THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

RECEIVED
JUN 14 2018
S.C. SUPREME COURT

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.

RESPONSE BRIEF OF RESPONDENT-PETITIONER JOEY PRESTON

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STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), SCACR, Preston adopts Anderson County's ("County") Statement of the Case except as to the description of Preston's counterclaims. (Anderson County Brief, p. 2)[1]

[1] For purposes of reading ease, Preston will cite to Anderson County's Brief as "AC Brief" and his own brief as "Preston Brief."

STATEMENT OF FACTS

"It is clear to this Court that what has been referred to by both sides as a "toxic political environment" did exist in Anderson County on the 18th day of November 2008." (R. p. 3)

"We were cutting off potential liabilities. We weren't trying to do it. We did it." (R. pp. 1622)[2]

I. BACKGROUND OF PRESTON'S TENURE.

Preston and his family moved to Anderson County in 1996 after he accepted the position of Anderson County Administrator. (R. p. 913, lines 1-2) Prior to moving to Anderson, Preston's career enjoyed a quick ascension through the ranks of the local government sector: first, as an administrative services officer for the City of Charlotte; then, as the Director of Zoning and Development for York County; and last, as Cherokee County Administrator for ten (10) years. (R. pp. 911, line 4-912, line 18) Contrary to Anderson County's instant portrayals, Preston was a highly capable Administrator and generally viewed as such. (R. pp. 1589, line 16-1600, line 24)

Despite the snares laid by political foes, during the eleven consecutive years of Preston's tenure, Anderson County received clean audits from certified public accountants every year. (R. pp. 1601, line 15-1602, line 22) During Preston's tenure, Anderson County won six consecutive national awards for transparency in financial reporting. (R. p. 2906) Michael Cunningham worked with Preston for nearly eleven years (1998 until 2009) and, during that time, he never saw Preston do anything unethical. (R. p. 558, lines 5-11)[3]

A. A Blood Feud Dawns and Warring Factions Ensue.

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[2] Trial Testimony of Gracie Floyd, Anderson County's longest presiding Council-member.

[3] During his tenure, and at the direction of Council, Preston helped: improve transportation for minority communities (see R. p. 1598, line 19-1599, line 12); obtained grant monies to clean mill sites (see R. p. 1599, lines 13-25); tore down dilapidated houses (see R. p. 1600, lines 2-10); improved roads and access (see R. p. 1600, lines 16-22); improved utility infrastructure (see R. p. 1617, line 11-20); coordinated the construction of a sports complex, a library, and revamped zoning (see R. p. 1601, line 15-1602, line 22).

The rancor afflicting County politics dates back to the mid-90's when Anderson County decided to build the Beaver Dam Sewer Line. (R. p. 636, lines 2-25; p. 511, lines 17-24; p. 1603, line 22-1604, line 5; p. 1605:11-22; p. 1606:3-23; p. 1607; p. 2900-2907) The County sought to build the sewer line to serve industrial development on Interstate 85, but a portion of the line crossed property owned by council member Cindy Wilson, who sought to block construction. (R. p. 636, lines 5-13; p. 2902). (See also FN)[4]

Over the next few years, C. Wilson sued Anderson County three times causing it to incur several hundreds of thousands of dollars in legal fees. (R. p. 636, lines 5-13; p. 2902) Reportedly, C. Wilson sought to preserve the "way of life" of "large family farms and high-dollar estates" of the "Old South." (R. p. 2902) And, as such, naturally pitted against a County Administrator with a progressive bent.

Once "she gets in her head what correct is...she becomes completely and totally fixated on it. Almost obsessively, compulsively." (R. p. 2906) The Beaver dam fray prompted a successful run for County Council, which is reported to have immediately transformed into "high theater." (R. p. 2901) A Wilson family friend described Wilson as "sometimes given to conspiracy theories to explain those who disagree with her." (R. p. 2905) Almost immediately upon arrival, C. Wilson began accusing Preston of "Enron-style accounting problems," but never with actual proof. (R. p. 2906). She clamored for a "forensic audit of county finances." (R. p. 2906) Within a year of her assuming office, C. Wilson's fellow Council members passed a resolution condemning her for efforts to pursue "vendettas and outright lies." (R. p. 2907)

The dispute escalated between Preston and C. Wilson and, over time, degenerated into bitter political factions pitting supporters of C. Wilson against virtually anyone who appeared to support

[4] R. pp. 3-4;p. 295;p. 636, lines 11-25;p. 1605, line 8–p. 1607, line 25;p. 2414-2416;p. 2428 (Attorney Tom Bright notes from 10/04/2008: "All related to Beaver Dam sewer line. This is payback for [C. Wilson].)"

Preston.[5] Repeated accusations and claims, concerning various matters, by C. Wilson and others surrounding her about Preston ensued.[6] Eventually C. Wilson became a member of County Council heightening the visibility of the acrimony to new levels. Over the ensuing seven (7) years, the blood-sport (as former Council member Waldrep once called it) of Anderson County politics became unrivaled in ugliness. (R. pp. 505, lines 17-25; 517, line 18-p. 518, line 18.) Preston began to receive anonymous phone calls at his home. (R. p. 843, lines 13-24 (discussing call received by Preston's son).) Increasing threats were made against Preston. Anonymous letters were sent accusing Preston of all sorts of behavior, including one sent to the pastor of his church. (R. pp. 2916-2917) Individuals began following Preston and the harassment grew so bad he had to have Anderson County's chief security officer follow him for protection. (R. pp. 842, lines 24-25) And, Preston endured various political stunts to gain political advantage over him. (See R. p. 4 (citing R. pp. 2414-2416, 2421-2422, 2640-2647 at ¶22, 2760, 2832-2836, 2841-2842, 2850-2858))

The harassment was similarly leveled at Council members who endeavored to work cooperatively with Preston. Former Council member Bill McAbee testified that the political climate had grown so bad "from the people that supported [C.] Wilson and her group...that he felt threatened, other council members felt threatened..." (R. pp. 652, lines 13-19; see also R. pp. 868, line 25-p. 869 line 23) By way of example, Council members (all except C. Wilson and Waldrep) received anonymous letters at their homes threatening sodomy and prison.[7] A radio caller on WAIM radio made comments about his

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[5] R. p. 505, lines 5-11; p. 517, line 19-p.518, line 18; p. 845, lines 1-25; p. 1607, lines 1-20; p. 1609, lines 19-22.

[6] R. p. 4; p. 295; p. 844, lines 7-18; p. 853, lines 3-18; p. 1607, lines 1-20; p. 1609, lines 19-22 (Preston "main object" of C. Wilson's baseless allegations); R. p. 2423 (Listing C. Wilson's unfounded accusations against Preston); 2425-2427 (Listing C. Wilson's defamatory accusations against Preston); p. 2428; pp. 2896-2898)

[7] See R. pp. 650, line 12-p. 654, line 10 (McAbee testifying about letters to Preston and all council members except C. Wilson and Waldrep making threats including prison and sodomy); 653; 1265,

intentions "to take out" Michael Thompson and "spend the rest of his life in federal prison..." (R. pp. 1266, 2928) Other verbal threats were made against Council member McAbee and his family. (R. p. 654, lines 14-16)[8] Indeed, matters had grown so bad that SLED commenced a criminal investigation. (R. p. 653 line 16-p. 654, line 8) The letters, phone calls and stalking instances continued until the 2008 Council departed office in December of that year. By 2008, the political environment in Anderson County had grown nothing short of toxic, with a top target – Joey Preston. (R. pp. 842; 1607, lines 1-20; 1609, lines 19-22)

II. Interference With Preston's Duties

The contentiousness between Preston and C. Wilson increasingly invaded Preston's professional life. Eventually, by 2008, the interference with his job became so oppressive, Preston, with the approval of then sitting Council filed a lawsuit against both C. Wilson and her ally, Bob Waldrep, due to their disregard of the Home Rule Act.[9] Indeed, the Anderson County Court of Common Pleas eventually enjoined both Waldrep and C. Wilson from further interfering with Preston's official duties. (R. pp. 2640-2647) Circuit Court Judge J.C. Nicholson found:

- Paragraph 24: "Exhibit 15 indicates as recently as August 5, 2008, Defendant Waldrep endorsed publicly alleged efforts of newly elected Council members who have not yet taken office to place a particular County employee on leave in January of 2009." (R. p. 2644)
- Paragraph 25: "Per the County Personnel policies, only the County Administrator can place a County employee on leave." (*Id.*)

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lines 14-21; 840-841; 2922-2926; 2933)

[8] Such conduct also included less serious but nonetheless demeaning behavior. For example, on one occasion, C. Wilson's followers distributed toy ducks, would quack, and use "a duck caller" during a public Council meeting whenever Council member Floyd spoke. (R. p. 1613, lines 6-12.) On other occasions, C. Wilson's supporters—in open meetings—called Floyd a "clown," a "court jester," and the "Village Idiot." (R. p. 1623, lines 14-24)

[9] See R. p. 4 (*Finding* "Council members disregarding the legal 'chain of command established by the Home Rule Act'."); R. p. 2641 (*Finding* Action "filed with the approval of a majority of the members of Anderson County Council.")

- Paragraph 10: "Previous attempts by the County Administrator, County Attorney and County Council members to stop Defendants from ordering and instructing County employees have been unsuccessful and ignored by [C. Wilson and Waldrep." (R. p. 2642)
- Paragraph 27: "The County Administrator's duty to supervise his employees is being intentionally thwarted by [C. Wilson and Bob Waldrep]." (R. p. 2644)
- Paragraph 29: "The actions of [C. Wilson and Bob Waldrep] have interfered with the County Administrator's ability to do his job." (*Id.*)
- Paragraph 30: "The actions of [C. Wilson and Bob Waldrep] have adversely affected the morale of the County employees." (*Id.*)
- "Plaintiff has shown he is likely to prevail on the merits in this case." (R. pp. 2640-2647).[10]

Importantly, after the Circuit Court made the findings against C. Wilson and Waldrep, Anderson County adopted Resolution 2009-63 ratifying their conduct as taken on behalf of Anderson County in their official capacities. (R. pp. 32-33, bullet point 5; R. p. 57, FN 28; R. pp. 3300-3303; see also *infra*)

The testimony at trial unequivocally established that, after the primaries in June of 2008, and continuing through December of 2008, Councilman Waldrep, Councilwoman C. Wilson, and the three incoming Council members-elect (Eddie Moore, Tom Allen, and Tommy Dunn) began holding a series of meetings, on Sunday, at Bob Waldrep's office. (R. pp. 5; 369, line 22-p. 370, line 22) "The meeting participants excluded others on Council with whom they would be serving." (R. pp. 5; 371, line 18-p. 372, line 4) During those meetings, the soon-to-be majority of Council laid out an intricate agenda including: firing the then County Attorney (the McNair Firm); hiring Nexsen Pruet as the new firm; hiring Bob Daniel as their investigator of sorts; designating the next Chairman (Eddie Moore); drafting resolutions for the first meeting in 2009; implementing a hiring freeze; compiling a list of employees (*i.e.*, political adversaries) they would fire; and how to get rid of Joey Preston. (R. pp. 372, line 5-p. 379,

[10] Preston filed the lawsuit against C. Wilson and Bob Waldrep and the original hearing occurred on September 24, 2008, the day before Preston gave notice to the County of his claims for constructive discharge and anticipatory breach of contract. (R. pp. 2424, 2640-47) Later, after the County executed the Severance Agreement, Michael Cunningham, the new County Administrator, was substituted as the Plaintiff. However, the events referred to in the Order involved Preston, not Cunningham.

line 17; 2872-2873)[11] What the documentary evidence lays most plain, however, is the group's intent regarding Preston.[12]

III. Preston's Claims

On this backdrop, Preston's employment claims arose. (R. pp. 2026-2028) At bottom, C. Wilson, Waldrep, Council-elect Edwin Moore ("Moore"), Council-Elect Tom Allen ("Allen"), and a handful of County citizens wanted Joey Preston out of Anderson and had actively worked to drive oust him for years.

Preston first notified the County of the claim on September 25, 2008, after having retained counsel. (Id.) The County referred the claim to the personnel committee, which then hired Tom Bright of Ogletree Deakins, one of the largest employment firms in the United States. (R. pp. 803, line 17-p. 804, line 10.)

