

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2017-001898

RECEIVED

NOV 08 2017

S.C. SUPREME COURT

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.

**SUPPLEMENTAL APPENDIX TO ANDERSON COUNTY'S
PETITION FOR WRIT OF CERTIORARI**

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INDEX

Respondent Joey Preston's Motion to Dismiss filed with the South Carolina Court of Appeals on May 23, 2014	1
Appellant's Return to Respondent Joey Preston's Motion to Dismiss Appeal filed with the South Carolina Court of Appeals on June 16, 2014.....	87
Respondent Joey Preston's Reply filed with the Court of Appeals on June 20, 2014.....	118
Order of the Court of Appeals Denying Respondent's Motion to Dismiss filed on July 8, 2014.....	147

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002499

Anderson County, ... Appellant,
v.
Joey Preston and the South Carolina Retirement System, Respondents.

RESPONDENT JOEY PRESTON'S MOTION TO DISMISS

RECEIVED
MAY 23 2014
SC Court of Appeals

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Joey R. Preston ("Preston") moves the Court for an Order dismissing the appeal of Anderson County ("County"). As explained below, the County failed to file a valid Notice of Appeal as required by Rule 203(b)(1), SCACR. As a result, the Court of Appeals lacks jurisdiction to hear the County's appeal and an immediate dismissal is required.

OVERVIEW

A full Anderson County Council voted on whether to pursue the instant appeal on November 19, 2013. Four (4) members voted in favor of Anderson County Resolution No. 2013-067 ("Disputed Resolution"), while three (3) members voted against it. (*See Ex. 1.*)¹ The Disputed Resolution sought to authorize the County's attorneys "to take all necessary action to notice and fully pursue an appeal in" the lawsuit of Anderson County v. Preston et al., C.A. No. 2009-CP-04-04482. (*See Ex. 2.*)

Two Council members, Cindy Wilson ("Wilson") and Eddie Moore ("Moore"), improperly cast votes in favor of the Disputed Resolution due to conflicts arising under the State Ethics Act and Anderson County Code. As explained *infra*, then, without the tainted votes of Wilson and Moore, the Disputed Resolution actually failed by a margin of three (3) to two (2). The County's Notice of Appeal, a jurisdictional prerequisite to this appeal, therefore, proves unauthorized, *ultra vires*, and void *ab initio*.

¹ The pertinent excerpt of the official minutes have been provided. However, should the Court desire to review the entire transcript, it can be found at: <http://www.andersoncountysc.org/Content/Council/Minutes/CC11192013.pdf>.

**1. THE STATE ETHICS ACT AND ANDERSON COUNTY CODE
DISQUALIFIED WILSON AND MOORE.**

The State Ethics Act and the Anderson County Code disqualified Wilson and Moore from voting on Resolution No. 2013-067. The material portion of the State Ethics Act states:

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest...

S.C. Code Ann. § 8-13-700. The pertinent section of the Anderson County Code ("ACC") §2-37(g)(4) states:

No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public, or in which he/she is otherwise disqualified by any state or county law or regulation...Any member shall be deemed to have a personal or financial interest if:

He/she has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or direct descendant) has such an interest;

...

He/she cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety.

ACC §2-37(g)(4). When such provisions are applied to Wilson and Moore (as per the lower Court's final judgment and the evidence in this case), no scenario exists under which Wilson or Moore should have participated in voting on the Disputed Resolution.

A. WILSON'S DISQUALIFICATION:

The lower court found Cindy Wilson possessed a direct financial interest in a severance agreement ("Severance Agreement") executed between Preston and the County, which the County sued to rescind in the underlying lawsuit. (*See Ex. 3* at 10-13.) In relation to the Severance Agreement, Circuit Court Judge Roger Couch found:

For the reasons set forth below, the Court finds both C. Wilson and Waldrep possessed direct financial interests in the Severance Agreement vote and their respective votes carried a substantial appearance of impropriety.

(*Id.* at 10 (emphasis added).) And:

Since Preston agreed not to pursue any further claims against any County Council member, Waldrep and C. Wilson had a direct economic interest in the outcome of the vote regardless of the vote's outcome.

(*Id.* at 12 (emphasis added).)

