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S.C. SUPREME COURT

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.

REPLY BRIEF OF PETITIONER-RESPONDENT ANDERSON COUNTY

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ATTORNEYS FOR PETITIONER-RESPONDENT ANDERSON COUNTY

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I. Overview

In one of its final acts, the outgoing Anderson County Council of 2008 introduced, purported to debate, passed, reconsidered, and passed again a $1.1 million severance agreement for Joey Preston. The debate did not touch on either the substance of the Severance Agreement or the merits of approving it. Instead, proponents of the Severance Package engaged in a highly orchestrated series of parliamentary maneuvers designed to insulate the Package from public scrutiny or later reconsideration. (R. pp. 1918-59; p. 1983)

The Package's terms were arbitrary and unjustifiable. The Package purported to be offered in settlement of Preston's claim of "anticipatory breach" of his Employment Agreement. But the actions that constituted this supposed anticipatory breach were not actions of Anderson County at all. Instead, Preston's attorney cited to ***expected future*** actions of the incoming majority of Council – a group that had no authority to act or speak for Anderson County at the time of the vote. (R. pp. 1914-15)

Beyond this, the Severance Package paid Preston more than he could have recovered, even if his Employment Agreement had been breached. The reference in Preston's demand letter to unspecified tort claims against certain individuals (not the County) was not sufficient to justify paying Preston more than the severance provided in his Employment Agreement. Preston's friends on County Council paid him what they wanted to, because they wanted to – not on the basis of an evaluation of actual legal responsibility ***of the County.***

Besides being substantively indefensible, the Severance Package was procedurally corrupt. The debate was run by a Chair who was actively courting Preston for employment. And the Severance Package was negotiated and sponsored by the Chair of the Personnel Committee, whose daughter's consulting firm had just received from Preston an inexplicable and

substantial enhancement to its contract with Anderson County. It is also indisputable that Preston was aware of the facts that made those votes improper.

All of the foregoing is established on the record. Accordingly, this case presents clear questions: May a public official retain a severance package, paid with public funds: (i) whose value substantially exceeds the severance provided by contract; (ii) when there was no breach that would justify any severance 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?

Whether intentionally or not, Preston's response brief ("Preston Resp.") does more to obscure these questions than to illuminate them. The brief opens with a vitriolic discussion of the old feud between Preston and Cindy Wilson; whatever the merits of this spat, it does not justify giving Preston $1.1 million in public funds. Nor, most critically, does it support the assertion that Preston had any sort of legal claims ***against the County***. The purported "settlement" with Preston was a sham, and agitated descriptions of a "blood feud" do not change that.

Another noteworthy misdirection in Preston's response brief is the dedication of a substantial number of pages to an entirely new theory of why the Court of Appeals' decision – that County Council lacked a quorum when it acted on the Severance Package – was erroneous. This argument is out of place and should be disregarded. First, the County in its petition for *certiorari* did not challenge this aspect of the Court of Appeals' ruling, and so inclusion of the argument in Preston's response to the County's brief is improper. Second, the new argument is simply wrong.

Despite Preston's misdirection, the relevant record is clear. The Severance Package was unjustifiable on its face, unjustifiable in the context of Preston's purported claims, and passed with votes of persons who were beholden to Preston. The courts have the authority to undo such an improper bargain, and this Court should do so.

II. The Severance Package Should Be Voided on Several Independent Grounds

A. Preston's Anticipatory Breach Claim Was a Legal Impossibility; the "Council-Elect" Could Not Breach Preston's Agreement

The entire premise of Preston's Severance Agreement was that Preston had a valid claim for "anticipatory breach" of his Employment Agreement that justified settlement. Without that cornerstone, the entire $1.1 million edifice crumbles. That cornerstone was at all times completely fictional. The demand letter written on Preston's behalf admits as much when it acknowledges that his claim was based on what "newly elected Council Members intend, after January 2009." (R. p. 1914) Indeed, Preston's own brief makes this same admission, revealing the core fallacy of Preston's argument. Preston's brief argues that "the soon-to-be majority of Council laid out an intricate agenda," which included the firing of Preston, in a series of post-primary meetings. (Preston Resp. 6-7 & nn. 11-12) That is, Preston relies for his anticipatory breach claim on predicted future actions of persons not yet in office. Political rhetoric is one thing; genuine acts by a political body are another. Those not yet in office cannot speak or act for the County; a "Council-elect" is not a political entity. Indeed, even if the "soon-to-be majority" had acted to fire Preston once in office, this would not have constituted a breach because his contract was terminable at will, with payment of severance. There was no anticipatory breach of Preston's Employment Agreement, because his friends remained in control. When they undertook to pay him for what they predicted the next Council might do, they acted capriciously.

Preston invites this Court to join the trial court in combing through all of the slights and insults directed at Preston by anonymous citizens and Councilmembers-elect. But none of this will support an anticipatory breach claim, because Preston's Employment Agreement was with Anderson County, and only Anderson County could anticipatorily breach that contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981) ("a repudiation is a statement ***by the obligor to the obligee*** indicating that the obligor will commit a breach" (emphasis added)). And Anderson County did not breach.