Multiple witnesses testified that Bright had counseled them that if the County lost an ensuing lawsuit, it could cost the County over two million dollars ($2,000,000.00). (R. pp. 461, line 8-p. 462, line 5; 623, line 22-p. 624, line 3; 1254, lines 17-25) When asked Bright similarly indicated Preston could

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[11] During cross-examination, Waldrep conceded the group meeting at his office discussed specific employees (*i.e.*, Michelle Ricketson, Bill Strewing, Brandon Grace). Curiously, none of them remained employed by Anderson County after the newly elected officials took office. (R. pp. 377-379, line 17) Joey Preston was also specifically discussed. (R. p. 380, lines 17-20)

[12](See R. pp. 2635 (8/14/08 E-mail from Moore to Waldrep stating, "[Joey Preston] just wants to freeze everything **so we can't run him off**") (emphasis added); 2825 (8/04/08 E-mail from Moore to Jena Trammel: "Hopefully we can get [Joey Preston] **run out of Anderson County**...") (emphasis added); 2827 (8/13/08 E-mail from Reporter Stan Welch to E. Moore regarding the audit proposed: "Eddie, if you can get the **witch hunters** to understand what should be done, you are the man!")(emphasis added); 2831 (10/20/08 E-mail from Moore to Reporter Stan Welch: "Well, I told radio hog Saturday that they had been **trying to get rid of Joey for 10 years and we did it just by winning a primary**.")(emphasis added); 2422 (Bright Notes 10/13/08: "[H]e's heard [C. Wilson say 'let's fire him.'")(emphasis added).)

possibly win but opaquely added the County could win too.[13] Bright conceded he never conducted analysis of the County's potential tort or §1983 liability. (R. p. 521, lines 2-9)

Shortly following his retention on October 8, 2008, Bright's notes reflect, that at Chairman Michael Thompson's instruction (see R. p. 498, lines 15-23), he interviewed all seven Council members (including C. Wilson and Waldrep) and the County Attorney to receive their input.[14] Interestingly, Bright's notes reflect the exact sentiments—in October 2008—as were reflected by the Severance Agreement vote on November 18, 2008—five in favor, two against. (See FN. 14)

Following two personnel committee meetings and a month's worth of negotiations, Tom Bright and Preston's lawyer reached a potential resolution of the dispute. (See R. pp. 2445-2456) Correspondence between Bright and Preston's attorney confirms, contrary to the County's suggestions, that the proposed Severance Agreement was, in fact, still being negotiated until late in the afternoon on November 18, 2008. (Id.) On the evening of November 18, 2008, Anderson County Council approved the Severance Agreement by a vote of 5-1-1 mirroring the vote tally for almost all important decisions made in County government during this timeframe. (R. pp. 632 line 25-p. 633, line 8)

IV. The Evidence Negating the County's Claims

The County now reduces all of its claims to 2 nuclei of facts. They include: (A) allegations regarding Allison Schaum ("Schaum Allegations"); (B) allegations regarding former council member Michael Thompson ("Thompson Allegations"). The trial evidence regarding each is treated below:

A. The Schaum Evidence:

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[13] Anderson County has treated Bright's testimony as if favorable to it. Untrue. It is true that Bright's testimony on direct was more polished and slightly more positive than bad. However, on cross-examination, Bright did the County no favors and any gentle leanings he exhibited on direct examination quickly subsided. (See R pp. 439-74 (direct); pp. 475-532 (cross))

[14] See R. pp. 2414-2416 (Thompson), 2417-2420 (County Attorney), 2421-2422 (R. Wilson), 2423 (Greer), 2424 (Waldrep), 2425-2427 (C. Wilson), 2428 (McAbee), 2429-2431 (Thompson).

Schaum testified she never discussed the formation of PAC in 2004 with either her father or mother. (R. p. 1451, lines 9-17)[15] She similarly never discussed her contacting Anderson County with her father or mother before doing so in 2007. (R. p. 1719, lines 3-6) Neither Schaum's mother nor R. Wilson ever gained any financial benefit from PAC. (R. p. 1714, lines 2-11) Schaum testified that she had never met with Preston before initiating contact with Anderson County in 2007. (R. p. 1716, lines 10-11; see also R. p. 1048, lines 1-21) And she never informed Preston's office that she was Ron Wilson's daughter when she initiated contact in that timeframe. (R. p. 1717, lines 10-14) Preston asked Schaum to create a presentation that she could pitch to County representatives, Department of Agriculture representatives, School Board members, and local farming interests, which she did. (R. pp. 1716, line 19-p. 1717, line 9; 1050, line 15-p. 1051, line 19)

At the urging of the Farmer's Market Board and the Department of Agriculture, Preston and Schaum executed the original contract in September of 2007. (R. pp. 1052, lines 1-20; 2149-2152) Preston agreed to "revisit [the contract in] about a year and see where [they] were." (R. p. 1728, lines 10-15; 1063, lines 5-8)[16]

Schaum's initiatives landed Anderson County an eighty thousand ($80,000.00) grant, which was double the amount of the top line number Preston had placed on the program's expenditures. (R. pp. 1730, line 6-p. 1731, line 9) PAC spearheaded three conferences in Anderson County. (R. pp. 1731, line 10-p. 1732, line 3) The third conference, the Carolina Farm Stewardship Conference, occurred during the last week in October of 2008 and hosted over 500 attendees. (R. pp. 1731, line 10-p. 1735, line 4;

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[15] Schaum's testimony in this regard is consistent with the general tenor of her relationship with her father, which was not particularly close. (See, e.g., R. pp. 1736, line 22-p. 1737, line 13 (Relationship with her father was not one where they discussed a lot, including their work.)

[16] According to Schaum's testimony, her father did not know she was pursuing the contract, nor did she discuss it with him before its execution. (R. p. 1720, lines 1-6) In fact, R. Wilson did not learn of the contract until after the fact and, "He wasn't very happy" about it. (R. p. 1736, lines 12-21)

see also 2134) On the heels of this conference and a little over a year after executing the pilot Services Contract, Schaum contacted Preston because she hoped the trial period would be over. (Id.; R. p. 1057, lines 19-20)

Schaum drafted the amended Services Contract and proposed it to Preston. (R. pp. 1736, lines 21-25; 1063, lines 21-25) Like the original Services Contract, Schaum testified she never discussed the amended Services Contract with her father. (R. p. 1736, lines 1-8) Schaum noted she never spoke to her father about her work and he never spoke to her about his; the two did not have that type of relationship. (R. pp. 1736, line 1-p. 1737, line 13)

Contrary to the County's portrayal, the amended Services Contract was not a "rich" agreement. While the amended Services Contract did have a term and a liquidated damages provision, the agreement contained no minimum hour requirement, meaning the County could reduce Schaum's weekly pay to virtually nothing if it so chose. (R. pp. 1735, lines 10-15; 1104, line 24-p. 1105, line 4; 1297, lines 8-22)

Schaum never discussed Preston's employment dispute with him. (R. pp. 1739, lines 4-7; R. pp. 1104, line 24-p. 1105, line 4) Schaum never discussed Preston's Severance Agreement with him. (R. p. 1739, lines 8-10) Schaum never discussed the amended Services Contract with R. Wilson. (R. p. 1739, lines 15-20) R. Wilson did not benefit from the amended Services Contract. (R. pp. 1739, line 24-p. 1477) R. Wilson did not benefit from Preston's Severance Agreement. Schaum did not benefit from Preston's Severance Agreement. (R. p. 1740, lines 2-4) Simply no relationship existed between the amended Services Contract and Preston's Severance Agreement. (R. p. 1740, lines 5-8; 1105, lines 7-9) Indeed, no evidence even demonstrates Schaum knew of Preston's employment dispute, which, in fact, she did not. (R. pp. 1739, line 4-1740, line 4) And, no evidence demonstrates R. Wilson even knew about the amended Services Contract when he voted in favor of Preston's Severance Agreement.

B. The Thompson Evidence:

According to the testimony of both Thompson and Preston, Thompson first approached Preston in the beginning of March 2008 and inquired whether the County had any interest in hiring him after he rotated off County Council at the end of December 2008. (R. pp. 783, lines 20-23; 785, lines 6-9; 1819, lines 2-24.) Preston responded that he believed Thompson's background would be a good fit for the County. (R. pp. 785, lines 4-17; R. pp. 1820, line 1-p. 1821, line 24 More credentialed than 95 to 98% of County employees, Thompson: had an MBA, had nine years of purchasing experience with the Bosch Corporation wherein he managed a fifty-six million dollar commodity portfolio, and had a real estate license and a background in real estate.[17] Preston informed Thompson he thought he would make a good fit with the assessor's office (R. pp. 785, lines 18-22; 1827, lines 1-6)

Preston encouraged Thompson to pursue appraisal courses, which is confirmed by an e-mail dated March 4, 2008. (R. pp. 783, lines 12-19; 1109, line 11-p. 1110, line 13; see also 2067-2070) Thus, by March of 2008 even before the Anderson County primaries and a full six (6) months before Preston's employment dispute even arose, Thompson and Preston had already discussed Thompson's employment with the County and Preston had agreed to hire. (R. pp. 785, lines 4-17; 1820, line 1-1821, line 24) Yet, given the chance, the County would lead this Court to believe Thompson parlayed his Severance Agreement vote in exchange for a job.

Thompson testified he contacted Preston about another opening with Anderson County in August of 2008. (R. pp. 794, line 19-p. 796, line 4; 1110, lines 23-25) E-mail correspondence from Thompson confirms the fact. (R. p. 2076.) The position sought by Thompson was for a position as assistant purchasing manager. (R. p. 794, line 19- p. 796, line 4.) According to Thompson, he asked Preston about the position but Preston indicated another County employee was in line for the spot. (R. p. 794, line 19-p. 797, line 16; 798, line 12-p. 799, line 3.) However, Preston told Thompson the promotion of

[17] See R. pp. 1820, line 2-p. 1821, line 11, Preston; 770, lines 19-21; 863, lines 2-19; 865, lines 12-24; 2863-2865; see also 562, lines 12-21 (Thompson was a great candidate but for the political climate).

existing personnel would create an opening. (Id.) And Thompson would get the subsequent opening resulting from the internal promotion. (Id.) This conversation occurred nearly a month before Mr. Preston's employment dispute with the County ever arose. (Id.)[18]

Like all other witnesses in the case, Thompson testified he received no benefit from the approval of Preston's severance agreement. (R. pp. 867, lines 19-21; 868, lines 2-5.) Preston received no benefit from his pursuit of a job from the County. (R. p. 867, lines 14-16.) No *quid pro quo* exchange existed between the severance agreement and his pursuit of a County job. (R. p. 867, lines 12-13.) Indeed, no relationship existed between the two whatsoever. (R. p. 866, lines 12-25.) Preston agreed to hire Thompson in August of 2008 for the position of Buyer, before the proposed Severance Agreement or employment dispute ever existed (R. p. 866, lines 12-25; 1111, lines 4-7) and Thompson testified he would have voted in favor of the Severance Agreement regardless. (R. p. 866, lines 16-24)

Contrary to the County's suggestions, Thompson testified he favored the Severance Agreement because the political infighting over Preston had begun to threaten potential economic development initiatives. (R. pp. 859, line 13-p. 861, line 6) Thompson did not believe it served the County's "best interest to go through a drawn out litigation process." (Id.) And Thompson confirmed he did not believe it served the County's best interests to spend two million dollars investigating Preston – as it has. (Id.)

ARGUMENT

STANDARD OF REVIEW

Preston largely agrees the scope of review applicable to this case is *de novo*. However, it is likewise true that, as to "questions of credibility" (see, e.g., R. p. 40), significant deference should,

[18] Little debate can exist that Thompson far exceeded the credentials of the position identified by Preston in August of 2008. For example, the Buyer II job required a bachelor's degree in business, marketing, or accounting. (See R. pp. 2082-2083) Thompson had an MBA. (R. pp. 863, lines 2-19; 865, lines 12-24) The position required four years of progressively responsible supervisory work. (See R. pp. 2082-2083) Thompson had 9 years at Bosch. (Id.) And Thompson was honorably discharged from the Navy. (Id.)

therefore, be afforded to trial court findings where matters of credibility are involved. See Aiken County Dep't of Social Servs. v. Wilcox, 304 S.C. 90, 403 S.E.2d 142 (Ct.App.1991). Despite the broad scope of review, Anderson County still continues to bear the burden of convincing the Court that error occurred below. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979). To the extent the County seeks review of the Circuit Court's denial of its motion to amend, the scope of review is whether an abuse of discretion has occurred. Armstrong v. Collins, 366 S.C. 204, 228, 621 S.E.2d 368, 380 (Ct. App. 2005).

