Bob Waldrep, in which he sought injunctive relief to prevent them from allegedly interfering with his job. In support of his request for a temporary injunction in that case, Preston set forth a laundry list of conduct that he ascribed to them in an affidavit. (R. pp. 2170-2226) Preston testified that this list of examples of interference was complete at the time the affidavit was prepared, that he would have included "everything [he] was aware of," and that all of the incidents of interference pre-dated September 25, 2008 – the date of his demand letter to the County. (R. pp. 1914-15; pp. 974-77) This collection of stored-up grievances will not support the decision in late 2008 to pay Preston $1.1 million. First, the list itself collects every grievance back to 2002; Preston cannot rely on stale complaints to claim anticipatory breach in 2008. Second, many of the items on the list are either trivial, or reflect genuine political questions, or both.[10] The mere fact Council members clashed with a County Administrator does not entitle the Administrator to a lifetime retirement benefit. Preston testified that none of the "interference" that he cited as examples in his lawsuit against Wilson and Waldrep was so bad that it caused him to quit his job. (R. pp. 968-70) Indeed, Preston's September 25, 2008 demand letter stated that, while "[c]ertain Council Members have hindered Mr. Preston's ability to perform his duties as County Administrator for at least seven years," Preston "has overcome the efforts [to] stymie him in the performance of his duties." (R. p. 1914) The letter was clear that the anticipatory breach would arise from predicted events starting in January 2009, not past events. Thus, all of

[10] For example, Preston contended that Cindy Wilson's interference with his job included the following: "On January 21, 2003, Ms. Wilson complains that she thinks a campaign manager for a County Council candidate was working for the County." (R. p. 2172 at ¶ 4(c))

the prior conduct to which Preston now points could not offer a justification for paying him a severance.

Preston also suggests it was economically rational to pay him over a million dollars, because the County's lawyer had given a worst case estimate of what litigation might cost that exceeded that amount, and because the County wanted an "amicable divorce." Neither of these justifies the arbitrary act of settling a nonexistent claim. Attorney Tom Bright's testimony was clear and credible that any number in this range that he might have mentioned was a "worst-case scenario," not a valuation or a recommended settlement value. (R. pp. 462-63) Any lawyer, when asked about the worst thing that might happen, will provide a big number. However, it is not reasonable to use that nuclear scenario as a basis for settlement – especially when the only legal advice provided is that the claim itself does not have merit, and where the client has already decided to settle the case anyway. (R. pp. 458-60, 464-65, 471-72) Nor is "buying peace" a valid public purpose when the payments exceed the maximum possible recovery by six figures. While Preston has repeatedly suggested that the Severance Package is somehow justified because the County has spent a substantial amount of money investigating Preston and litigating various issues concerning the Severance Agreement, that has no bearing on the propriety of the Package. If the Package was improperly approved by the use of tainted votes, and if it represents arbitrary and capricious government action, then the County cannot be criticized for mounting a legal challenge to it. Indeed, it is equally plausible to argue that the 2008 majority caused these expenditures, by the cavalier way they handled the consideration of the Package.

Finally, Preston relies on the statement in the October 23, 2008 letter from his lawyer that "there also exist a number of causes of action which Mr. Preston will assert against two current Council Members as well as maybe one or more incoming Council Members. His additional

causes of action will, obviously, include tort claims given the extreme malice and intentional nature of the actions of the subject Council Members over the past several years." (R. p. 2026) This unspecific claim of "additional" claims against individual Council members – not the County – does not justify paying Mr. Preston a severance from ***County*** funds. A straightforward way to see this is to imagine a demand letter to the County with this simple language: "I have tort claims against two council members and several yet to take office. The County should use public funds to settle these claims." Without a doubt, it would be arbitrary to spend County funds to resolve such unspecified and ambiguous claims. Preston's supposed tort claims are not backed by any greater specificity.

The fact that – for whatever reason – Preston was ready to vacate his position does not convert the sometimes rough-and-tumble nature of Anderson County politics into a wrong entitling Preston to over a million dollars.

C. The Settlement Package Was an Egregious Violation of Public Policy

As both this Court and the Court of Appeals have recognized, courts have the power to rescind a public act where that act is against public policy. *See Baird*, 333 S.C. at 535, 511 S.E.2d at 77-78 (recognizing in the absence of "direct authority" preventing a court from invalidating a bond ordinance based on a violation of the state ethics act that a court has jurisdiction to do so); *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). Preston's Severance Package is the very embodiment of disregard for the public interest, and so should be invalidated.