The State Ethics Act prohibited Wilson from voting on the Disputed Resolution wherein the County decided whether to continue pursuing the rescission of the Severance Agreement (*i.e.*, file an appeal) in which Wilson had a direct economic interest. (Compare Ex. 3 at 12 *with* S.C. Code §8-13-700 ("No public official...may participate in making...a governmental decision in which [s]he...has an economic interest..")) Even if the County contests the Court's finding about Wilson, the State Ethics Act still prohibits her participation because just like the underlying Severance Agreement vote, regardless of the appeal's final disposition, such disposition economically impacts Wilson.² Moreover, Wilson's vote likewise violated Anderson

² Significantly, voting on matters wherein Wilson possesses a financial interest also subjects her to financial and disciplinary sanctions under the Anderson County Code. *See* ACC §§1-7, 2-288, & 2-90. Such sanctions are additional economic interests

County Code §2-37(g)(4) because Wilson possessed an economic interest in the vote on the Disputed Resolution and because Wilson's vote garnered a "substantial appearance of impropriety" under the same. See ACC §2-37(g)(4).

Numerous other findings in the lower court's order similarly forbade Wilson's participation in voting on the Disputed Resolution due to §2-37(g)(4)'s prohibition on Council members' voting on matters bearing a substantial appearance of impropriety. The lower court made the following findings concerning Wilson's personal animus against Preston:

A council person, Cindy Wilson, came onto Council carrying a personal grudge against the County Administrator [Preston] as a result of decisions made by the administrator in a condemnation case involving her or her family's land. (*See, e.g.*, Def. Ex. 17; Def. Ex. 18; Def. Ex. 23; Def. Ex. 24; McAbee Tr. Test. (Day 2); Floyd Tr. Test. (Day 5).

(Ex. 3 at 3.)

Repeated accusations and claims, concerning various matters, by Cindy Wilson and others surrounding her concerning the County Administrator [Preston]. (*See, e.g.*, Def. Ex. 21; Def. Ex. 23; Def. Ex. 24; Def. Ex. 121; Def. Ex. 132; Floyd Tr. Test. (Day 5)).

(Id. at 4.)

[Preston brought suit] against the Town of Williamston, Cindy Wilson and others concerning allegations made against Preston surrounding his obtaining a BMW roadster. This case resulted in settlement and the payment of damages from the defendants, including Cindy Wilson, a council member to Mr. Preston.

(Id. at 5.)

impacted by Wilson's vote on the Disputed Resolution thereby broadening the prohibited conduct.

Also, Preston as County Administrator sued Robert Waldrep and Cindy Wilson, alleging the need for injunctive relief and civil damages. That case resulted in the issuance of a Temporary Restraining Order by Judge Nicholson restraining the two named Council members for violating the Home Rule Act in their dealings with employees of the County and Preston.

(Id. at 6.)

Further, C. Wilson brought an action against Preston in his official capacity as County Administrator seeking a Writ of Mandamus to obtain financial records of the County, *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008). Her petition was denied by the Circuit Court. This decision was affirmed by the South Carolina Supreme Court.

(Id. at 6.)

Even if the County contests such findings, which it cannot credibly do so, Wilson should have refrained from voting on whether to appeal an Order containing serial findings about her personal (yet very public) grudge against Preston. In this way, Wilson ran afoul of ACC §2-37(g)(4)'s prohibition against participating in votes garnering a "substantial appearance of impropriety." Accordingly, when the Court discounts Wilson's vote, see infra, the Disputed Resolution fails by a vote of three (3) to three (3). *See also* ACC §2-37(g)(3) ("Except where otherwise specified in these rules, a majority vote of those members present and voting shall decide all questions, motions, and other votes.")

B. MOORE'S DISQUALIFICATION:

Section §2-37(g)(4) of the Anderson County Code similarly disqualified Moore from voting on whether to prolong the County's lawsuit against Preston.³ Moore's own testimony proved: (1) a deep personal animus against Preston such that Moore's participation in a vote about Preston bore a substantial appearance of impropriety; and (2) testimony so unbecoming of Moore—from himself about himself—that a substantial appearance of impropriety foreclosed his continued participation in discussions and votes about this lawsuit.