I. THE COUNTY'S POST-TRIAL, QUORUM THEORY MISAPPLIES ITS OWN CODE CAUSING THE LOWER COURT TO COMMIT ERROR.

A byproduct of the County's untimely pursuit of unpled quorum issues ("Quorum Issues"), the two judge panel of the Court of Appeals ("Lower Court") misapplied the Anderson County Code ("ACC") by invalidating Preston's Agreement.[19] Substituting its own view, the Lower Court substantially ignored the Circuit Court's analysis of Anderson County's actual Code.[20] But, what the Circuit Court observed and the Lower Court overlooked, were indicia throughout the County Code manifesting a legislative intent to define the term quorum without reference to voting disqualification issues (treated collectively as "Voting Capacity"). (See R. pp. 47-49)

A. Pursuant to ACC §2-37(g)(4), But Not ACC §2-288, the Circuit Court Found Four Members Should Not Have Voted.

[19] Setting aside pleading and preservation deficiencies (treated in Section III), the legal correctness of the Lower Court's findings as to the Quorum Issue underlies all but two (i.e., Arguments V and IX) of the grounds asserted by the County in its Brief. Where appropriate, Preston will incorporate the analysis from Section II into relevant portions of Section III.

[20] When still before the Circuit Court, the County claimed it had raised the Quorum issue during trial, see R. p. 3168 p. 48, only to claim next the parties tried the Quorum Issue by consent. (R. p. 3249) Then, once at the Lower Court, the County claimed the prospect of the Quorum Issue never arose before judgment.

Due to an appearance of impropriety, the Circuit Court found four votes ran afoul of ACC §2-37(g)(4): Thompson, R. Wilson, C. Wilson, and Waldrep. (R. pp. 8-9) As to C. Wilson and Waldrep, the Circuit Court found both had accrued a financial benefit, despite voting against the Severance Agreement. (R. pp. 10) When issuing the finding, the Circuit Court recognized C. Wilson and Waldrep "voted against their respective interests." (R. p. 10) By contrast, the Circuit Court found neither Thompson nor R. Wilson, "derived [any] financial benefit." (R. p. 9) The Lower Court did not alter these findings, nor has the County challenged them in any way. Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015).

1. Two Separate Sections of the County Code Address Conflicts of Interest: One Concerns Procedure the Other Substantive Ethics.

Importantly, two sections of the Anderson County Code address what Council members must do when they possess "personal or financial interests" in matters before the public body. The first, ACC §2-37(g)(4),[21] appears as the fourth enumerated procedural item beneath Section 2-37(g), entitled: "parliamentary procedure." (Id.) The provision lists twelve procedural rules governing Council's internal meeting processes. See e.g., City of Pasadena v. Paine, 126 Cal. App. 2d 93, 271 P.2d 577 (Cal. App. 2 Dist. 1954) The second, ACC §2-288, prescribes Council members' substantive ethical obligations when they possess a personal or financial interest in matters before Council. The former proves substantially broader than the latter presumably by design. As noted, the Circuit Court's findings fell beneath the *former*, not the latter.

Infractions of §2-37(g), as parliamentary procedural rules, fall beyond the purview of South Carolina's courts. As with all parliamentary rules, Anderson County Council self-regulates §2-37(g)(4) through the legislative body's internal appeals process. See e.g., ACC §2-37(g)(1). As Anderson

[21] To increase reading ease, Preston will use shorthand for serial references to Code provisions. For example, Preston will reference ACC §2-37(g)(4) as "§2-37(g)(4)" or "Section 2-37(g)(4)" after its initial citation. Other Code provisions will be similarly treated.

County itself has elsewhere argued and prevailed, South Carolina courts do not loom large over legislative bodies as parliamentary traffic cops. See Bradshaw et al. v. Anderson County et al., C.A. No. 2009-CP-04-00491. South Carolina decisional law instead embraces the widely accepted rule declining such judicial review.[22] South Carolina Public Interest Foundation v. The Judicial Merit Selection Commission, 369 S.C. 139, 143, 632 S.E.2d 277, 278 (2006). Importantly, consistent with the foregoing rule, neither the County Code, nor §2-37(g) provides a remedy for potential infractions beyond Council's internal appeals process.

Falling under an altogether separate section of the County Code (entitled, "Ethics"), ACC §2-288 establishes substantive, ethical standards governing Council members' conduct. Modeled after and mirroring the same, §2-288 restates prohibitions found in the State Ethics Act. Compare ACC §2-288 *with* S.C. Code §8-13-700. Section 2-288 addresses how Council members must manage matters implicating their personal or financial interests when they come before the legislative body. Consistent with substantive nature and effect, the very next paragraph, ACC §2-289, requires Council members, if unsure of their obligations under §2-288, to obtain an advisory opinion from the County Attorney. Unlike the parliamentary portion of the Code, §2-288 specifies the singular instance when County contracts may become "voidable" by infractions of §2-288. (See *infra.*)

2. Only One County Code Provision, Inapplicable Here, Could Support Unwinding Council-Approved Contracts.

Only a single provision of the six listed by §2-288 contemplates unwinding Council-approved contracts due to ethical conflicts. ACC §2-290 provides County contracts may become "voidable" if infractions of §2-288(5) occur. Section 2-288(5) disallows Council members from voting on matters

[22] See also State v. Lewis, 181 S.C. 10, 186 S.E. 625, 631 (1936) ("That is merely a matter of parliamentary procedure, which each body...usually does...regulate[s] for itself."); Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) (Same); see also MASON'S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975).

where they have a "substantial or controlling financial interest in any business entity, transaction or contract with the county" and "approved, awarded, entered into or authorized" the transaction in their official capacities. (ACC §2-288(5)) But, even then, §2-290 only treats such contract as voidable and, only if, collusion also exists by virtue of the contracting party's knowledge of the transaction's interested nature. (ACC §2-290)

Here, as found by the Circuit Court, none of the four discounted votes fell beneath §2-288(5). (R. pp. 9-10) As to Thompson and R. Wilson, §2-288(5) did not apply because, as noted above, they had "no financial interest" in the Severance Agreement's approval. The votes of C. Wilson and Waldrep fell beyond §2-288(5) because their votes against the Severance Agreement excepted them as "interested parties" under language specific only to §2-288(5). Thus, Thompson, R. Wilson, C. Wilson, and Waldrep did not and could not violate §2-288(5).

Important to the quorum discussion below and overlooked by the Lower Court, the County's Code manifests a strong legislative presumption *against* the relief the County seeks under the Code. Such legislative intent confirms the Circuit Court's quorum findings. Apart from §2-290, solely allowing treatment of certain contracts under §2-288(5) as voidable, the County Code's terms create neither civil causes of action nor proper footings for the same.[23] The canon of construction: *expressio unius est exclusio alterius* supports this analysis.

By specifically enumerating §2-288(5) infractions rendering Council-approved contracts as voidable in certain instances, §2-290 and the County Code manifests an intent to exclude the same treatment relative to the Code's other provisions. Rainey v. Haley, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013).[24] The County Code could and would list other violations sufficient to unwind County

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[23] This is not surprising since the State Ethics Act already regulates and affords remedies for such misconduct. In addition, Section 2-290 treats violations of §2-288(5) as malfeasance in office.

[24] See also 62 C.J.S. Municipal Corporations § 378 ("One of the well-recognized rules in the

contracts. The County Code elsewhere confirms the same legislative intent. For example, in pertinent part, ACC §1-10(4) states nothing in the Code shall "affect the validity" of any "contract, agreement, lease, deed or other instrument," when formally approved by County Council. See ACC §1-10(4).

B. The 2008 Council Had a Quorum Because, Under the County Code, Whether a Quorum Exists Does Not Take Into Account a Council-member's Voting Capacity.

Common law rules concerning how to calculate a quorum apply by default only if legal enactments or other controlling provision has not supplanted them. See e.g. Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013)("In the absence of any statutory or other controlling provision") Here, the County Code sets forth a number of provisions manifesting an intent as to how a quorum should be calculated. Despite the same, the County incorrectly contends, and the Lower Court mistakenly accepted, the common law default rules should apply. This is contrary to law.

The County Code solely defines the term "quorum" with reference to Council members' physical presence at the meeting site. Section §2-37(d) states a "quorum" consists of "a majority of the council." (ACC §2-37(d)) Even though the Code eliminates reference to voting capacity in relation to quorum requirements, the Lower Court essentially substituted the definition in §2-37(d) for the one used by Robert's Rules of Order ("Robert's Rules"). (See R. p. 3686) Robert's Rules define quorum as: "the number of voting members who must be present in order that business be legally transacted." ROBERT ET AL., ROBERT'S RULES OF ORDER §40, at 334. By swapping the definition from Robert's Rules in lieu of the one framed by the plain language of the Code, the Lower Court impermissibly rewrote Section 2-37(d). (R. pp. 3686-3687)

It is impermissible for a South Carolina court to rewrite a legislative enactment to "inject matters" nowhere appearing in the language chosen by the legislative body. Hodges v. Rainey, 341

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construction of ordinances is the application of the maxim, *Expressio unius est exclusio alterius*).

S.C. 79, 87, 533 S.E.2d 578, 582 (2000). And, as this Court held in Donze v. Gen. Motors, LLC, "[Courts] cannot read into" legislative acts something that does not fall within "the manifest intention" of the legislative body. 420 S.C. 8, 22, 800 S.E.2d 479, 486 (2017). It defies logic to conclude deletion to any reference of voting capacity in the quorum definition manifests an intention to include it. Yet, that is exactly how the County misapplies its Code.

Indeed the exact opposite proves true. In various ways, the Code manifests an intent to exclude voting capacity considerations with reference to quorum considerations. The Circuit Court's ruling, in this regard, results in treating quorum issues in "*pari materia*," while "produc[ing] a single harmonious result." Fullbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 272, 802 S.E.2d 794, 798 (2017), reh'g denied (Aug. 22, 2017).

Section 2-290 amply illustrates the point. As noted, §2-290 affords the sole contract remedy under the Code for the single ethical violation (of a Council member) supportive of relief. (See *supra*.) Four quorum-related consequences ensue. First, by declaring the Severance Agreement void, the Lower Court granted a remedy not authorized by the Code. (See *supra* (Discussing canon of *expressio unius*...)) Here, the County reserved to itself contractual enforcement rights relative to the sole remedy granted (i.e., declaring contract voidable).

Second, the Lower Court ruled Preston violated a Code provision affording no remedy. See §2-37(g)(4); *supra*. The provision also falls beyond what this Court will review as a parliamentary procedure rule. State v. Lewis, 181 S.C. at 10, 186 S.E. at 631. Third, the sole remedy provided under the Code is treatment of the contract as voidable treatment. See ACC §2-290; Davis v. Cordell, 237 S.C. 88, 98, 115 S.E.2d 648, 654 (1960); Restatement (Second) of Contracts §§ 7 (1981). This means the County must retain contractual capacity. If so, a quorum must exist and voting capacity cannot tie to the existence of a quorum under the Code. Application of §1-10(4) produces the same

result. Last, the foregoing analysis forecloses the one tainted vote rule advocated by the County and discussed more fully below.

Unsurprisingly, then, the County's prior usage under the Code likewise confirms Preston's analysis. As an initial matter, the Code requires construction of its terms: "shall be guided by the previous usage of county council..." ACC §2-37(g)(12 (emphasis added). Until the issue surfaced in this litigation, the County treated quorum issues exactly as Preston describes and found by the Circuit Court. (R. p. 47; R. at FN5)

One example occurred just ninety days before the County filed this lawsuit. On August 19, 2009, two members recused themselves due to financial conflicts and exited chambers for a break while deliberations occurred. Angered by the proceedings, two other members left in protest. Then, the County Attorney, see ACC §2-288, who the Code charges with responsibility to advise Council on disqualification issues, retrieved the two members with conflicts for purposes of reestablishing a quorum.

Consistent with the County's interpretation of the Code, at least before litigation commenced, once the disqualified voters returned, Council had "a quorum of council" and the issue under consideration would "require a majority of those members present and voting" to carry. (R. pp. 3295, line 39-p. 3296, line 43). Thus, three months before filing its Complaint, the County followed prior usage and interpreted the Code's quorum requirements exactly as Preston does now. But now, the County urges the exact opposite, notwithstanding §2-37(g)(12)'s contrary mandate.