A remarkably similar case to this one was decided by the Supreme Court of New Jersey. That thoughtful opinion deserves careful consideration here. In *Thompson v. City of Atlantic*

City, 921 A.2d 427 (N.J. 2007), the court concluded that rescission of a tainted agreement and restitution of its proceeds was the only appropriate remedy. *Atlantic City* 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.[11] 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.)

The court observed that "it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself." 921 A.2d

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[11] This council member resigned before the final vote. 921 A.2d at 438**Error! Bookmark not defined.**. Moreover, the final council vote on the settlement agreement was five to one, with one abstention. 921 A.2d at 432. Thus, the vote of the interested council member did not change the outcome; this did not prevent the court from finding an impermissible conflict of interest, however.

at 436. The "appearance of self-dealing . . . had the clear capacity to undermine public confidence in the integrity" of government, and thus violated public policy. 921 A.2d at 438. These "egregious" conflicts of interest rendered "the settlement itself void *ab initio,*" and justified the "equitable remedy [of] rescission of the settlement agreement and restitution of the ill-gotten settlement proceeds." 921 A.2d at 441-42.

The *Atlantic City* court found that multiple sources of law invalidated the settlement, relying on "the conflict-of-interest doctrines embodied in the common law, statutory law, and municipal code." 921 A.2d at 437. Here as well, the votes for Preston's severance agreement were improper under the Ethics Act,[12] the Anderson County Code,[13] and the common law, including public policy and the other cases cited in this section.

The Severance Package virtually defines caprice, fraud, unreason, and disregard for public policy. This Court is the only means of redress for these clear wrongs. Like the *Atlantic City* court, this Court should rescind the Severance Package.

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[12] The South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991, S.C. Code Ann. §§ 8-13-100 *et seq.* (the "Ethics Act") provides: "No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated." S.C. Code Ann. § 8-13-700(A). Preston and Thompson violated the Ethics Act by negotiating for post-election employment for Thompson at the same time that Preston was seeking Thompson's vote in favor of Preston's severance agreement. The approval of the Package thus violated the Act. *See Baird v. Charleston Cnty.*, 333 S.C. 519, 535, 511 S.E.2d 69, 77-78 (1999) (Ethics Act challenge to vote for ordinance states a claim to have the ordinance declared invalid).

[13] The Anderson County Code provides that "[n]o member [of county council] shall vote on any matter in which he/she has a personal or financial interest," and that a member is "deemed" to have such an interest if either he or she individually or a member of his/her immediate family "has a substantial interest in any business which contracts with the County" or the member's participation in the matter "would create a substantial appearance of impropriety." As the facts set out in detail on *supra* pp. 12 -13 demonstrate, the votes of Thompson and Ron Wilson were directly prohibited under the Code.

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

The Court of Appeals incorrectly concluded that Preston, while serving in his capacity as county administrator, had no duty whatsoever to reveal known conflicts of interest to the County Council he was serving. (R. pp. 3679-82) This was error, and establishes a troubling precedent for other public servants.

Preston was aware that Michael Thompson was soliciting a County job from him, and that Preston had just upgraded Ron Wilson's daughter's county contract for no good reason, and yet Preston stood silently by and let them cast votes to pay him severance, 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."). *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.").

Rescission is available in the face of Preston's failure to speak. *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 473, 10 S.E.2d 3, 5 (1940) ("It is generally affirmed as a rule that fraud avoids all contracts."); *McDaniel v. Kendrick*, 386 S.C. 437, 444, 688 S.E.2d 852, 856 (Ct. App. 2009) ("A constructive trust ***results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty*** which gives rise to ***an obligation in equity to make restitution***." (emphasis added)).

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. (R. p. 3681) The Court appears to have interpreted the County's argument as advocating 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. 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 Circuit Court's invalidation of four votes rendered the Severance Agreement null and void, and 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 the Complaint to seek invalidation on the basis of absence of a quorum at the County Council meeting.

As the Court of Appeals explained in its decision, the quorum issue was presented in this case for the first time only when the Circuit Court issued its Order declaring a total of four County Council votes on the Severance Package null.[14] Before that ruling, the possibility of the invalidation of enough votes to destroy the quorum was not a part of this case. Accordingly, after the Circuit Court's post-trial ruling injected the 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. 3245-70) While Anderson County believes a remedy can be fashioned on the current state of the record, permitting amendment of the Complaint would further clarify this point.