It may be that Preston faced – and might have continued to face – political opposition. That comes with a political position, and it can be unpleasant. But avoiding unpleasantness is not a sound basis for paying a public official a settlement. It was capricious to give Preston a golden parachute because the voters of Anderson County elected politicians who questioned his tenure. The Package was a political exit strategy, not a settlement of a valid legal claim.

B. The Total Value of the Package is Unjustifiable

Even if the "Council-elect" had somehow acted on behalf of Anderson County to terminate Preston, the ***most*** to which he could have been entitled was the severance provided in his Employment Agreement. That Agreement expressly notes – as is required by law – that Preston served "at the pleasure of [County] Council." (R. p. 1892 at 2.A; S.C. Code Ann. § 4-9-620 ("the term of employment of the administrator shall be at the pleasure of the council")) This means that he could be terminated and that if the termination were without cause he would be entitled – at most[1] – to the severance provided in that Agreement, and no more.

[1] As we have noted, the Court of Appeals has since held that a county council cannot enter into an employment contract that extends beyond the term of that council; under this principle, the severance agreement in Preston's Employment Agreement was invalid. *See Cunningham v. Anderson County,* 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), *rev'd in part on other grounds*, 414 S.C. 298, 778 S.E.2d 884 (2015).

The $1.1 million paid to Preston far exceeded the severance amount in his Employment Agreement. Again, Preston's own demand letter acknowledges this. (R. pp. 2026-28) Testimony at trial reiterated this point. (E.g., R. pp. 356-57; 453-56; 999-1002; 1270; 1287-92)

Preston's justifications for this largesse fail under scrutiny. First, he argues that the threat in the demand letter that Preston might assert other unspecified tort claims against certain individual Council members means that his potential recovery was not capped by the severance provision in his Employment Agreement. This contention is incorrect for several reasons. First and most simply, the threat was wholly unspecific. If Preston's demand letter had sought only a tort recovery, without specifying any torts, a settlement with him would have been capricious on its face. Attempting to justify paying him an enhancement to his severance for exactly the same claim – though paired with an equally meritless claim for anticipatory breach – is equally capricious.

Second, Preston had already sued the two Council members in question – Bob Waldrep and Cindy Wilson – for every wrong they had purportedly done to him, in a lawsuit hereinafter referred to as "*Preston v. Waldrep.*" (R. pp. 968-78 (Preston asserted all claims he knew of in that lawsuit); pp. 2170-2226) Since Preston had ***already*** sued on the facts underlying his tort claims, he could not assert them a second time.

Attempting to justify the size of the payment to himself, Preston also points to the testimony that Tom Bright, legal counsel retained by the County to deal with Preston, stated that the "worst-case scenario" was that the cost of litigation could exceed the settlement amount. (R. pp. 462-63) This one statement cannot be yanked from the entire context of the legal advice provided by Tom Bright, and used to justify an otherwise arbitrary settlement. Mr. Bright testified that he advised that Preston's claim did not have substantial merit. (R. pp. 458-60, 462-

63, 471-72, 477-79) He also testified that it was clear to him that Ron Wilson and others directing Mr. Bright had decided to settle with Preston regardless of the merits, and to "try and get the best deal you can." (R. pp. 464-65) This direction is consistent with a decision to give Preston a political gift, and not with reasoned stewardship of County funds. Thus, if Mr. Bright's opinion is to be invoked to measure the reasonableness of the Severance Package, then the Severance Package falls short.

Finally, Preston points to the overall cost of the investigation into the entire Preston regime as evidence that it was rational to settle with Preston for $1.1 million. (Preston Resp. 41 and n.46) This is, of course, a *non sequitur*. This cost (of which the costs of this litigation form only a part) bears no relationship to the merits of Preston's claim. It is again easy to see this if one imagines a demand letter on Preston's behalf that dispensed with legal claims, and argued only that future political peace would be so valuable that the County should purchase it by paying Preston to leave office. "If Preston stays in office," the letter might read, "the political battles will cost millions. So Mr. Preston will leave office if you agree to pay him only $1 million." Such a deal would be an utterly improper use of public funds. And it is precisely this calculus that Preston urges this Court to adopt.

It is true that seeking to undo the Severance Package has cost money. But Anderson County has made a judgment that the events of November 18, 2008 were fundamentally wrong, and that seeking judicial redress for that wrong serves an important public purpose. Anderson County submits that the record establishes that it is Preston's fault – for seeking and obtaining from political allies an utterly unjustified public payout – that this litigation has occurred.

C. The Votes of Michael Thompson and Ron Wilson Are Indefensible

The integrity of the votes cast by public officials is critical to our political institutions. Preston asks this Court to conclude that two egregious violations of that trust did not matter. We submit that such a conclusion is impossible.

Michael Thompson was Chair of County Council, and he presided over the November 18 debate. He was integral to passage of the Package. Yet, at that very time he was actively courting Joey Preston for employment. It is hard to imagine a more blatant conflict of interest. *See Thompson v. Atlantic City*, 921 A.2d 427, 432, 437 (N.J. 2007) (court quoting one councilman observing conflict: "you got a job from the Mayor and you're voting to give him a million dollars"; rescission was appropriate because "[t]he public had good reason to suspect that [those with financial ties to mayor] might not be able to exercise complete objectivity and independence in assessing the merits of the lawsuit" they were settling on behalf of city).