Modeled after the State Ethics Act, §2-288(5) mirrors S.C. Code §8-13-700. (See *supra*; see also ACC §2-288(5)) With respect to Code provisions grounded upon a state statutory antecedent, the County Code states: "[U]nless otherwise specifically provided, [they] shall have the meanings prescribed by the statutes of the state for the same terms." (ACC §1-2) Moreover, § 2-37(a) requires:

"County council will conduct its meetings in accordance with...state ethics laws." In determining the correct application of such provisions, then, County Code mirrors how state ethics laws apply.

Here, the State Ethics Commission ("Commission") issued an advisory opinion specifically addressing whether disqualification under S.C. Code §8-13-700 operates to disqualify Council members for purposes of calculating whether a quorum exists. Relative to the Voting Capacity issue, the Commission used the definition of quorum from the Freedom of Information Act ("FOIA") and found disqualification under the State Ethics Act did not impact whether a quorum existed. In a formal opinion SEC AO98-002, the Commission advised:

> [T]he Freedom of Information Act, S.C. Code § 30-4-20 (1991) does not bear out the proposition that the Ethics Reform Act's disqualification provision has any bearing on whether a quorum exists in a public meeting...The Freedom of Information Act (FOIA) states that a quorum is, unless otherwise defined by applicable law, a simple majority of the constituent membership of a public body. S.C. Code § 30-4-20(e) (1991)...Thus, we would find that disqualification under the Ethics Reform Act does not affect the existence of a quorum.

South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006).

The County claims various cases and advisory opinions from other sources render the Commission's interpretation questionable. But, the County misses the point: the County Code constitutes a controlling legislative act essentially requiring the County to interpret its statute in *pari materia* with parallel state statutes. The Ethics Commission uses the Freedom of Information Act's ("FOIA") definition of quorum when interpreting the State Ethics Act. Unsurprisingly, then, the Code likewise incorporates FOIA's requirements and deploys its definition of quorum. (Compare ACC §2-37(d) *with* ACC § 2-37(a) *with* ACC § 2-676 *with* ACC §2-352 *with* S.C. CODE ANN. § 30-4-20(e).

Last, as the Circuit Court correctly noted, the Code's various voting formulations likewise denote Voting Capacity as unintended to relate to whether a quorum existed. (R. p. 47 & FN4) For example, for certain votes (e.g., Preston's Severance Agreement), the measure carries with a majority of those present and voting. Elsewhere, however, measures carry with a vote of a majority of a quorum present. Two other Code provisions also operate to impact this analysis. First, Section 2-37(g)(4) requires Council-members to declare themselves not voting in the manner provided by state law when disqualifying interests exist. Second, by operation of rule, Section 2-37(g)(3) automatically casts affirmative votes for those Council-members who possess Voting Capacity but still do not vote (i.e., attempts to deprive quorums and the like). Thus, under the County Code, no distinction exists between a "majority of those present and voting" and a "majority of the quorum present," unless Voting Capacity does not impact the quorum's computation. South Carolina Courts construe legislative acts as to give meaning to all parts. Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003).

II. ILLEGAL, MIRED IN ERROR, AND OFFENSIVE TO EQUITY, THIS COURT SHOULD NOT GRANT UNPLED RELIEF NINE AFTER FILING.

Nine years after filing suit, Anderson County now asks the Supreme Court to deploy its equitable powers to grant an unpled, new remedy ("Revised Claim") consisting of no more than an illegal snatching of Preston's retirement savings. (See AC Brief pp. 16-19, Sect. II; R. pp. 127-129) Numerous other defects afflict the claim. Illegal, infected with manifest error, and offensive to equity, the Court should flatly reject the claim.

A. The Circuit Court's Findings Neither Impacted the 2008 Council's Quorum Nor the Validity of Preston's Severance Agreement.

Anderson County's request for this Court to impose a constructive trust hinges upon the Lower Court's invalidation of Preston's Severance Agreement due to the untimely raised Quorum

Theory. (See AC Brief, p. 16)[25] As an initial matter, Preston incorporates herein, by reference, his analysis from: Section II explaining why the Quorum Theory fails and, thus, the claim fails; Section III(G) explaining why granting the relief would improperly upset the Circuit Court's supportive findings when denying the County's motion to amend; Section II from Preston's Brief also discussing the defects under Rule 15 and 59(e), SCRCP with the claim; Section IV from Preston's Brief discussing the claim's deficiencies; and Section V from Preston's Brief explaining why the unclean hands doctrine should bar the same. Secondly, this relief is altogether improper, the County cites no authority actually supporting the same, because none exists, and this Court should reject the same, without further review.

B. Anderson County Failed to Introduce Clear, Definite, and Unequivocal Evidence of the Elements Required to Impose a Constructive Trust.

Anderson County failed to introduce evidence sufficient to prove the claim the constructive trust it now seeks to impose. 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." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 6 (2012). The County was required, but did not, to prove the *prima facie* elements of a constructive trust by "clear, definite, and unequivocal evidence." Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979). South Carolina Courts impose constructive trusts to prevent unjust enrichment. Hale v. Finn, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010).

The trial judge, a jurist with forty years of courtroom experience, heard the record evidence for over a week, weighed the credibility of the witnesses, see R. p. 40, p. 60, and found no evidence Preston committed wrongdoing. (R. p. 1-40) Then, after oral argument, the Court of Appeals sifted

[25] In Section II of its brief, Anderson County avoids disclosing what it seeks is a constructive trust. Because the County seeks to redirect Preston's retirement funds, a constructive trust claim is the only remedy the Section could reference but, as explained below, does not apply here. (AC Brief, p. 17 (citing S.C. Code §9-1-1680))

the record and agreed the evidence showed Preston was not "at fault." (R. p. 3691) The County identifies no specific findings warranting reversal in connection with discharging its burden of convincing this Court error occurred. Skinner, 272 S.C. at 523, 252 S.E.2d at 892.

The Lower Court flatly rejected the County's accusations of wrongdoing against Preston. For example, Anderson County accused Preston of breaching his fiduciary obligations. (R. pp. 135-136) But, just like the Circuit Court, see R. pp. 27-28, the Lower Court rejected the claim as contrary to the evidence. (R. pp. 3676-3677) The County accused Preston of ethics violations under state law and the Anderson County Code. (R. pp. 133-134) But, just like the Circuit Court, see R. pp. 23-24, the Lower Court rejected such claims as unfounded. (R. pp. 3678) The County accused Preston of fraud, constructive fraud, and negligent misrepresentation. (R. pp. 135-138) But, just like the Circuit Court see R. pp. 24-27, the Lower Court concluded otherwise. (R. pp. 3679-3681)

When the record evidence fails to establish "fraud, bad faith, [or] abuse of confidence," South Carolina's appellate courts will not, and do not, impose constructive trusts. Carolina Park Assocs, 400 S.C. at 6; see also FN4.[26] Here, Anderson County exerts no effort, identifying or explaining why the findings of the lower courts prove incorrect. Nor does the County explain why this Court should upset the credibility determinations made by the Circuit Court, which remain wholly unchallenged to date, when determining the evidence failed to support the County's constructive trust claim. (See R. p. 40)[27]

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[26] Baptist Found. for Christian Educ. v. Baptist Coll. at Charleston, 282 S.C. 53, 60, 317 S.E.2d 453, 458 (Ct. App. 1984) ("[N]o evidence... [of] actual or constructive fraud or wrongdoing of any kind."); Hemingway v. Small, 284 S.C. 42, 47, 324 S.E.2d 335, 338 (Ct. App. 1984) (Failed to satisfy "clear and convincing" evidence standard.)

[27] The County suggests S.C. Code §9-1-1680 creates a statutory remedy for constructive trust thereby excusing fulfillment of its required showing and purpose. (AC Reply to Preston, p. 17) Not so. The statute merely excepts the doctrine of constructive trust *ex maleficio* from the anti-alienation provisions thereby requiring satisfaction of all facets of the doctrine's application.

Imposing a constructive trust under such circumstances would violate S.C. Code §9-1-1680 and must be denied. Smith v. S.C. Ret. Sys., 336 S.C. 505, 531, 520 S.E.2d 339, 353 (Ct. App. 1999).[28]

C. The County Failed to Prove Any Unjust Enrichment Occurred.

Even if Preston's Severance Agreement remained invalidated, which should not occur, South Carolina courts cannot impose a constructive trust unless the County demonstrates by "clear, definite, and unequivocal evidence" that unjust enrichment somehow occurred. Hale, 388 S.C. at 89, 694 S.E.2d at 57("A constructive trust... is imposed...to prevent unjust enrichment."); Carolina Park Assocs., 400 S.C. at 6 (Available when facts support "obligation in equity to make restitution.") Indeed, this is the whole purpose of such claims. Id. Here, the County failed to do so for three reasons.

First, while claiming otherwise, the County failed to prove the value of Preston's pension benefits by clear, definite, and unequivocal evidence. In lieu of calling live witnesses, the County elected to submit two affidavits from SCRS employees. Yet, neither affiant attests to personal knowledge of the affidavit's contents, nor do they identify the source of the data and calculations. (R. pp. 251-252) Also omitted are the information source's credentials.

While the witnesses very well may have testified consistently with the affidavits, such testimony would nonetheless require an appropriate foundation notably absent from the affidavits. Without some indicia of the reliability of the data and calculations, coupled with the source's credentials, neither affidavit constitutes competent nor reliable evidence. As a result, the affidavits fail to establish the

[28] The County invokes S.C. Code § 9-1-1680 ("Section 9-1-1680") to justify imposing a constructive trust on state retirement monies. (See AC Brief, p. 17) The County cites the statute's reference to "constructive trusts," omitting the language just prior citing S.C. Code § 8-1-115 ("Lien Provision"). Section 8-1-115 allows liens on state retirement monies but only after the conviction of an official for offenses like embezzlement or misappropriation." Id.

reliability of their contents sufficiently enough to satisfy a clear, definite and unequivocal evidence burden of proof. Carolina Park Assocs., 400 S.C. at 6.

Indeed, Dr. Charles Alford, the economist called by the County to testify about such issues, conceded he lacked any understanding of how the calculations were tallied, what the qualifications of the SCRS employees were that made the calculations, and had made no efforts to ensure the accuracy of any of the data or calculations. (R. p. 1300, line 1302, line 10) As to Preston's Master Employment Agreement, Alford likewise failed to take into account terms requiring Preston to receive maximum benefit and could not testify he made certain calculations correctly because they required legal conclusions. (R. p. 1305, lines 1-4) Under Rule 702, SCRE, such evidence fails to assist the Court because it fails to satisfy reliability criteria. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Thus, based upon his testimony, his calculations lack value if no basis sustains the underlying validity of the data.

Third, even if this Court allowed the invalidation of Preston's Severance Agreement to stand, which it should not, Anderson County still could not impose a constructive trust over his retirement funds.[29] A constructive trust only provides a remedy for unjust enrichment. Hale, 388 S.C. at 89, 694 S.E.2d at 57. Moreover, "the equities on both sides must be taken into account in considering an appeal to a court's equitable powers." 27A Am. Jur.2d Equity §78. Such inquiry necessitates taking into account the benefit actually received, for which the public entity remains responsible in *quantum meruit*. United States Rubber Products, Inc. v. Town of Batesburg, 183 S.C. 49, 190 S.E. 120 (1937).

Here, Preston gave up his job as County Administrator and his rights under the Master Employment Agreement, which contained an indemnity provision that survived his termination.[30] Often

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[29] Of note, however, the same analysis applies no matter the theory.

[30] The law is well settled in this nation that where an express contract has been rescinded or abandoned, one furnishing labor or materials in part performance may recover in *quantum meruit* unless the original

overlooked by the County, Preston's employment agreement contains a severability provision, almost certainly forecloses unenforceability of the indemnity clause. Alford conceded the indemnity provisions had economic value. (R. pp. 1309, line 9-1310, line 6) Alford admitted the release in Preston's severance had economic value. (R. p. 1308, lines 7-14) Alford did not take into account the value of any tort claims released by Preston. (R. p. 1312, lines 12-15) And, the calculations relating to the benefit received by the County also required legal interpretations Alford conceded he lacked qualifications to provide. (R. p. 1319, lines 5-7)

The single largest benefit received from the County and, uniformly intended by the 2008 Council, was the ability to avoid the potential $2,000,000.00 financial downside opined by Attorney Tom Bright, if litigation between Preston and the County eventuated. (R. p. 616, line 15-617, line 17; p. 624, lines 16-24) The County received that benefit but squandered it.