During his testimony, Moore testified:

- Months before even taking office, Moore authored an e-mail discussing his intention to get Preston, "run out of Anderson County soon..." (Ex. 4 at 1270: 7-14.)
- Months before even taking office, Moore wrote another e-mail stating: "[Preston] is desperate and just wants to freeze everything so we can't run him off." (Id. at 1280: 23 to 1281:3.)
- Months before taking office, Moore wrote: "well, I told Radio Hog Saturday that they been trying to get rid of Joey for ten years, and we did it just by winning a primary and good detective work." (Id. at 1284: 3-10.)
- Months before he took office, Moore asked Preston if any public documents were going to be shredded at a "public shred day." When Preston clarified 'no,' Moore instructed a local radio announcer not to share Preston's response so people would keep believing public documents were being shredded. (Id. at 1294:4-21.)
- Moore admitted that months before he took office he advocated putting Preston on administrative leave and prohibiting further contact with county employees. (Id. at 1269: 1-4.)

³ Unlike Wilson's disqualification, which arose under both the State Ethics Act and the Anderson County Code, Moore's disqualification arises solely under ACC §2-37(g)(4).

- Before taking office, Moore admitted he contacted the Attorney General to urge a grand jury investigation of Preston, which eventually occurred and resulted in a finding of no probable cause but only after Moore used the same to smear Preston in the media. (*See Id.* at 1315 to 1318 (referring to his efforts: "I don't want to play our hand just quite yet."))
- That Moore's personal computer was "struck by lightening" just around the time he received a subpoena for the information on his computer. (*Id.* at 1221: 15-23.)
- That he knowingly misrepresented himself in a Meet-the-Candidate article as "a P.E. licensed engineer in six different states" (*see Id.* at 1228 to 1232 (Q. Did you understand that you were going to have information about you biographically that was going to be inaccurate as published in a newspaper in public circulation? A. Yes. (*Id.* at 1229:22-25.))
- Moore admitted that misrepresenting oneself as an engineer in South Carolina constituted a crime. (*Id.* at 1232: 12-17.)
- Moore admitted he gave false testimony under oath about being an engineer during a wrongful death lawsuit where he was named as a Defendant. (*See Id.* at 1232-1234) (Q. And that testimony is false? A. Yes.)
- Moore admitted he made a misrepresentation to the Family Court about possessing certain furniture, which he claimed not to have when he did. (*Id.* at 1313:17-25.)
- Moore also testified that, as a younger man, he was a member of the South Carolina Chapter of the Klu Klux Klan. *See* <http://www.wyff4.com/news/local-news/anderson-news/Deposition-Councilman-belonged-to-Ku-Klux-Klan/16998490>.

Due to Moore's own sworn testimony, a substantial appearance of impropriety exists such that he should not have voted on the Disputed Resolution. If the Court discounts Moore's vote, the Disputed Resolution failed by a margin of three (3) to two (2).

2. WILSON'S AND MOORE'S CONFLICTS DISQUALIFY THEIR VOTES UNDER THE DECISION OF BAIRD V. CHARLESTON COUNTY.

The Supreme Court's holding in *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controls the issue of how to treat votes cast by officials with conflicts of interest. 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 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955) (“[T]he Council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.”) Accordingly, due to Wilson's and Moore's conflicts under the State Ethics Act and the Anderson County Code, both votes prove void under the holding of Baird.

3. THE COUNTY NEVER FILED A VALID NOTICE OF APPEAL BECAUSE NO AUTHORITY EXISTED TO DO SO.

While counsel for the County filed a notice of appeal on Plaintiff's behalf, no valid authority existed to do so. This necessarily proves true because the County failed to pass the Disputed Resolution. As a consequence, the notice of appeal filed by the County constitutes an unauthorized, *ultra vires* action and void *ab initio*.

Moreover, the County cannot remedy this defect on appeal Pursuant to Rule 203(b)(1), SCACR, the County was required, but did not, file a valid notice of appeal

no later than December 8, 2013. "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. DOT*, 361 S.C. 9, 14-15 (2004); see also *Mears v. Mears*, 287 S.C. 168, 169 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.")⁴ Because the County failed to file a timely notice of appeal, the Court of Appeals lacks jurisdiction to hear this case and it must be immediately dismissed.

CONCLUSION

Anderson County has wasted over three (3) million dollars in taxpayer dollars and judicial resources pressing a lawsuit transparently filed to exact political payback. As reflected in the lower court's order, the case is altogether devoid of legal and factual merit. For the reasons set forth above, the Notice of Appeal in this case was not properly authorized and is, therefore, null and void. Before any more public dollars or judicial resources are wasted on this case, the Court should properly dismiss the instant appeal for want of jurisdiction.