Preston defends Michael Thompson's participation in the vote by arguing that Thompson was qualified for the position that he sought, that Thompson did not personally receive part of the Severance Package, and that Thompson testified that he would have voted for the Package anyway. (Preston Resp. 12) None of this is relevant. The impropriety of Thompson's participation in this vote while he was seeking a job from Preston is not wiped away because of the contents of Thompson's resume, or the fact Preston did not also write Thompson a check.

Ron Wilson was Chair of the Personnel Committee and the acknowledged leader of the settlement discussions with Preston. (R. p. 471) He made the motion to bring the Severance Package up for a vote, and he stated that he was the only Council member who had seen the proposed agreement. He, too, was a central figure in approval of the Package. And he, too, should never have participated in the debate. On November 1, 2008 – 17 days before the vote, and about a week after Preston's October 23 demand letter – Preston signed a consulting contract

with Ron Wilson's daughter's consulting company. (R. pp. 2158-61) That company was already under contract with the County (R. pp. 2149-52), and the revised agreement was on its face indefensibly favorable to the company. It raised the hourly rate, provided for an annual increase in rates, created a definite term, and gave the right to "liquidated damages" if the contract were terminated. All of these increases were given to a company with no other consulting jobs at the time.[2] (R. p. 1750) The conclusion that Preston acted to curry favor with Ron Wilson is inescapable.

Preston's primary response to this clear skulduggery is to insist that it is inconsequential because Ron Wilson's daughter testified that she never mentioned the contract upgrade to her father. This argument does not save Ron Wilson's vote on the Severance Package, for several reasons. First, this contract was a matter of public record and thus knowledge of it was imputable to County Council.[3] If this is so, then knowledge of the contract was imputable to Ron Wilson as well, and the idea that his improper vote was "innocent" evaporates. Ron Wilson lacked innocence in another respect as well. When subpoenaed to testify in this case, he invoked his Fifth Amendment right to avoid incriminating himself, and he declined to testify.[4] (R. pp. 685-87) This only strengthens the conclusion that Ron Wilson and his daughter were not credible when they claimed he was unaware of the windfall brought her by Joey Preston. In addition, Preston admits that he invested around $200,000 in Ron Wilson's Atlantic Bullion

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[2] Preston's attempts to defend the Schaum contract as not "rich," (Preston Resp. 10) are meritless and beside the point. How she performed under her initial contract is irrelevant, as her contract was in no way on a trial basis, but to the extent her performance is considered at all, it is dramatically overstated by Preston. (*See, e.g.*, R. pp. 1731, 1733, 1763-69, 1774-80) Moreover, what is beyond debate is that the terms were dramatically sweetened during the period Ron Wilson was "negotiating" with Preston.

[3] Preston argued this point vigorously to the Court of Appeals. (*See* R. p. 3435)

[4] In a civil case, an adverse inference may be drawn from an invocation of the Fifth Amendment privilege against self-incrimination. *See Griffith v. Griffith*, 332 S.C. 630, 640-41, 506 S.E.2d 526, 531-32 (Ct. App. 1998).

Ponzi scheme in 2009, and received compensation for sending other investors to the scheme. (R. pp. 1861-62) From his $200,000 investment, Preston admits he received at least $600,000 from Atlantic Bullion. (R. pp. 1862-63) It is rational to infer that Preston was close enough to Wilson and had communicated with him about such investments at or around the time of the Severance Package. Further, the point here is that Preston himself was aware of the facts that made Ron Wilson's vote improper, and that is the knowledge that mattered most.

But the overarching problem with Preston's protestations in favor of Ron Wilson's vote is that the Anderson County Code of Ordinances ("ACC") makes improper votes that "create a substantial appearance of impropriety." ACC § 2-37(g). Given Preston's recent generosity to his daughter, Ron Wilson should not have voted, and his vote has (at least) the appearance of impropriety.

D. The Approval of the Package Was the Antithesis of Reasoned Debate

The capricious nature of the vote to give Preston a $1.1 million severance is cemented by the nature of the Council proceeding. Only by viewing the videotape of the debate can the Court gain a full appreciation for the absence of actual deliberation, and the clear evidence of choreography. Anderson County described in its opening brief how every step of the process was plainly planned in advance. Chair Michael Thompson knew whom to recognize to keep the process moving. Council member Bill McAbee was visibly proud of his maneuvers to end debate and to reconsider the just-passed approval, so that it could not be brought up again later. (R. pp. 1940-45, 1950-53; p. 1983) Council member Gracie Floyd at one point reminded her colleagues to make a motion for reconsideration. (R. p. 1949, lines 2-3; p. 1983) Council member Larry Greer had already determined what budget line items could be shifted to pay the Severance Package. (R. p. 1946; p. 1983; pp. 1990-92; p. 2044; pp. 2047-48) And Council

member Floyd somehow, conveniently, had with her a proposed employment agreement for Preston's successor as County Administrator. (R. p. 1953, lines 12-35; p. 1983)

It is also important, though, to point out what is missing from this debate. There was no discussion of the propriety of the settlement amount. There was no discussion of the merits of Preston's legal claim. There was no discussion of the value of Preston's contractual severance. The only justification offered on the floor was Ron Wilson's statement that the County was in a "detrimental situation" and he would like to "get beyond this and move on." (R. pp. 1941-42) Buying political peace for Preston, by paying him to take a full retirement, was not an appropriate use of public money. Preston's brief offers no defense of this public-trust travesty.