Such value ranged between $800,000.00 and $1,000,000.00 before the County filed its Complaint. (R. p. 1837, line 3-9) By the time of trial, over five years ago, the amount had ballooned to $2,300,000.00. (R. p. 661, lines 22-23; see also R. p. 1410, lines 7-8) It is presently believed the amount exceeds $3,000,000.00. Conversely, Preston has lost the value of the covenant not to sue, promised by the Severance Agreement, causing him to incur well over a million dollars in unpaid legal bills.

By simple math, then, the County received nearly triple the value it paid before the Court ever considers the value of what Preston surrenders. By contrast, the calculation of the reciprocal benefit received by Preston starts with a negative number, since he has lost more than he ever received in

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contract remains in force. Strickland v. Coastal Design Assocs., Inc., 294 S.C. 421, 424, 365 S.E.2d 226, 228 (Ct. App. 1987).

severance. In either event, the County has not proved the claim by clear, definite, and unequivocal evidence.

Third, assuming *in arguendo*, the evidence the County had presented had actually supported the claim with proper evidence, the service credits purchased by Preston's severance constitute only a small fraction of the overall number of years supporting the annuity. (R. pp. 251-252) Those funds have already been paid out. Yet, the County still attempts to assert a constructive trust over the full pension. South Carolina's anti-alienation statute disallows such a result. S.C. Code §9-1-1680.

D. What Anderson County Seeks Dramatically Departs From Any Pled Claim in any Operative Pleading and Otherwise Fails.

What Anderson County fails to disclose is why it needs amendment. It is the same reason the Lower Court could not impose a constructive trust. Anderson County's operative pleading, its first amended Complaint, sought to impose a constructive trust over monies held by SCRS in the amount paid to the System. (R. p. 139, ¶¶82-84; R. p. 140, Prayer) In other words, it sought lump sum repayment of $359,258.00 from SCRS. Paragraph 82, for example, of the County's pleading seeks only: "amounts paid to the System." (i.e., $359,258.00) (R. 139, ¶82; R. p. 1986, ¶4(a))

The proposed amended Complaint previously sought by the County, and as denied by the Trial Court, contains identical allegations (i.e., seeking the amount paid to the System) but adding allegations about the County's Quorum Theory. (R. pp. 3267-3269, ¶¶81-84, 88-94) Now, representing: "without question Anderson County requested such relief," see AC Brief, p. 17, the County endeavors to collect the entire severance amount, or as much as possible, from Preston's pension funds, not SCRS. (R. p. 17-19)

Now on appeal, after nine years, the County seeks to recoup not just what was paid to SCRS from SCRS's funds, but instead from Preston, in the full Severance Agreement amount, or as much as his retirement annuity can absorb, all while retaining the benefits it received under the Severance. Such

request violates the statute and cannot issue in the name of equity. Smith v. Barr, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). It is also offensive, yet unsurprising.

Allowing Anderson County to pursue an unpled remedy, different in scope and bottomed on a new theory, and against him, not SCRS, all without notice or an opportunity to be heard, after nine years, on appeal, violates Preston's state and federal due process rights. "Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review." Thompson v. State, 415 S.C. 560, 566 (2016). It is axiomatic: a Defendant, like Preston, is entitled to know the relief sought against him and the factual basis alleged to support such relief.[31]

For this very reason, the South Carolina Rules of Civil Procedure require litigants to plead the facts under which they claim relief. Rule 8(a), SCRCP. It is also the reason why the substantive law of South Carolina disallows claim splitting. See Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34 (1999); Smith, 375 S.C. at 164. "A court's equity powers may not be exercised in such a manner as to deprive a person of constitutionally or statutorily protected rights." Rice v. Garrison, 258 Kan. 142, 152, 898 P.2d 631, 638 (1995)[32] Here, allowing such relief deprives Preston of a chance to interpose an answer, assert defenses, and be heard as to nuances of the amendment.

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[31] Preston would have alternatively asserted: quasi-contract claims; set-off; and indemnification under his original employment agreement's indemnity clause, which incidentally survived termination. (R. p. 001898) Preston would also have asserted estoppel as a defense, which may lie against government bodies in factual circumstances as this.

[32] As noted, the County's brief supporting its appeal asks the Court to reverse the Lower Court's refusal to allow Anderson County to divert Preston's retirement savings as a form purported equitable relief. (AC Brief, p. 16) Assuming this were a proper claim, which it is not, Anderson County did not affirmatively ask this Court to re-issue relief declaring Preston's Severance Agreement invalid as per its unpled Quorum Theory. Indeed, the County's Quorum Theory would, in such instance, altogether fall beyond the ambit of what the County asked this Court to review in its certiorari petition and its Brief. Thus, if this Court vacates the Lower Court's decision as issued without a quorum, then the Quorum Theory should only exist for treatment by this Court under the County's request for an amendment to its pleading, not under whatever theory is presently argued. Review of the County's Rule 15 Motion should progress under an abuse of discretion standard.

E. Allowing Imposition of a Revised Constructive Trust On Appeal Based Upon Unpled Grounds Prevents Preston From Presenting Equitable Defenses.

"Equity makes no distinction between public bodies and private persons as to obligations arising out of contract." Grady v. City of Livingston, 115 Mont. 47, 141 P.2d 346, 353 (1943). Because constructive trusts sound in equity, they implicate equity's ordinary rules and maxims. Mary F. Radford, George Gleason Bogert, & George Taylor Bogert, § 472. Theory of creation, The Law of Trusts & Trustees. Several bar the claim urged here.

First, like rescission, imposing a constructive trust must balance the equities requiring restoration to the status quo. Elview Const. Co. v. N. Scott Cmty. Sch. Dist., 373 N.W.2d 138, 143–44 (Iowa 1985); Sykes v. Reeves, 195 Ga. 587, 591, 24 S.E.2d 688, 691 (1943). While the County claims restoration only applies to rescission, the County seeks to deploy the claim as if it were rescission. No wrongful conduct supports the claim. The County could not obtain rescission, so it tries an end-run. It is a bunch of double-talk, without legal footing, and certainly not equity. Moreover, it is not true that equity, like a well-run clock, will always an affirmative remedy chime. Equity can also embrace inaction and has done so in cases like this. See e.g., Bozied v. City of Brookings, 638 N.W.2d 264, 272 (2001).

This principle accords with the flexibility Anderson County feverishly urges. That is, equity's imagination stretches even to recognition that what furthers equity most may be nothing at all. The notion appears particularly applicable where, also as here, a party such as the County attempts to use an asserted violation of public policy or purported illegal contract, in an offensive way, to thwart what is truly fair and just. Price v. Price, 325 S.C. 379, 383, 480 S.E.2d 92, 94 (Ct. App. 1996). As noted in Preston's brief supporting his appeal, the doctrine of unclean hands likewise would bar the instant claim. (Preston Brief, pp. 33-36) Preston incorporates that analysis by reference herein.

Last, now in year number nine of the litigation, the doctrine of laches bars the County's bid to fiat new relief for constructive trust. "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." King v. James, 388 S.C. 16, 28, 694 S.E.2d 35, 41 (Ct. App. 2010).

Here, the County knew the funds its pleading sought to recover were almost entirely transferred no later than September 12, 2012, nearly six years ago and *before* trial. (R. p. 243) Had the County desired to impose the constructive trust against Preston's pension payments, it could have, but did not, move to amend before trial began. Without doubt a delay of this magnitude qualifies as unreasonable. King, 388 S.C. 28, 694 S.E.2d at 41. Moreover, waiting to assert such claims until arriving at the Supreme Court undoubtedly results in prejudice. In addition to the prejudice discussed in Preston's Supporting Brief and that below, Preston also incorporates by reference the prejudice, futility, undue delay, applicable evidence and such other evidence as appears between R. pp. 3304-23. As noted, Preston has due process rights to know of the claims asserted against him, have an opportunity to be heard, and present evidence in his defense. Accordingly, the doctrine of laches bars the County's revise constructive trust claim

F. **None of the Authority Cited By the County Supports Its Position.**

None of the authority cited by the County teaches equity's flexibility allows a party to revamp its claims on appeal. (See AC Brief, pp. 17-18) Two cases, Hooper and Holland, involve equitable tolling issues. Two other decisions, Daniel and Watson, were decided a half-century before enactment of the modern rules of civil procedure. Daniel involved review of a probate court's issuance of an *ex parte* order. Watson discussed an insurance coverage dispute, a legal adjudication. And, Dibble analyzed a court's ability to appoint a lawyer where the recipient client lacked a right to receive an

appointment. Notably left unmentioned by the County, this Court abrogated Dibble in Ex parte Brown, 393 S.C. 214, 223 (2011). Indeed, the authority cited teaches only one thing: no precedent supports what Anderson County urges.

III. THE COUNTY'S RESCISSION REMEDY FAILS BECAUSE THE COUNTY SEEKS TO KEEP ITS BENEFITS AND TAKE PRESTON'S TOO.

Both the Trial Court and Lower Court correctly ruled Anderson County could not invoke rescission as a remedy:

A. Rescission Proved Unavailable Because the Court Could Not Return the Parties to the *Status Quo* Before the Severance Agreement's Formation.

"It is a well-settled general rule that where a municipality has received the benefits of a contract, equity will not cancel or set it aside without compelling the municipality to do equity by restoring the benefits received." 10A McQuillin Mun. Corp. § 29:144 (3d ed.)[33] Pursuant to this principle, South Carolina precedent requires: "In the absence of fraud...rescission is appropriate only if both parties can be returned to the status quo prior to the contract." See King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984); Rice and Santos, Inc. v. Jones, 279 S.C. 201, 305 S.E.2d 74 (1983). This analysis applies here.

As an initial matter to the extent the County argues rescission as an available remedy under the County Code, Preston incorporates by reference his discussion above in Section I

Both the Circuit Court and Lower Court found the parties could not revert to their status quo thereby barring rescission as a remedy. (R. p. 30; R. p. 3690) The Circuit Court and Lower Court similarly agreed Anderson County had failed to prove any species of fraud whether actual, constructive, or otherwise. (R. pp. 24-27; R. p. 3691) The Lower Court specifically found no evidence established:

[33] While arguing its contracts warrant special treatment due to their public nature, Anderson County proves keen on the notion that public contracts receive elevated footing over private ones. This is not so. But, it is especially not so in equity. "Equity is Equality." First Palmetto Sav. Bank, F.S.B. v. Patel, 344 S.C. 179, 184, 543 S.E.2d 241, 243 (Ct. App. 2001).

"Preston had engaged in fraudulent conduct [ ], breach a fiduciary duty [ ], or was at fault." (R. p. 3691) As a result, the Court of Appeals determined no circumstances existed to "justify...employing an exception to fashion a remedy that does not fully return the parties to their status quo." (R. p. 3692)

Although both rulings and the underlying substantive law prove clear, the County (once again) claims error occurred in usual fashion. Swapping judicial findings for more suitable facts of its own creation, the County then reverse-engineers its desired outcome claiming error occurred. Despite the broad standard of review, the County nonetheless shoulders the burden of convincing the Court error actually occurred. Dorchester Cty. Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

For example, the County claims restoration to the status quo was unnecessary because: "defendant himself [was] at fault for inducing the wrongful payment." (AC Brief, p. 19) Simply ignoring all contrary judicial findings and evidence to the contrary, the County then concludes Preston cannot invoke "changed circumstances" as a defense because he "provided benefits to those voting." (Compare AC Brief, p. 20 *with* R. p. 3677 (no fiduciary violations), p. 3681 (no fraud, constructive fraud, and negligent misrepresentation)) Yet, Anderson County provides no basis for the Court to upset the factual and credibility determinations underpinning both decisions below. (R. p. 40) And, this pattern recurs throughout the County's filing.

The following bald assertion appears on page 20 of the County's brief: "the fact that Preston cannot be returned to the position of County Administrator is irrelevant." (AC Brief, p. 20)[34] According

[34] In telling fashion, Anderson County stitches together a series of cases: all from jurisdictions other than South Carolina, all inapposite to this case, and all lacking in any utility since—despite how the County portrays their holdings—they address issues both clear and well-established under South Carolina law. (AC Brief, pp. 19-22) On page 19, the County cites Admiral Ins. Co. v. Am. Nat'l Sav. Bank, F.S.B., 918 F.Supp. 150, 156 (D. Md. 1996). The Admiral decision analyzes a restitution claim for funds mistakenly paid under an insurance contract where no coverage existed. The Court examined whether the Bank had to repay the funds due to a change of circumstances, only to conclude the Bank had not properly pled the defense. Decided under Maryland law, unrelated to a contract nor involving a public entity, Admiral adds zero value. Id. The County then cites Sokolow, Dunaud, Mercadier &

to the County, this proves especially true "given that is now clear as a matter of law that Preston's Employment Agreement was invalid..." (AC Brief, p. 21) This analysis lacks any basis.