⁴ Since it involves whether the Court has the power to hear the case at all, the existence of appellate jurisdiction to hear the instant case is a threshold issue for the Court to decide. *See, e.g., Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100 (Ct. App. 2009)

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Greenville, South Carolina

May 23, 2014

EXHIBIT 1

ANDERSON COUNTY COUNCIL
ANDERSON, SOUTH CAROLINA

All area newspapers, radio stations and television stations were informed of this meeting in compliance with the guidelines set forth in the *Freedom of Information Act*.

MINUTES

Special Recognition Section – November 19, 2013 - 6:00 p.m.

Linda N. Eddleman, Clerk to Council

PRESENT

Chairman Francis M. Crowder, Sr., Presiding – District #1
Eddie Moore - District #3
Tom Allen, District #4
Tommy Dunn - District #5
Vice Chairman M. Cindy Wilson – District #7
Rusty Burns – Interim Administrator
Mike Pitts - County Attorney
Ken Waters - District #6
Celia Myers – Acting Clerk to Council

ABSENT

Gracie S. Floyd – District #2

A verbatim transcript of the meeting is hereto attached for your approval. The meeting adjourned at 6:20 p.m.

MINUTES

Regular Meeting – November 19, 2013 - 6:30 p.m.

PRESENT

Chairman Francis M. Crowder, Sr., Presiding – District #1
Gracie S. Floyd – District #2
Eddie Moore - District #3
Tom Allen, District #4
Tommy Dunn - District #5
Ken Waters - District #6
Vice Chairman M. Cindy Wilson – District #7
Keri Waters - District #6
Rusty Burns – Interim Administrator
Mike Pitts - County Attorney
Celia Myers – Acting Clerk to Council

A verbatim transcript of the meeting is hereto attached for your approval.

The meeting adjourned at 10:30 p.m.

Respectfully submitted,



Linda N. Eddleman, CCC
Clerk to County Council

State of South Carolina)
County of Anderson)

ANDERSON COUNTY COUNCIL
SPECIAL RECOGNITION MEETING
NOVEMBER 19, 2013

IN ATTENDANCE:
FRANCIS CROWDER, CHAIRMAN
M. CINDY WILSON
~~GRACIE FLOYD~~ *Absent*
EDDIE MOORE
TOM ALLEN
TOMMY DUNN
KEN WATERS

ALSO PRESENT:
RUSTY BURNS
MIKE PITTS
RITA DAVIS

Celia Myers

1 quorum which there may not have been that night, let me
2 see where I'm at here, that was a comment made by the
3 judge. Then what would we hang our hat on next, I was
4 going to say. Maybe it's the FOI question. Was FIOA
5 violated that night? Would that overturn what happened
6 November 18th? I don't believe the court will overturn
7 the November 18th meeting based on a technicality after
8 four years of litigation, when the FOI question about
9 amending an agenda the night of the meeting was not
10 actually a law. Nor was it determined to be in
11 violation of the spirit of the law until four years
12 later. They're not going to go back and make that
13 retroactive. Do you really think -- okay. Already
14 covered that part. That leaves the comment by Chief
15 Justice Jean Toal, and as I said earlier, this comment
16 was not based on any actual law that was broken and
17 when an actual legal ruling has to be written I don't
18 think she can rule on that comment, that hey this
19 didn't, okay, this didn't look good. Bang, I'm going
20 to rule on it. Not going to overturn anything.

21 FRANCIS CROWDER: Time.

22 TOM ALLEN: All right. I guess the
23 timing was perfect. Thank you.

24 FRANCIS CROWDER: Thank you. Yes, ma'am, Ms.
25 Floyd.

26 GRACIE FLOYD: I would like to make a
27 motion that we extend the time, please, about -- for
28 about ten, fifteen minutes.

29 FRANCIS CROWDER: Have a motion to extend
30 time. Do we have a second? All right. All those in
31 favor of extending time, raise your right hand. All
32 those opposed. We will not extend time. The vote is
33 four to three. For the record, four to three.

34 All right. So, we will now vote on Ms.
35 Wilson's motion. Well, we'll start at the other end.
36 Well, we'll start with Ms. Wilson, how do you vote?

37 CINDY WILSON: In favor.

38 FRANCIS CROWDER: Mr. Allen?

39 TOM ALLEN: Against.

40 FRANCIS CROWDER: Mr. Moore?

41 EDDIE MOORE: In favor. But I don't
42 appreciate y'all using all the time so other council
43 members couldn't voice their opinion.