The Severance Package involved "fraud" [and] "clear abuse of power," and it was "unreasonable" and "capricious." Under *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995), these facts mean that it can and should be rescinded.

III. Preston's New Argument Against the Court of Appeals' Quorum Decision Is Incorrect and Out of Place

Preston devotes Section I of the Argument of his Response Brief in Anderson County's appeal to his contention that the Court of Appeals erred in finding no quorum present for the County Council vote on the Severance Package. In particular, he introduces an entirely new argument based on § 2-290 of the Anderson County Code.

Preston's quorum arguments are incorrect and misplaced. If appropriate anywhere,[5] they should have been presented in Preston's own lengthy initial brief to this Court, not in response to

[5] Preston has never before premised an attack on Anderson County's quorum argument in ACC § 2-290. Preston did not make this argument to the Circuit Court, to the Court of Appeals, or to this Court in either his petition for *certiorari* or his own initial brief addressing the quorum issue after *certiorari* was granted. "Where the appellate argument differs from the ground for a party's trial objection, the issue is not preserved." J. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 187 (3d ed. 2016).

Anderson County's appeal. It was Preston who sought and was granted *certiorari* on the Court of Appeals' quorum determination, not Anderson County.

A. ACC § 2-37(g), not ACC § 2-290, Governs Conduct of County Council Votes Like the One at Issue Here

Both the Circuit Court and the Court of Appeals looked to § 2-37(g) for the standard in determining whether votes were improperly cast for the Severance Package. Aside from being the only theory advanced in this case, it is the correct analysis.

ACC § 2-37(g)(4) deals expressly with the conduct of County Council meetings, and provides a standard for when a conflict of interest or appearance of impropriety precludes a member from voting. Indeed, the title of § 2-37(g)(4) is "When members may not vote." That is precisely the question posed in this case.

Despite this, Preston tries to divert the Court's attention to ACC § 2-288 and § 2-290, which deal more broadly with County "officials" or "employees" and with conflicts of interest generally. Preston seizes desperately on ACC § 2-288(5), which addresses specifically an "official or employee who has substantial or controlling financial interest" in an entity or transaction contracting with the County, and which prohibits such a person from participating in a transaction with the County. Preston then points to ACC § 2-290(a), which provides that where a person or entity contracting with the County has knowingly violated the restriction in § 2-288, the contract becomes voidable. Preston invites the Court to make the interpretive leap to the conclusion that this rule means that violations of ACC § 2-37(g)(4) do not render the resulting contracts void. This does not follow.

First and most obviously, ACC § 2-290 does not relate to or deal with ACC § 2-37(g)(4), and so the attempted inference fails. Since the two provisions address different aspects of

County government, in different sections of the Code, Preston's invitation to play them off against one another is a recipe for interpretive confusion. [6]

More broadly, though, Preston's argument would simply prove far too much. He asks the Court to conclude that one non-exclusive provision of the Anderson County Code, allowing for the voiding of a contract in a particular circumstance, preempts all South Carolina common law on the topic of conflicts of interest and arbitrary and capricious conduct. This is not the law. *Garris v. Governing Board of South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998), *Talbot v. James*, 259 S.C. 73, 190 S.E.2d 759 (1972), and other cases cited in Anderson County's Response Brief on pp. 7-8 and in the Court of Appeals' discussion of the quorum issue (R. pp. 3686-88) are still good law, and they support invalidation of the Severance Agreement. The fact that Anderson County has also provided for voiding of contracts infected by interest in one specified circumstance does not undercut that authority.

Finally, Preston's new argument sheds no light on the issue it purports to address: whether the disqualification of four votes for bias destroyed the quorum necessary to pass the Severance Package. The Court of Appeals agreed with Anderson County that the disqualified votes could not be counted toward a quorum, and that County Council could not act with only three members effectively present. ACC § 2-290, which does not address issues of quorum, and which relates to contract voidability under entirely different circumstances, has nothing to do with this issue. Preston's argument based on that enactment begs the question entirely.

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[6] Moreover, as Preston himself concedes, ACC § 2-290 is a (presumably mandatory) importation into the Anderson County Code of S.C. Code § 8-13-700, a section of the State Ethics Act. The notion, therefore, that ACC § 2-290 must be read in "*pari materia*" with other sections of the ACC so as to undermine the plain language of ACC § 2-37 and establish a new rule governing quorum determinations in Council proceedings – and one moreover that is contrary to the common law of this State – is illogical.

B. Preston's Other, Scattered Attacks on the Quorum Ruling Are Meritless

Preston sprinkles other attacks on the Court of Appeals' quorum ruling into his response brief. These arguments do not withstand scrutiny. In contrast to Preston's hodgepodge of pronouncements, the Court of Appeals' quorum ruling is logical, carefully reasoned, and firmly grounded in precedent.

First, in passing, Preston argues that rulings on parliamentary procedure are not subject to appeal. (Preston Resp. 19) This misses the point. The County is not asking for reversal of a ruling from the Chair that a particular motion was out of order; ***that*** would be a question of parliamentary procedure. Instead, the County points out that the inescapable result of disqualifying four votes is destruction of the quorum and hence the ability to act. This is not a point of "parliamentary procedure."