First, the Court cannot restore Preston to more than just his former position. Preston has now lost all of the remedies he could have asserted against Anderson County, certain officials, and private individuals. Preston released all such claims with the Severance Agreement. Since then, Preston's claims have become time-barred and the evidence stale. Even if certain claims somehow could revive (i.e., by tolling or otherwise), other claims (e.g., statutory) clearly cannot. In addition, much of the evidence Preston could have unearthed (text messages, phone numbers, emails, etc.) in 2008 and 2009 will, in most instances, no longer exist. And, Preston has lost the benefit of covenant not sue if rescission were to occur.

Second, Preston's master employment agreement contained an indemnification provision, which survived termination. (R. p. 1899, §17) While valuable in 2009, each successive year renders the indemnification provision less valuable. During the intervening time period (i.e., then and now), the indemnification provision would have helped Preston immensely.

Third, Preston also rejects the notion his employment contract "was invalid." (AC Brief, p. 21) The agreement contained a severability and survival clause. Any invalid provision severed. Relating to the agreement's invalidity, Preston has never had an opportunity to be heard about such issues and has different legal views on the same.

County again cites the decision of Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 452 (4th Cir. 2004) but again ignores the lower court's analysis regarding Griggs. As the lower court

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Carrerras LLP v. Lacher, 747 N.Y.S.2d 441, 447 (N.Y. App. Div. 2002). Only slightly better, Sokolow involved a rescission claim arising out of an alleged fraudulent inducement claim The Sokolow Court found summary judgment should have been denied because, if proved, the facts could support rescission. Id. In addition, also omitted by the County, the Sokolow opinion relied upon the decision of Butler v. Prentiss, 158 N.Y. 49, 64 (N.Y. 1899) acknowledging a party engaging in fraud excuses normal restoration requirements for rescission. (Id.)

explained, Griggs was an ERISA case and had no "bearing on South Carolina law." (R. p. 33) Moreover, Griggs actually supports the trial court's ruling as it confirms rescission is generally disallowed unless the parties can be restored to their prior positions. (Id.) *(citing* DAN B. DOBBS, HANDBOOK ON REMEDIES § 9.4 at 622 (West 1973) ("Plaintiff must make restoration of what he got under the contract in order to get rescission, and his inability to do so will not excuse such restoration...[H]e may be permitted to recover damages, but rescission will be barred...")) [35]

Third, the Griggs decision states: "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." Id. Yet, precisely for the reasons stated in the May 3, 2013 Order on pages 30 and 31, rescission (even if Plaintiff had proved its non-fraud based claims) cannot be granted in this case in a manner that does equity to both parties. Nor has Appellant ever explained how rescission could occur and do equity to both parties.

Finally, the County repeats rescission as appropriate due to the public nature of the contract. Not so. In fact, the exact opposite proves true. See e.g., 10A McQuillin Mun. Corp. § 29:144 (3d ed.) The County cites no South Carolina authority supporting its assertion that a Court in equity should place a County's contracts on unequal footing with those of private citizens. In its brief and below, the County cited the inapposite decision of Thompson v. City of Atlantic City, 921 A.2d 427 (N.J. 2007), bottomed on unique aspects of New Jersey law, for the proposition that rescission is the proper remedy when "a

[35] The County cannot reconcile its argument with the South Carolina precedent requiring parties seeking to invalidate a settlement agreement or release to tender the consideration of whatever has been received under such compromise. See, e.g., Dunaway v. United Ins. Co. of Am., 293 S.C. 407, 410, 123 S.E.2d 353, 354 (1962); Taylor v. Palmetto State Life Ins. Co., 196 S.C. 195, 12 S.E.2d 708, 710 (1940). Furthermore, the County is required to affirm the entire settlement agreement or rescind it in its entirety. 28 S.C. JUR. *Fraud* § 17; First Equity Inv. Corp. v. United Serv. Corp. of Anderson, 299 S.C. 491, 497, 386 S.E.2d 245, 249 (1989) ("A defrauded party is not allowed to rescind in part and affirm in part – he must do one or the other."). Here, the County seeks to undo the Severance Agreement--in part--while retaining all of the benefits. (AC Brief, p. 20)

public act has been taken improperly." [36] (AC Brief, p. 21) As noted *supra* and incorporated herein, however, the lower court found—for a wide number of reasons—the Baird decision controlled. (See R. pp. 12-14; see also *supra*) As a result, this Court should vacate the Lower Court's ruling and reinstate the Circuit Court's final order.

While the Lower Court erred when it invalidated Preston's Severance Agreement, it did correctly observe: "A cause of action seeking rescission and damages assumes a valid contract." (R. p. 3690) By now again pressing its rescission claims, notably without reservation or stated alternatively, the County tacitly concedes Lower Court incorrectly invalidated Preston's Severance Agreement.

IV. *BAIRD* IS THE LAW OF THIS STATE—NOT THE UNWORKABLE FORMULA STITCHED TOGETHER BY THE COUNTY.

After concluding the votes of Thompson, R. Wilson, C. Wilson, and Waldrep were improperly cast, both Lower Courts found the Supreme Court's holding in Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controlled.[37] (R. pp. 12-16; pp. 3682-3683) Adopting the majority view, the Baird Court held:

> In general, the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. See W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955). Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77-78.[38]

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[36] The Thompson decision involved statutory peculiarities under New Jersey's Faulkner Act having no application to the case at bar and bearing no relationship to South Carolina law. (Id. at 42)

[37] For additional discussion and authority, see R. pp. 3421-3425, which Preston incorporates herein by reference.

[38] In following Baird, the Trial Court cited eighteen different opinions from around the country which accord with the Baird Court's analysis and reject that of County. (R. p. 13, FN10)

Relying upon a patchwork quilt of inapposite authority from other jurisdictions (see AC Brief, pp. 22-23), the County tries to side-step the binding precedent established by Baird by, once again, re-arguing only one tainted vote sufficed to rescind Preston's Severance Agreement. (AC Brief p. 22-23)[39] To make matters worse, the authority cited by Anderson County has no application to this case. For example, Thompson v. City of Atlantic City, 921 F.2d 427, 190 N.J. 359 (2007), which Anderson County portrays as "remarkably similar" to this case, does not even vaguely resemble the facts or legal issues at bar.

Thompson arose under a peculiar set of facts under New Jersey's Faulkner Act. Unusual legal consequences arose as a result of the executive functions typically conferred upon New Jersey mayors, which included the approval and negotiation of settlement agreements. Id. at 433. Nowhere does Thompson advance the 'one bad apple taints the barrel' standard advocated by the County. Not one word of Thompson applies to legislative action or vote counting. Not one word of Thompson addresses the treatment of individual votes, disqualification of individual votes, or the disqualification of the total vote of a constituted body. Not one word of Thompson applies to this case.[40]

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[39] If the one tainted vote rule advocated by the County were adopted, Preston notes that every vote where Bob Waldrep and C. Wilson participated in furtherance of pursuing rescission of the Severance Agreement (e.g., authorizing this lawsuit, the appeal, and the expenditure of $3,000,000.00 to fund this case) would all be void or voidable.

[40] The decision of Appeal of City of Keene, supports Preston's position, not that of Anderson County. 693 A.2d 412, 415 (N.H. 1997). Keene accords with Baird noting "an administrative or legislative act need not be invalidated if the conflicting interest did not determine the outcome." Id. at 800. Under South Carolina law, the "appointment and removal of a public officer is a legislative or governmental function[]." Newman v. McCullough, 212 S.C. 17, 25 (1948); see also S.C. Code §4-9-620. (R. p. 22.) Thus, Keene bolsters Preston's position. The decisions of Dowling Realty v. City of Shawnee, 85 P.3d 716, 719 (Kan. Ct. App. 2004), Griswold v. City of Homer, 925 P.2d 1015, 1029 (Alaska 1996), and Winslow v. Town of Holderness Planning Bd., 480 A.2d 114, 117 (N.H. 1984) likewise prove inapposite. All three holdings involve planning commissions, which deploy quasi-judical powers. See Winslow, 480 A.2d at 266 (For example, "rezoning [is] quasi-judicial act...") Contrary to what the County argues, the Griswold decision does not automatically invalidate a vote due to the participation of a conflicted voter but instead applies a factoring test unique to Alaska law. Like Keene, Winslow follows Baird, and similarly notes, "legislative act[s]" are not invalidated due to conflicted votes not impacting the majority vote. Id.

Anderson County enumerates a list of five (5) factors that it amalgamates from various courts spanning a razor slim minority of jurisdictions. Predictably, such factors nowhere appear in South Carolina jurisprudence as South Carolina Courts follow the majority position adopted in Baird. Nonetheless, the Trial Court issued specific findings rejecting each of the factors identified by the County and again restated the same in its Order denying Anderson County's Motion to Alter Amend. (See R. pp. 65-66) Preston incorporates such rulings herein. (R. pp. 65-66) [41] The Lower Courts' reasoning, in this regard, accords with substantial South Carolina precedent.[42] See *infra.*

Anderson County also contends—one of the votes leading up to the Severance Agreement's approval, would not have passed under the Baird standard. Specifically, the County references the vote to end debate and call for the question, which passed 4-3 ("Parliamentary Vote"). Such analysis fails for numerous reasons:

- As the Circuit Court held, when the tainted votes were discounted, the Parliamentary Vote passed. (R. p. 17)
- Under Robert's Rules of Order Article 1 § 7, debate would eventually close regardless. R. p. 17, FN15.) The evidence of record confirmed no change in outcome would have eventuated had debate persisted. (R. p. 17; see also R. p. 450, line 21-p. 451, line 8; p. 632, line 25-633, line 8; p. 1243, lines 16-20; p. 1268, lines 20-23; p. 1351, line 16-p. 1622, line 25) All the remaining members would have voted the same way.
- "[H]ad [any Council] members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement." (R. p. 17) This did not occur.
- "Third, adverse parliamentary rulings can be appealed under the Anderson County Code." (R. p. 17, FN15 citing ACC § 2-37(g)) Here, no appeal occurred. (R. p. 17; pp. 1918-1959)

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[41] The County mischaracterizes the Severance Agreement as conferring solely an "individual benefit." (See AC Brief, p. 23) The evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. (R. pp. 15, FN13; R. pp. 65-66)

[42]The County cites no authority for such proposition under South Carolina law and under the County Administrator form of government, the body has much less ability to interact with personnel within the local government to wield power.

- As noted, South Carolina Courts do not review the parliamentary processes of legislative bodies. See State v. Lewis, 181 S.C. 10, 186 S.E. 625, 631 (1936); Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903); see also MASON'S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975).

One last reason exists, as related to the Circuit Court's actual ruling as opposed to arguments the County now tries to revive. The one tainted vote rule does not apply because, as explained above, only one County Code provision affords a contractual remedy and the provision in question was not the one relied upon by the Circuit Court.

To date, Anderson County has never challenged or articulated any reason why any of the above findings were in error. This Court should, therefore, reject the County's position, vacate the Appellate Court's Opinion and affirm the Circuit Court's final judgment.

V. The Severance Agreement Was: Not a Product of Fraud & Abuse of Power, Was Not Unreasonable & Capricious, and Did Not Violate Public Policy.

Anderson County failed to prove any of its accusations of fraud and abuse of power in this case. The County's Brief fails to identify any evidence to the contrary, but instead resorts to rhetoric and accusations for which never offered evidence. Accordingly, the County has furnished this Court with no basis to grant certiorari in this regard.