44 FRANCIS CROWDER: Ms. Floyd?

45 GRACIE FLOYD: Against the motion.

46 FRANCIS CROWDER: Mr. Dunn?

47 TOMMY DUNN: In favor.

48 FRANCIS CROWDER: Mr. Waters?

49 KEN WATERS: Against.

50 FRANCIS CROWDER: All right. Okay. I

1 appreciate Mr. Allen's comments, but I will be voting
2 in favor of the motion. And I will tell you why. Oh,
3 I can't do that because we've run out of time. But I
4 can tell you it's the hardest decision I've ever had to
5 make in my life, almost.

6 So anyway, we will now move on to Item number
7 11, acceptance of the 2014 Full Depth Patching and
8 Single Treatment. Mr. Holt Hopkins.

9 HOLT HOPKINS: Mr. Chairman, we placed in
10 your mailbox about a month ago a list for you to be
11 considering and hoping for any feedback that you may
12 have. But what you have in your packet tonight is a
13 recommended priority list separated out by each
14 district for the roads that we would like to patch and
15 tar and gravel or seal next year in our summer
16 contract.

17 We need -- we request two things. One, that
18 you approve the priority list because if you'll look at
19 the money it exceeds the amount of money each one of
20 you have in your paving accounts. But we will, after
21 tonight, or as soon as you approve the list, we will be
22 able to go to other funding sources and try to get as
23 much of it done as possible. But the second part we're
24 asking you to do tonight is actually allocate as much
25 of your paving account as you can spare towards this
26 list, so we'll know how much more we need to make up.

27 FRANCIS CROWDER: I reckon I should have
28 actually had a motion to discuss, which I failed to do.

29 TOMMY DUNN: I make a motion we move this
30 on the floor.

31 CINDY WILSON: Second.

32 FRANCIS CROWDER: We have a motion by Mr.
33 Dunn, a second by Mr. Moore. Now discussion.

34 HOLT HOPKINS: If you have any specific
35 questions about any roads, ---

36 FRANCIS CROWDER: I do have questions.
37 Personally, I do not want to commit any of my paving
38 money towards that list. I have some projects in my
39 mind that I, at least one or two of them I've talked to
40 you about, that are not on that list. So can a council
41 member reserve the right not to appropriate money to
42 this effort?

43 MIKE PITTS: Yes, sir, I believe as far
44 as the list is concerned, with the priorities you can
45 move, if y'all are approving the list tonight, through
46 action, you can make a motion to amend -- each council
47 member would have the ability to make that motion.

48 FRANCIS CROWDER: Okay. Well, I want to make
49 a motion to reserve the right to put projects on there
50 for District 1.



**ANDERSON
COUNTY**

Making News.
Making Progress.

Council Members

Francis M. Crowder, Sr.
Chairman
District 1

M. Cindy Wilson
Vice-Chairman
District 7

Gracie S. Floyd
District 2

Eddie Moore
District 3

Thomas F. Allen
District 4

Tommy Dunn
District 5

Ken Waters
District 6

Unda H. Edleman
Clerk to Council

Rusty Burns
Interim Administrator

AGENDA
ANDERSON COUNTY COUNCIL
Special Recognitions – November 19, 2013 – 6:00 pm
Historic Courthouse – Council Chambers – Second Floor
Chairman Francis M. Crowder, Sr., Presiding

1. **CALL TO ORDER:**

Chairman Francis M. Crowder, Sr.

2. **INVOCATION AND PLEDGE OF ALLEGIANCE:**

Council Member Tom Allen

3. **PRESENTATION RESOLUTIONS/PROCLAMATIONS:**

- a. **Proclamation** – a proclamation expressing gratitude to Red Cross for overseeing the emergency relief and recovery efforts provided to the Azalea Apartment fire victims and their families and other matters related thereto. – Mr. Tommy Dunn (allotted 5 minutes)

4. **ADJOURNMENT**

AGENDA
ANDERSON COUNTY COUNCIL
Regular Meeting – November 19, 2013 – 6:30 pm
Historic Courthouse – Council Chambers – Second Floor
Chairman Francis M. Crowder, Sr., Presiding

1. **CALL TO ORDER:**

Chairman Francis M. Crowder, Sr.