Preston next tries to suggest, on the basis of a single "on-the-fly" ruling by the Anderson County Attorney during a meeting, that the County somehow had a practice that is inconsistent with the quorum ruling. (Preston Resp. 19) This exchange[7] does not forever "estop" the County for numerous reasons. It was not an "official position" of the County and it was not taken in this case. Instead, the County Attorney was required to render an instant opinion, and he did so. The fact that the County Attorney did not locate the governing cases under the circumstances does not reflect poorly on him – and it certainly does not render those cases inapplicable here.

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[7] Preston points to a County Council meeting on August 18, 2009. All seven members of the Council were in attendance, but after two recused themselves from voting on two particular resolutions and two other members left the meeting with the intent of depriving the Council of a quorum, the County Attorney was asked whether he had "any suggestions on" this "interesting position." (R. p. 3296, ll. 15-16) After requesting "a minute" to "hit the books," the County Attorney told the Council that based on his review of the County Code, as long as the two members who recused themselves returned, "I think that we would have a quorum of the council at that point and then it would require a majority of those members present and voting" to pass the item in question. (R. p. 3296, ll. 38-43)

Moreover, the ruling was ultimately not acted on. The two members who left to try to thwart the vote actually returned and voted. (R. p. 3300, ll. 1-12; 20, ll. 28-36) Both resolutions passed by a vote of 3-2. (R. p. 3300, l. 13; p. 3303, ll. 28-36) Thus, by any standard a quorum was present. Finally, it is noteworthy that the language of the County Code cited by Preston says only that the County should be "guided" by prior usage – not bound.

Finally, Preston throws in a reference to an opinion of the South Carolina Ethics Commission that suggests that "disqualification under the Ethics Reform Act does not affect the existence of a quorum." *See* South Carolina Ethics Opinion, SEC AO98-002 at 4 (Nov. 19, 1997). (Preston Resp. 20-21) This opinion is unreliable for a number of reasons. First, it is inconsistent with this Court's decisions in any of the numerous cases in the *Garris* line of authority. Indeed, the Ethics Commission reached its conclusion without any analysis, or even mention, of this line of binding authority. Beyond that, the Commission's decision is in conflict with other administrative decisions, notably various Attorney General Opinions, which recognize the *Garris* line of cases and reach the exact opposite conclusion of the Ethics Commission. For example, the Attorney General has opined that "[w]here one is disqualified, that person's presence should not be counted to establish a quorum." 1975 S.C. Op. Att'y Gen. No. 4018 (April 14, 1975).[8]

[8] Another flaw in the Ethics Opinion, which Preston has at times echoed, is its reliance on FOIA as a starting point for analysis. FOIA has nothing to say about what constitutes a quorum of County Council ***for purposes of conducting business***, nor about whether a member disqualified for bias counts toward that quorum. FOIA is concerned only with whether a meeting must be open to the public. Under FOIA – which is concerned only with openness – a meeting must be open if a "simple majority" of members of the body is present. A meeting might be open to the public under FOIA, yet at the same time it could lack the quorum required take a given action under the law governing that body. FOIA neither expressly nor impliedly preempts a county from determining what constitutes a quorum necessary to take action.

IV. This Court Can and Should Fashion an Equitable Remedy

The Severance Package was an unjustifiable sham, invalid due to lack of a quorum, with its very existence owing to the collusion of conflict-ridden public servants seeking to give their political ally a million-dollar golden parachute. In the face of such facts, this Court is not powerless to construct an appropriate equitable remedy. *See 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.") The record contains all the information needed to fashion a remedy, in that it demonstrates how much Preston was paid under the void Severance Agreement and in particular how much he will receive in pension payments that he would not have received but for the payment allowing Preston to begin drawing a full pension at age 45.[9]

In its brief, the South Carolina Retirement System ("SCRS") expresses concern that any remedy not harm the retirement fund by making it worse off than it would have been had the Package never been adopted. The County recognizes this concern, and its proposed remedy of imposing a constructive trust on any future excess payments to Preston (as compared to retirement funds he would have received in the absence of the Severance Package) would satisfy SCRS. SCRS also notes that, under the combined requirements of S.C. Code Ann. § 9-1-1680 and *Briggs v. Richardson*, 288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986), a constructive trust may be imposed on retirement benefits if Preston holds those retirement benefits "by fraud, actual or constructive, by duress or abuse of confidence, by ***commission of a***

[9] At trial, Anderson County presented unrebutted expert testimony that, along with the unrebutted testimony from SCRS, demonstrates how the excess payments that Preston stands to 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 rescission of the Severance Package. (R. pp. 251-52 at ¶¶ 5-11; pp. 253-55 at ¶¶ 5-7, 11-14; pp. 2671-81; p. 1290)

wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience." *Id.* (emphasis added). This standard is broader than Preston's contention that a constructive trust requires "fraud," and the facts of this case satisfy it.