Moreover, while Anderson County sought rescission based upon a violation of public policy, the County's Amended Complaint never alleged how. (Compare R. pp. 133-134, ¶¶37-39 with R. pp. 18-19) Nor does it do so now. (AC Brief, pp. pp. 19-21) In an unchallenged ruling, which the County continues to ignore, the Circuit Court specifically found "greater harm" would result by disregarding the "strong public policy" whereby "South Carolina courts" defer to "the discretionary decision-making conferred upon legislative bodies by statute." (R. at 18-19)

Remaining under the County's fifth ground supporting its Petition is its argument portraying the 2008 Council's decision as "arbitrary and capricious." Once again, the County repeats the same, nine

year old accusations but omits discussion of applicable legal standards and ignores the actual evidence of record. (AC Brief, pp. 31-32)

As an overarching principle, noted by the Trial Court, "[i]t is not the prerogative of the courts to pass upon the wisdom of [a] County Council's decision." Bear Enterprises v. County of Greenville, 319 S.C. 137, 140 (Ct. App. 1995) When evaluating a County Council's decision-making, then, South Carolina courts use a "fairly debatable" standard of review. That is to say, South Carolina courts will refuse to substitute their own judgment for that of a County Council where a contested decision is "even fairly debatable." Bear Enters., 319 S.C. at 141. A party challenging a County Council's decision-making as "arbitrary and capricious" shoulders a steep burden of proof and must prove the same by clear and convincing evidence. Pressley v. Lancaster Cnty., 343 S.C. 696, 704 (Ct. App. 2001).[43] When applied, here, Anderson County plainly failed to satisfy its burden.

Anderson County's grounds for contending Preston's Severance Agreement was arbitrary and capricious break-down into four issues:

Issue 1: AC Brief, p. 32: Preston's claim for "anticipatory breach" was pretense;

Issue 2: AC Brief, p. 34: The Severance Package paid more than the maximum value of his claim; Issue 3: AC Brief, p. 37: Debate on the Severance Agreement was a sham;[44] and

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[43] Importantly, the County has not ever and does not now challenge any of the Circuit Court's legal findings regarding the correct legal standards and burden of proof. In fact, the County simply ignores the same. (See AC Brief pp. 31-41; R. p. 67)

[44] **The Severance Agreement vote was not Arbitrary & Capricious & not a sham.** All Council members knew the severance agreement was being negotiated. (R. p. 2425; R. p. 410, lines 23-25; p. 508, lines 1-15; R. p. 509, line 13-p 511, line 3) The Council had splintered into warring camps. (R. p. 632, line 14-23) All major votes taken at the time were 5-2. Waldrep and C. Wilson were the 2. (See R. pp. 632, line 25-p. 633; 1670:22, line 8; R. p. 487, lines 12-25; R. p. 2413; R. p. 2424) Over a month before the Severance Agreement, the County's employment specialist interviewed everyone and it was 5-2 in favor of some sort of amicable resolution. (R. p. 410, line 23-25 R. p. 449, lines 7-10) Over a month before the severance vote, Waldrep told Bright that 5 members of council wanted to buy out Preston's contract) The vote ultimately carried 5-1-1, (R. p. 413, lines 1-7), which was the usual vote of five to two. (R. p. 414, line 2) Waldrep and C. Wilson hated Preston. (R. p. 500, line 8; p. 502, line 12-16) The Opposition Group sought to block an amicable departure so

Issue 4: AC Brief, p. 38: Proffered justifications do not rescue. Preston addresses the same below.

As found by the Circuit Court, the evidence of record demonstrated the Severance Agreement was not arbitrary and capricious for the following reasons:

- **The Options Outline By Legal Counsel**

  Approval of the Severance Agreement fell within the advice of employment specialist, Tom Bright ("Bright"), who identified settling with Preston as one of the options outlined to the County personnel committee. (See R. pp. 525-526)

- **The Exposure Assessment Given By Legal Counsel**

  The 2008 Council relied upon the opinion of an outside employment specialist, Tom Bright, who told them the downside risk presented by Preston's claims could total up to two million dollars or more. (R. pp. 462, line 8-p. 463, line 12 ("[T]his could certainly clear two million-dollars in exposure...,"; R. p. 495, lines 19-21)

- **The Severance Agreement Released Both Employment and Tort Claims**

  "Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement. " (R. pp. 20, FN16 citing pp. 2026-2028; p. 454, lines 9-13; p. 490, lines 1-25 ("[Preston's attorney] specifically was identifying tort claims against individual council members...").) Contrary to Anderson County's portrayal, then, Preston's claim was not merely one for anticipatory breach but also included tort claims.

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they could avoid paying him a severance. (R. p. 644, lines 11-24; p. 511, lines 17-24; p. 801, lines 17-19; p. 802, lines 3-7; p. 2825; p. 1260, lines 20-25; p. 1611, lines 7-9; p. 1612, lines 1-8) Preston had sued C. Wilson and Waldrep and it was pending at that time. (R. p. 402, line 16-24) The majority wanted a fair, amicable departure. (R. p. 519, lines11-14) The majority wanted to derail the scheme to get Preston. (R. p. 1622, lines 1-6) The Opposition Group conspired to set Preston up and fire him for insubordination. (R. p. 514, line 1-4; 1789, line 16-20-p. 1792, line 9-23) This is what they did to Michael Cunningham as well. (R. p. 576, lines 1-23) To that end, they began making public accusations to sully his reputation. (R. pp. 1609, lines 3-22; 1551, line 9-1552, line 7) The Opposition Group also undertook effort to interfere with his job duties. (R. p. 1664, line 11-19; pp. 3021, 3025 R. p. 494, lines 14-17; R. p. 434, lines 1-2) They planned to suspend Preston without a hearing, then give him tasks he could not complete, and terminate him or conduct an "audit" and find something to fire him for cause. (R. p. 448, lines 9-11; p. 2823-24; p. 2847; R. pp. 508, line 20-509, line; 1531:25-1532, line 4)(R. p. 487, lines 12-25; R. p. 2413; R. p. 2424.) By contrast, Waldrep wanted to suspend Preston without conducting the required hearing so he could search for a reason to justify firing him. (R. p. 634, lines 21-25; R. p. 2414) Similarly, C. Wilson also sought a reason she could cite as a basis for firing Preston. (R. p. 2425) Both C. Wilson and Waldrep attended a personnel committee meeting—on October 27, 2008--where settlement terms transmitted by Preston on October 23, 2008 were discussed. (R. p. 515, lines 1-21)

- **The Severance Agreement Contained A Broader Release Than That in the Master Employment Agreement.**

  As the Trial Court found, the release contained in the Severance Agreement exceeded the scope of the release contemplated by Preston's Master Employment Agreement. (Compare R. p. 1894, ¶E with R. p. 1986 ¶6; with R. p. 527, line 11-p. 529, line 20))

- **The Severance Agreement Terminated Preston's Indemnity Protections.**

  The Severance Agreement terminated an indemnity provision set forth in Preston's Master Employment Agreement, which originally was intended to survive the Agreement, but was terminated under the Severance Agreement. (Compare R. p. 8 §14 with R. p. 1986 ¶6 with R. p. 1894))

- **The Stated Intentions of Two Sitting Council Members and Incoming Members Would Have Violated Preston's Statutory Rights.**

  "Based on what the members of County Council knew at the time, such actions could very well have violated Preston's legal and contractual rights," as Preston's Master Employment Contract and South Carolina statute provided for a hearing before dismissal or suspension without cause. (See FN29 (outlining conspiracy to deprive Preston severance pay); R. pp. 20-21; R. p. 1897, ¶13 & S.C. Code §4-9-620.)[45] "To follow such course could very well have [and did result] in the costly litigation feared by the County's employment lawyer...who: "[E]stimated potential exposure, including attorneys' fees and costs, of up to two million dollars ($2,000,000.00)."[46] (R. p. 21; R. p. 616, line 17-p. 617, line 22; 623, line 22-624, line 3; 1254, lines 17-25, Greer; 462, lines 8-25)

- **The Proffered Reasons Supporting the 2008 Council's Decision.**

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[45] See also R. pp. 520, lines 8-19; R. p. 1260, line 10-p. 1261, line 1; R. p. 1788, lines 12-25; R. p. 1260, line 10-p. 1261, line 1; R. pp. 2429-2434, 2635, 2825, 2827-2828, 2831) While it is incorrect that the County did not have legal exposure to Preston's potential claims, even if true, the County never explains why it is arbitrary or capricious for a sitting Council "to safeguard against imminent litigation, for which they had received notice and for which their employment attorney opined would expose the County to millions of dollars in exposure. (R. pp. 68-69 ("No authority exists to support the notion that elected officials must standby and idly watch as the County becomes entrenched in litigation. Legislative bodies routinely address issues in prospective fashion.").

[46] (See R. p. 462, lines 8-25 ("[T]his could certainly clear two million dollars in exposure..."); R. pp. 623, line 22-p. 624, line 3; see also R. p.1254, lines 17-25; R. p. 1614, line 16-p. 1622, line 25.) Of course, in hindsight, the 2008 Council's decision-making and analysis proved prescient even by the time of trial, since Anderson County had already spent more than two million dollars ($2,000,000.00) in pursing Joey Preston. (R. p. 1410, lines 2-21; 661, line 17-p. 662, line 6) To date, according to the Anderson Independent Mail, that amount now approximates $2.6 Million Dollars ($2,600,000.00). (See R. p. 3244)

Each of the 2008 Council members, who the Court found properly voted for the Severance Agreement, provided independent and lucid reasons supporting their votes.[47] The members cited *inter alia* the desire to avoid the exposure expressed by Anderson County's lawyer, concerns about the constant distraction from the County's business, adverse impacts on economic development, and the ability to allow Anderson County to move beyond the infighting once Preston departed. (See FN 20) Members cited "cutting off potential liabilities

- **The Vote Was Not a Sham.**

Preston has discussed the aspects of the voting process above, which is incorporated herein by reference.

For the reasons set forth above, the decision made by the 2008 Council was "fairly debatable" as confirmed by the evidence presented at trial. As such, the decision must remain undisturbed. 319 S.C. at 140, 459 S.E.2d at 885.[48] The Court should deny the County's Petition.

VI. PRESTON HAD NO DUTY OF DISCLOSURE UNDER THESE FACTS.

Anderson County's sixth requested ground likewise fails. To support its claims for fraud, constructive fraud, and negligent misrepresentation, the County contends Preston, a layperson, had a duty to conduct legal analysis of the potential conflicts of each Council member and report them during the November 18th, 2009 meeting. The County's argument lacks merit.[49]

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[47] (R. pp. 1-43 (citing R. pp. 1254, lines 17-25; R. p. 1260, line 10-p. 1261, line 1; R. p. 1266, line 2-p. 1267, line 4; R. p. 1614, line 16-p. 1622, line 25; R. p. 616, line 17-p. 617, line 17; R. p. 618, line 15-p. 619, line 2; R. p. 620, lines 14-24; R. p. 623, line 22-624, line 3; R. p. 627, lines 4-13; R. p. 660, line 7- p. 665, line 19; 2423)

[48] The County raises the issue of Preston's at-will status suggesting Preston's Master Employment Agreement was invalid. Unfortunately, the precedent relied upon by the County in this regard did not issue until five years later. Legislative bodies do not have to foresee what an appellate court may decide five (5) years later. The question before the Lower Courts was whether, based upon the information then available, County Council's decision-making was fairly debatable.

[49] In Footnote 12 of its Brief, the County makes statements charitably described as reckless. It contends Thompson and Preston had some sort of financial reciprocity with respect Thompson's future employment. All of the evidence of record, set forth above (under Thompson evidence) showed the exact opposite of what Anderson County represents. Predictably, then, the County makes no citation to the factual aspects of the case. As to Footnote 13, Preston would direct the Court to Section I above, where the proper application of the Code is found. It appears, Anderson County's design on appeal to this Court is to collapse as many issues together as it can in hopes of creating enough confusion to conceal the stark divide between what it says and what it proves.

First, when the case began, the County promised clear and convincing evidence demonstrating a *quid pro quo* exchange for a laundry list of items outlined by its Complaint. Knowing it had already spent a million dollars in public funds before filing a complaint, the public at large assumed they really must have something. As discussed above, the County failed to introduce any evidence "linking" any of the improprieties it alleged (but did not prove) "to Preston's Severance Agreement." (R. p. 25) No evidence of *quid pro quo* exists. No evidence supporting any type of fraud or breach of duty.

Second, Anderson County impermissibly attempts to shift to Preston the positive legal duty of the Council members to disclose conflicts of interest, if such conflicts existed, which they did not. Such analysis contradicts the County's own Code, which "expressly confers such duty, first on the individual Council member, and then if doubts persist, on the County Attorney." (ACC §2-352(b)) Council members were required to pose any questions they had to the County Attorney, not Preston, for an advisory opinion. (ACC § 2-289) It would be entirely unworkable otherwise.