If this Court does not fashion complete relief at this stage, 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. That motion was timely because the issue did not exist until the Circuit Court itself disqualified four votes. Moreover, as evidenced by the Court of Appeals' ruling on the quorum issue, no prejudice would result from an amendment to address the purely legal effect of the disqualification of four votes.

VIII. Anderson County's Suit Seeking to Invalidate the Severance Agreement Did Not Itself 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,

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[14] Anderson County anticipates this sequence of events will be the subject of further briefing in Preston's appeal.

Preston has no valid counterclaim for breach of contract. 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. Should this Court determine that the Severance Agreement is not null and void, it should nevertheless rule that this lawsuit did not breach the Severance Agreement.

First, courts have recognized that an action challenging the validity of a contract containing a covenant not to sue is not a violation of that covenant. Such a covenant is not an "incontestability clause." *See Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966) ("[W]hen the very existence of a covenant is disputed in good faith that dispute must be resolved before the covenant can be recognized and allowance must be made for such resolution. . . . It cannot rationally be argued that the covenant, retroactively, denied the right to the very litigation which was necessary to establish its existence."); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985) (covenant not to sue "would go only to the merits of the controversy settled – not to the existence or terms of the Settlement Agreement itself"). Given the important public policy issues at stake here, a provision that would prevent the County from seeking a determination of whether approval of the Severance Package violated its conflict of interest rules or public policy generally would itself be a violation of public policy.

Second, the scope of the covenant is limited to claims "relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County...." (R. p. 1987 at ¶ 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 Package and the manner in which it

was adopted.[15] (R. pp. 133-140 at ¶¶ 34-87) To the extent the suit involves Preston's actions, it involves the actions he took as the County's ***adversary*** after he asserted a claim against the County, not his actions taken "on behalf of the County." This lawsuit is about whether the Package as approved by Preston's allies was arbitrary, in violation of public policy, and/or supported by tainted votes. These claims are outside the scope of the covenant.

Even if this Court rules that the Severance Agreement is valid, the Court should also affirm that Anderson County's suit did not violate that Agreement.

IX. No Fee Award is Available to Preston, Whether or Not the Severance Agreement is Voided

For similar reasons, this Court should hold that Preston is not entitled to an attorney's fee award against Anderson County, even if the Severance Agreement is valid.

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 only if the political subdivision acted "***without substantial justification*** in pressing its claim against the party" and where "***no special circumstances*** would make the award of attorney's fees unjust." For the reasons set forth in this brief, Anderson County was substantially justified in seeking invalidation

[15] Although it is not pursuing this argument on appeal, the County did allege that Preston violated the Severance Agreement after it was signed by backdating official documents. (R. p. 1802) Preston argued below that these allegations concerned his "actions as an employee on behalf of the County." While Preston's "backdating" conduct took place while he was still employed, falsifying documents was not done "on behalf of the County" and this conduct took place ***after*** the execution of the Severance Agreement, taking it outside the scope of the covenant. Courts do not interpret releases or covenants not to sue to encompass future conduct. 66 AM. JUR. 2D *Releases* § 28 (a covenant not to sue "ordinarily covers all claims and demands ***due at the time of its execution*** that were within the contemplation of the parties" (emphasis added)); *Gardner v. City of Columbia Police Dept.*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) ("it is uniformly considered that a general release ... ordinarily covers all claims and demands ***due at the time of its execution***, and within the contemplation of the parties" (emphasis added)).

of this extraordinary Agreement, and it would be unjust to impose a fee award on Anderson County in this case.

Preston has suggested this question is not ripe for resolution. This matter has lived a long life already, and if only in the interests of judicial economy, this Court should clarify that no fee award is available to Preston. The record is more than adequate for this resolution, and there is no reason to wait for a second round of appeals to reach that conclusion.

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.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER-RESPONDENT ANDERSON COUNTY

May 7, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001898

Anderson County ..... Petitioner-Respondent,

v.

Joey Preston and the South Carolina Retirement System ..... Defendants,
Of whom Joey Preston is Respondent-Petitioner,
And the South Carolina Retirement System is Respondent.

CERTIFICATE OF COUNSEL

Counsel for Defendants certifies that the Final Brief of Respondent-Petitioner complies with Rule 242(i), to the extent this certification is applicable to briefs filed in response to certified questions of law.

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PROOF OF SERVICE

I certify that I have served this 7th day of May 2018, the Final Brief of Respondent-Petitioner on counsel for the Defendants by depositing copies of same in the U.S. Mail, first class postage prepaid, addressed as shown below:

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