The conduct of both Preston and of those on County Council who voted in his presence and with his knowledge to pay him for a claim that could not exist, while they had financial ties to him, easily justifies a constructive trust on the benefits generated by that deal. The Severance Package caused Anderson County to deposit over $350,000 of public funds with SCRS for Preston's benefit. Upon rescission of the Package – and to the extent that the improper payments are not made up in some other way – the only sensible outcome would be to redirect the incremental benefit generated by that deposit back to Anderson County.

In response to the County's arguments that equity should fashion a remedy here, Preston largely repeats arguments raised in prior briefing of his appeal that a constructive trust is not merited under the facts (Preston Resp. 22-24), and that the County has not demonstrated any unjust enrichment occurred (Preston Resp. 24-26). Rather than follow Preston's lead and re-brief these issues here, the County refers to Section IV of its own response brief in Preston's appeal, and in particular pages 16-18.

Preston otherwise wrongly alleges that in invoking this Court's inherent equitable powers the County seeks to pursue "an unpled remedy." (Preston Resp. 27-28) That allegation is groundless. 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. 133-40) In addition, the prayer for relief sought "such other relief as [is] just and appropriate."[10] (R. p. 140)

[10] Anderson County also included an additional prayer for relief in its proposed Second

Even laying aside the specific relief requested in each count and the prayer for relief, the general prayer alone is sufficient to encompass the equitable remedy the County seeks. Black letter law recognizes that

> a court of equity may grant proper relief under the general prayer that is consistent with the case stated in the bill of complaint. Accordingly, under the prayer for general relief, a decree which accords with the equities of the cause may be shaped and rendered; the court may grant any appropriate relief that conforms to the case made by the pleadings although it is not exactly the relief which has been asked for by the special prayer. The trial court is authorized in equity proceedings to mold its judgment so as to adjust the equities of all the parties and meet the obvious necessities of each situation.

27A AM. JUR. 2D *Equity* § 206; *accord Makozy v. Makozy*, 874 A.2d 1160, 1172 (Pa. Super. Ct. 2005) ("Under the prayer for general relief, the plaintiffs are entitled to such relief as is agreeable to the case made in the bill, though different from the specific relief prayed for." (quotation marks omitted)); *D'Ambrosio v. D'Ambrosio*, 610 S.E.2d 876, 883 (Va. Ct. App. 2005) ("a court of equity may grant proper relief under the general prayer").

Preston's related argument that permitting the County to pursue an equitable remedy based on the County's quorum argument "violates his state and federal due process rights" and prevents him from presenting equitable defenses is unavailing. (Preston Resp. 28-30) First, Preston himself invited the quorum issue into this case when he raised (without pleading) a challenge to the Cindy Wilson and Bob Waldrep votes. (R. pp. 1377-79, 1382-83, 1391-94) The County objected that this was improper (R. pp. 1377-79), but Preston prevailed and the Wilson and Waldrep votes were disqualified in the Circuit Court's decision. Preston is not prejudiced by

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Amended Complaint, which was drafted when the Circuit Court injected the quorum issue into the case. That amendment, which (as argued *infra* Section VIII) should be allowed to the extent there is any concern over the scope of relief sought, requests the Court "rescind and invalidate as null and void the Severance Agreement," "direct and order Preston to return to Anderson County all funds paid to him or paid on his behalf in connection with the Severance Agreement," and "grant . . . such other relief as the Court considers just and appropriate." (R. p. 3269)

the logical consequence – an invalid Severance Package – resulting from his own trial strategy. Second, as argued above, Anderson County has sought appropriate equitable relief premised on the invalidity of the Severance Agreement since the start of this litigation. Preston has had ample opportunity to present any equitable defenses to such relief as he thought meritorious, and in particular has had opportunity to be heard on the equitable remedies sought by Anderson County at each stage of this litigation.

Preston's protestation that none of the cases cited by Anderson County looks exactly like the instant case (Preston Resp. 30-31) does not mean that equity is stymied. The beauty of equity is its flexibility to fashion remedies to fit particular facts. The facts of this case are certainly unusual; this does not mean that equity is straitjacketed. *See generally* 12 S.C. JUR. *Equity* § 8 (1992) ("[E]quity will always seek to provide a remedy where a right has been violated.").

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, and the record is more than sufficient to do so.

V. Rescission is Available

While equity is available generally to provide relief, this Court should overturn the holding of the Court of Appeals that rescission is unavailable. 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, and this is a prime case where rescission is available despite the foreclosing of some avenues by the passage of time.

It is important to step back and consider the alternative. If rescission, or some other equitable remedy, is not available, this means that Preston is allowed to retain a million-dollar

severance payment provided to him under a void contract. This cannot be the proper outcome. The correct response, as the Fourth Circuit recognized in *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004), is that rescission is available, even where restoration to the *status quo* is impossible, where the court can fashion an appropriate remedy. And such a remedy is plainly within the Court's power here.

Preston's attempt to dismiss *Griggs* as an ERISA case with no persuasive power here fails. (Preston Resp. 34) The *Griggs* court was plainly addressing bedrock equitable principles that are not limited to the ERISA context. Moreover, ERISA is itself a codification of the equitable law of trusts. The principle enunciated by *Griggs* is universal, and it allows rescission here. Preston is also flatly wrong that *Griggs* supports the proposition that "a plaintiff must make restoration of what he got under the contract in order to get rescission." (Preston Resp. 34) *Griggs* indeed acknowledges that there is some "support for such a proposition" but concludes that "[a] closer review of relevant authorities . . . reveals that the complete restoration requirement is a general one that is subject to certain exceptions" and that "courts of equity did not automatically deny rescission . . . where complete restoration of benefits could not be accomplished." 385 F.3d at 447-49.