Third, Anderson County impermissibly interchanges legal conclusions with factual knowledge, conflating the two. (R. p. 19) This is wrong. Misrepresentations as to matters of law cannot support fraud claims. Barber v. Barber, 291 S.C. 399, 400 (Ct. App. 1987). Whether conflicts of interest exist under Anderson County's ethics provisions constitutes a legal determination and fails to support any of the County's claims. It is for this very reason why such inquiries must be posed to the County Attorney, not the County Administrator, a lay official.

"Moreover, to the extent duties of disclosure existed, the impacted *elected officials* possessed positive legal duties to disclose any issues implicating ethical matters." (R. p. 19) But, in any event, the County never proved such disclosures were material to the outcome because all the remaining, non-disqualified members testified they would not have voted differently had such disclosures been made. (R. p. 19) Indeed, the evidence of record confirms the same. (R. p. 19)

Moreover, by November 18, 2008, the Court found "Preston did not possess a duty to disclose information about his employment claims to County Council." (R. p. 25) "It [was] clear to [the lower court] that by October and November of 2008, Preston and County Council had assumed positions adverse to each other." (R. p. 25) By that time, Preston had already sued two Council members individually. (See R. pp. 2640-2647) He had employed personal counsel to pursue an anticipatory breach of contract claim and tort claims against certain Council members and Council-elect. (R. pp. 2029-2032) The County and the individual Council members each had also retained their own attorneys. (R. Opp. 2029-2032)

VII. THE COURT SHOULD DISALLOW ANY AMENDMENT TO THE COUNTY'S PLEADING.

Preston has addressed the impropriety of the County's amendment request (above) explaining why the Quorum Theory fails in such instance. All such analysis applies here and Preston incorporates it by reference. [50] The Circuit Court likewise issued specific findings of prejudice and undue delay. Preston incorporates all factual findings made by the Circuit Court denying the County's Motion to Amend below, along with all of its arguments. (R. pp. 3304-24)

The County never provided any reason to alter such findings via a Rule 59(e), SCRCP motion. This is particular true where Preston submitted evidentiary materials which support the prejudice findings. If it wanted to contest the factual findings of fact, the County should have done so, long before now. When it did not, they became law of the case. What's more, however, such evidence remains

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[50] Preston would point out another internal flaw in the Lower Court's Order for the Court's consideration. The lower court held Baird suggested the destruction of a quorum could result from vote invalidation under the State Ethics Act. (R. p. 3687) However, unless it has changed its view, the Ethics Commies not count use voting disqualification relative to counting a quorum. South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997). It is noteworthy that such an approach is an emerging view. This is because it typically)has no impact on the number of competent voters typically needed to carry a measure and with smaller local government bodies public business can proceed without delay. If a measure must have a majority of a quorum of 4, three votes must be in favor, regardless of whether the 4th individual can vote. Allowing inclusion in the quorum permits the legislative body to continue transacting business but does not impact the minimum vote to carry.

uncontested. And, a motion to amend falls beneath discretionary reviews standards. As the only evidence in record, not basis exists to upset the Circuit Court's findings. No amendment should be allowed.

This Court's well-authored and reasoned opinion in Cunningham v. Anderson Cty., 414 S.C. 298, 304, 778 S.E.2d 884, 887 (2015) highlights the error in the crux of the County's reasoning relative to both Rule 59(e) and Rule 15. In Cunningham, the court determined:

> The court of appeals' opinion effectively gives Cunningham an opportunity to make an argument he has never made before. We hold Cunningham is limited to the allegations in his complaint and his chosen strategy before the trial court. Because he has not preserved the argument he is an at-will employee, we find the court of appeals' remand erroneous.

Cunningham v. Anderson Cty., 414 S.C. 298, 304, 778 S.E.2d 884, 887 (2015). Thus, what Cunningham teaches is a party must bring all issues that it can bring at one time or they are waived. By the County's logic, no prospect existed for Cunningham's treatment as an at-will employee until the Court invalidated his employment contract. This is not the Rule. Nor could it be since litigation would never end. Nor has the County supplied any authority.

Nor can the party file a Rule 59(e) motion to revive a previously rejected theory, since it could have been brought. Here, the facts are stark. Preston cites them in further support of the County's prior ability to assert them and conversely, undue delay.

In this regard, Preston would note: (a) the County at all times had possession of the evidentiary materials supporting Waldrep's and C. Wilson's conflicts (i.e., Complaint, demand letter, release, etc.); (b) Waldrep and C. Wilson knew all salient facts and such information proves either known or attributable to the County; and (c) C. Wilson testified about such matters in her pre-trial deposition, which appears in the record between So, beyond the fact that, Preston had raised individual vote counting since the first motion hearing, deposition testimony was known prior to trial. (R. pp. 1679-1680, 1685)

Preston also rejects the distortion of jects the pretense under which the County contends the issues do not appear in the pleadings. The Circuit Court did not think so. The County's pleading nowhere seeks

the disqualification of individual votes. In fact, the County operated throughout the case advocating a single tainted vote rule, which it still advocates to date. As a result, the Complaint challenges the 2008 Council's action as a whole. (See R. p. 6, §I; p. 133, ¶35; 171, ¶125)

It was Preston who raised the issue of individual vote counting and disqualification. And that is why such defense appears specifically in Preston's answer. And, to the extent the County now says otherwise, the Record ccan be p Thus, Preston pled *Baird* and what it meant was the County would have to tally the participants as a whole to prove the measure failed. Leave to amend should also be refused without a proposed draft pleading, which particularly matters for he reasons described below relative to Preston's retirement funds.

Preston incorporates all factual findings made by the Circuit Court denying the County's Motion to Amend below, along with all of its arguments. (R. pp. 3304-24) The County never challenged any such findings and Preston's evidentiary submittal remained and remains unrebutted. Moreover, the County never moved to amend any of the Circuit Court's factual findings establishing prejudice on the part of Preston, undue delay on the part of the County and futility.

All such findings are incorporated herein in support of Preston's position. (R. pp. 44-79) The County cannot ask this Court to overturn, in collateral fashion, the findings of a trial court when the County never responded to any of the factual findings, nor did it ask for reconsideration or amendment of the same under Rule 59.

A post judgment motion to amenMatrix Capital Mgmt. Fund, LP v. BearingPoint, Inc., 576 F.3d 172 (4th Cir. 2009)

Preston incorporates by reference his arguments concerning the County's denied motion to amend as set forth between p. 14-19 of his brief in Support of his appeal. All such matters address the same issues and to avoid unnecessary duplication, they are incorporated herein by reference. Preston

incorporates by reference his analysis under the discussion of constructive trusts below. Such analysis renders the County's proposed amendment futile. For these reasons, the Court should refuse the request.

VIII. ANDERSON COUNTY PLAINLY BREACHED PRESTON'S SERVICE AGREEMENT.

Clear and unambiguous, the Severance Agreement's Covenant states in material part:

> The County agrees and hereby covenants irrevocably **never** to make **any** claim or demand, or to **commence**, cause or **permit** to be **instituted or prosecuted any claim**, charge, proceeding or **action** at law or **in equity** against Mr. Preston, his heirs, **legal representatives**, or assigns, by reason of any claim, demand or cause of action which the County may now have, or may hereinafter acquire, relating to **Mr. Preston's employment** with the County or his actions as an employee on behalf of the County, expressly including, but not limited to, **all** actions taken by Mr. Preston within the scope and course of his employment as **County Administrator**.

(R. p. 1987, ¶8 (emphasis added)) Despite the Covenant's terms, Anderson County claims it did not breach the Covenant when it permitted the commencement of this action wherein it asserts equitable claims predicated on breaches of duties Preston solely would or could owe in his capacity as County Administrator. The County's argument lacks merit.

By suing Preston, Anderson County committed an obvious breach of the Covenant. As an initial matter, the County denies breaching the Covenant because Paragraph 8's terms do not foreclose a lawsuit against Preston seeking the Severance Agreement's rescission. The County simply invents such construction pretending language exists in the Covenant nowhere so appearing.

Anderson County and Preston were both represented by counsel who negotiated and authored the Covenant. The Covenant uses simple language communicating clear and unambiguous terms: the County irrevocably covenanted to never institute a lawsuit against Preston for *any* claim, equitable or legal, as related to his County employment. Yet, the County construes the Covenant to mean—*never*--except for its claim to co-opt Preston's retirement account. And, the County interprets its promise not to pursue--*any claim or action*—except impliedly its claims for: fraud, constructive fraud, misrepresentation, breach of fiduciary duty, abuse of power, constructive trust, and unjust enrichment.

Despite what the County argues, Attorney Tom Bright actually confirmed the Parties did intend to implement an incontestability clause of sorts explaining the parties sought a no fault divorce expressing they were not "gonna have anything to do with each other." (R. p. 473, lines 1-4) The County's provision also begs the Question of what legal effect the Covenant would have if the Court accepted the County's position. Preston filed a motion to dismiss invoke the covenant. The County said it did not apply because it only sought to challenge validity, a proposition that makes the Circuit Court's analysis correct. However, as soon as it narrowly escaped the motion: scorched earth.

The County also denies it breached the Covenant by arguing the claims it alleged do not relate to Preston's prior employment as County Administrator. Simply untrue. As the Circuit Court found, see R. p. 36, Anderson County plainly supports the claims asserted in the instant lawsuit with actions taken by Preston as a County employee. (See R. pp. 129-130, ¶¶12, 13, & 17 (Thompson's job application); R pp. 131-132, ¶¶25-28 (Farm to school lunch program); R. pp. 132-133, ¶¶30-33 (McAbee travel); R. p. 129, ¶¶11(a)-(c) (Employment memos))

Moreover, seven of the County's eleven claims hinge upon accusations that Preston breached duties owed as Anderson County's Administrator.[51] To make matters worse, the County's Petition—presently before the Court--relies upon allegations relating to Preston's employment. (See e.g., AC Brief, p. 44)

Anderson County relies upon two cases unhelpful to its arguments. First, the County cites: Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp, 358 F.2d 1007, 1016 (D.C. Cir. 1985). Winchester involved a challenge to the validity of an oral covenant under the California Statute of Frauds. A dispute also arose between the parties about whether the oral covenant embraced one or two disputes. Contrary to the holding stated by Anderson County, the Winchester Court noted:

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[51] (See R. p. 134, 3rd Cause of Action ("COA"), ¶45 (Breached fiduciary duties"); R. p. 135, 4th COA, ¶49, (Disclosure duty); R. p. 136, 5th COA, ¶56 (Disclosure duty); R p. 137, 6th COA, ¶64 (same); R. p. 138, 8th COA, ¶76 (Contract breached); R. p. 139, 9th COA, ¶79 (Fiduciary duties); R. p. 139, 11th COA, ¶86 (Preston has been unjustly enriched)

"Attorney fees necessarily incurred in defense of suit are a proper item of damages." Id. at 436. The Covenant here has clear and unambiguous terms, unequivocally breached by Anderson County.

Next, the County misapprehends the decision of Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1016 (D.C. Cir. 1985). Schneider's reasoning accords with Preston's analysis: "[L]itigation in defiance of a promise not to sue could constitute a breach." Id. at 1016. Unlike here, no recovery of fees eventuated in Schneider because no covenant to sue existed.

An array of courts have allowed recovery of attorney's fees as a proper element of damage when a party breaches a covenant not to sue. Treatment of attorney's fees as an element of damage likewise accords with South Carolina law. See Benedict College v. National Credit Systems, Inc. v. Ford, 400 S.C. 538, 550 (Ct. App. 2012). Last, the County never asked the Trial Court to reconsider its findings about the County's breach of the Severance Agreement. (See R. pp. 3163-317) [52]

IX. THE COUNTY SEEKS AN IMPERMISSIBLE ADVISORY OPINION ABOUT ITS EXPOSURE TO ATTORNEY'S FEES.

Preston remains unclear how to respond to Anderson County's final issue. As the County plainly knows, under S.C. Code §15-77-310, a party cannot file a petition until after final disposition of the case. The petition process requires an affidavit and specific findings from the Circuit Court. No such materials exist. At any rate, the County requests an improper advisory opinion for apparent tactical reasons. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

[52] See S&D Mech. Contractors, Inc. v. Enting Water, Inc., 71 Ohio App.3d 228, 241, 593 N.E.2d 354, 363 (Ohio Ct. App. 1991); Anchor Motor Freight, Inc. v. Int'l Bd. of Teamsters, 700 F.2d 1067, 1072 (6th Cir. 1983).

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Appeals' Opinion and reinstate the final order of the Circuit Court.

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June 11, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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.

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Respondent-Petitioner, do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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June 11, 2018