The primary obstacle to a full return to the *status quo* cited by the Court of Appeals is the fact that Preston cannot now be restored to the position of County Administrator. (R. p. 3691) This, though, is not a reason to allow him to keep his million-dollar severance. *See Griggs*, 385 F.3d at 452.[11] Beyond this ground, Preston speculates the Severance Agreement is not subject to rescission because he has allegedly lost the benefit of certain claims that he released in the

[11] It must furthermore be recalled that we now know that Preston's employment contract was invalid under *Cunningham*, 402 S.C. 434, 741 S.E.2d 545.

Severance Agreement against the County and various individuals. (Preston Resp. 33) As argued above, however, Preston's supposed "claims" against the County and others were at all times a fiction and otherwise utterly lacking any specificity; the "loss" of vague and valueless claims does not bar rescission here. (*See supra* pp. 3-6) Preston's claim that he also lost the value of the "indemnity" provision in his Employment Agreement is equally unavailing; we now know that no claim subject to the indemnity has been asserted, and the survival of that promise under *Cunningham* is, at least, problematic.

Equity is not constrained in providing a remedy to undo the void Severance Agreement, and rescission is one available element of equity open to this Court in resolving this matter.

VI. In This Case of First Impression, the Authorities Cited by Anderson County Provide a Persuasive Framework

Anderson County's argument that even one tainted vote should invalidate the Severance Agreement – because of the particular and egregious circumstances of this case – presents a question of first impression in South Carolina.

Contrary to the suggestions of Preston (Preston Resp. 35-36), *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), did not involve or address such an argument. *Baird* does not shed any light on Anderson County's argument, and it certainly is not dispositive. *Baird* held that invalidation of a number of votes equal to or greater than the margin of passage of a measure is ***sufficient*** to invalidate the measure; *Baird* did not hold that invalidation of that number of votes is always ***necessary*** to invalidate a measure. That question remains open.

In addition, *Baird* involved a very different set of circumstances. *Baird* was a challenge to a measure of general application that was in the public eye, and that was subjected to multiple readings over a period of time before passage. Even if *Baird* could be read to require invalidation of a number of votes equal to the margin of passage in that particular context, it

would not dictate the outcome in this vastly different case, involving a single unannounced vote on a sweetheart deal for one individual.

Anderson County relies on a number of persuasive cases from other jurisdictions that hold that – under particular and extraordinary circumstances like those present here – a single tainted vote is enough to invalidate a measure. (County Br. 22-27) Anderson County does not advocate for a rule that one bad vote is always enough. Instead, Anderson County believes that South Carolina should join other jurisdictions that recognize that one bad vote can be enough in an exceptional case like this one. Here, a lame duck County Council rammed through an unjustifiable payment to a single individual, with no public notice and no opportunity for debate. The mode of passage was calculated and choreographed. (R. p. 1983) The tainted voters were instrumental in the debate and passage. This was the opposite of reasoned and deliberate public legislative action. The lame duck Council's passage of the Severance Agreement was extraordinary and improper, and the analysis of other courts' review of similar sorts of extraordinary conduct provides helpful guidance to this Court in fashioning a response.

VII. Preston Knew Votes Were Being Cast, and Sat Silently By

Preston is likewise wrong that under the egregious facts of this case, he had no duty to speak up and make clear conflicts of interest known during the vote on his Severance Agreement. (Preston Resp. 42-44) As County Administrator, Preston was the County's chief executive officer. He owed the County a high duty of loyalty, and he retained that duty at the time that he sat silently by and watched Council Members who were personally beholden to him vote in favor of his million-dollar Severance Package.

Preston seeks to excuse his silence by observing that the Council Members who voted for his Agreement while receiving favors from him should have policed themselves. This may be

true, but it is immaterial. Any breach by them of their duties does not relieve Preston of his obligations as County Administrator.

Preston next suggests that his silence was not fraudulent because it involved a legal opinion. This argument, too, obscures the point. Preston had a duty to disclose the very material facts that Michael Thompson was actively courting Preston for employment and that Ron Wilson's daughter had just received a sweetheart deal from Preston. Legal conclusions might flow from those facts – and indeed surely would have – but Preston's breach of duty involves his silence on the ***facts***.

Preston is also wrong – on the facts and the law – in arguing that disclosure of these two plain improprieties would not have mattered. As for the facts, Ron Wilson had the only copy of the Agreement and announced he was the only Council member to have seen it. Thompson was the Chair. Without their crucial participation, the Agreement could not even have been introduced. By allowing Thompson and Wilson to participate, Preston's silence caused passage of the Severance Agreement.

More fundamentally, however, Preston misconstrues the appropriate legal analysis and burden of proof in a case of fraudulent concealment. Black letter law provides that "when there is nondisclosure of a material fact, the courts permit inferences of inducement and reliance." 37 AM. JUR. 2D *Fraud and Deceit* § 238. That makes sense, given the difficulty of providing proof about "what might have been" had a fraudulent concealment not occurred. *See Vasquez v. Superior Court*, 4 Cal. 3d 800, 814 (1971) ("The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction . . . .").

The Restatement makes clear that a misrepresentation need not be "the sole or even the predominant or decisive factor" in influencing a plaintiff's conduct, nor is it necessary for a

plaintiff to show that he "would not have acted or refrained from acting as he did unless he had relied on the misrepresentation." RESTATEMENT (SECOND) OF TORTS § 546 cmt. (b). Instead, the inquiry is whether the representation "played a substantial part, and so has been a substantial factor, in influencing [the plaintiff's] decision." *Id.*

Preston's final contention, that his duties were all excused by the fact that he had asserted a claim against the County (Preston Resp. 44), is meritless. He was certainly free to negotiate with the County in his own interest. But as long as he was employed, he retained the duty not to collude for his own benefit by sitting silent in the face of obvious and egregious impropriety.

The roles that Councilmen Thompson and Wilson played in passing the Severance Package were a "substantial factor" in passing the Package. That is enough to support the County's claims of breach of duty, fraud, constructive fraud, and negligent misrepresentation.

VIII. Anderson County Should Be Given Leave to Amend its Complaint Before Any Future Proceedings in this Case

After the Circuit Court interjected the quorum issue into this case, the County moved to amend its Complaint to allege that the invalidation of four votes destroyed a quorum and rendered the Severance Agreement void. (R. pp. 3245-70) The County's motion to alter or amend raised the same argument. (R. pp. 3165-68) The Court of Appeals accepted the County's quorum argument but never reached the denial of the motion to amend. Although the County contends this Court can fashion a remedy without a complaint amendment, the County seeks to preserve the amendment issue should proceedings in this lawsuit continue.

Preston's response on this point, to the extent intelligible,[12] is to raise – yet again – many of the same arguments presented at length in his own initial brief regarding the quorum issue, including that accepting the County's quorum argument somehow "prejudices" Preston; that the

[12] The County respectfully notes that Section VII of Preston's brief contains numerous typographical errors, incomplete sentences, and related problems.

manner in which the County raised the quorum argument, through a Rule 59(e) motion, was improper; and that the quorum issue was part of the case prior to the Circuit Court's decision. Rather than rehash these arguments, the County refers generally to Sections II and III of its own Response Brief to Preston, including in particular the County's discussions as to why Preston cannot demonstrate any prejudice flowing from the timing of the quorum issue (County Resp. 10); why the County's raising the quorum issue through Rule 59(e) was proper (County Resp. 10-13); and why the quorum issue was not part of this case until the Circuit Court issued its Order invalidating four votes (County Resp. 13-14). For these reasons, if this case continues, this Court should clarify that the County must be permitted to amend its Complaint.

IX. This Lawsuit Did Not Breach the Severance Agreement, and There is No Basis for an Award of Attorney's Fees Against the County

By voiding the Severance Agreement, the Court of Appeals removed any argument that Anderson County's lawsuit violated that Agreement. That underlying decision should stand, but this Court should also clarify that this lawsuit did not breach the Severance Agreement, and that Preston has no claim for attorney's fees.

Anderson County has cited substantial authority that, absent a very clear expression of intention to the contrary, a lawsuit challenging the validity of an agreement containing a covenant not to sue is not itself a breach of that covenant. *E.g., Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966). Such an "incontestability clause" is extraordinary and must be spelled out. Preston is incorrect that Anderson County's attorney testified that "incontestability" was intended. (Preston Resp. 48) Tom Bright testified that he "was not contemplating" including language to prevent a suit like this one when he drafted the covenant not to sue. (R. p. 472 ll. 16-25)

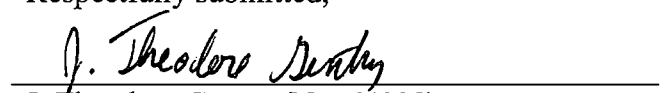
The covenant is also limited to claims "relating to Mr. Preston's employment with the County," and Preston muddies the waters by suggesting that the claims in this lawsuit "relate to Preston's prior employment." (Preston Resp. 48) They do not. The claims the County has asserted challenge the validity of the Severance Agreement, not actions Preston took for the County while acting as County Administrator.

Finally, even if this Court were to conclude that the Severance Agreement should stand, Anderson County's decision to challenge the Agreement was reasonable, for the many reasons set forth in Anderson County's briefing. In the interest of judicial economy in a matter than has lived a long life already, this Court should clarify that this suit was substantially justified under S.C. Code Ann. § 15-77-300 and that Preston has no right to recover his fees. There is no reason to wait for a second round of appeals to reach that conclusion.

CONCLUSION

The Severance Package was a collusive political exit strategy, not a reasoned piece of legislation for the public good. Anderson County is entitled to judicial relief.

Respectfully submitted,



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June 26, 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

RECEIVED
JUN 26 2018
S.C. SUPREME COURT

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.

PROOF OF SERVICE

I certify that I have served this 26th day of June 2018, the Reply Brief of Petitioner-Respondent on counsel for the Respondent-Petitioner and Respondent by depositing copies of same in the U.S. Mail, first class postage prepaid, addressed as shown below:

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