2. **INVOCATION AND PLEDGE OF ALLEGIANCE:**

Council Member Gracie S. Floyd

3. **APPROVAL OF MINUTES:**

- a. November 5, 2013 meeting

4. **CITIZEN COMMENTS:** Agenda Matters

5. **"IT'S A WONDERFUL NEIGHBORHOOD" PRESENTATION BY MR. DAVID SIMPSON** – Eddie Moore (allotted 10 minutes)

6. **INFORMATION FROM COUNTY COUNCIL MEMBER, DISTRICT #2:** Mrs. Gracie S. Floyd (allotted 30 minutes)

7. **ORDINANCES – THIRD READING:**

- a. **#2013-042** – an ordinance to amend an agreement for the Development of a Joint County Industrial and Business Park (2010 Park) of Anderson and Greenville Counties as to enlarge the park. – Mr. Burriss Nelson (allotted 10 minutes)

8. **ORDINANCES – SECOND READING:**

- a. **#2013-043** – an ordinance amending Ordinance #99-004, the Anderson County Zoning Ordinance, as adopted July 20, 1999, by amending the Anderson County Official Zoning Map to rezone from R-20 (Single-Family Residential) to C-2 (Highway Commercial) one parcel of land, identified at 3031 Highway 81 North, consisting of +/- 5.75 acres. The parcel is further identified as TMS #146-00-08-017. – Mr. Bill West (allotted 10 minutes)
- b. **#2013-045** – an ordinance authorizing a fee in lieu of tax and infrastructure improvement credit arrangement pursuant to a fee in lieu of tax agreement between the County and Plastic Omnium Auto Exteriors, LLC ("Plastic Omnium") for its second expansion; the termination of an existing fee in lieu of tax arrangement (the "Original FILOT") between Anderson County, South Carolina (the "County") and Plastic Omnium by terminating the lease agreement for the Original FILOT and transferring the property subject to the Original FILOT to Plastic Omnium; the conversion of an existing fee in lieu of tax arrangement (the "First Expansion FILOT") between the County and Plastic Omnium to a simplified fee type of fee in lieu of tax arrangement and extending the term of the First Expansion FILOT; the conversion of an existing fee in lieu of tax arrangement (the "Inergy FILOT") between the County and Inergy Automotive Systems (USA), LLC ("Inergy") to a simplified fee type of fee in lieu of tax arrangement and extending the term of the Inergy FILOT; an infrastructure financing agreement between the County and Plastic Omnium for property not subject to a fee in lieu of tax arrangement; and infrastructure financing agreement between the County and Inergy for property not subject to a fee in lieu of tax arrangement; and other matters relating to the foregoing. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
- c. **#2013-046** – an ordinance authorizing Anderson County to enter into a lease agreement with the Federal Aviation Administration ("FAA") for space the FAA rents at the airport; and other matters related thereto. – Mr. Holt Hopkins/Mr. Mike Pitts (allotted 10 minutes)

9. **ORDINANCES – FIRST READING:**

- a. **#2013-047** – an ordinance authorizing the execution and delivery of a fee in lieu of tax agreement and an infrastructure finance agreement by and between Anderson County, South Carolina and a company known to the County at this time as **PROJECT RACK** with respect to certain economic development property in the County, whereby such property will be subject to certain payments in lieu of taxes, and Project Rack will receive certain infrastructure credits in respect of investment in related infrastructure; and other matters related thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)

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Post Office Box 8002 • Anderson, S.C. 29622-8002
(864) 260-1048 • (864) 260-4356 fax

- b. **#2013-049** – an ordinance authorizing (1) the execution and delivery of a fee in lieu of tax and incentive agreement by and between Anderson County, South Carolina (the "County") and a company identified for the time being as **PROJECT OPPORTUNITY**, acting for itself, one or more affiliates or other project sponsors (the "Company"), in connection with the expansion of certain facilities in the County (the "Expansion Project"); (2) certain special source revenue credits in connection with the Expansion Project; (3) the execution and delivery of a first amendment to lease agreement (and related amended memorandum of lease and option to purchase) by and between the County and the Company approving a ten-year extension of the term of such lease agreement and the fee in lieu of tax arrangement set forth therein; (4) the assignment and transfer to the Company of rights, interests, and obligations under the lease agreement and related agreements; (5) the execution and delivery of a special source credit agreement by and between the County and the Company in connection with certain additional existing property in the County (the "Existing Non-FILOT Project"); (6) the benefits of a multi-county industrial or business park to be made available to the Company, the Expansion Project, and the Existing Non-FILOT Project; and (7) other matters relating thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - c. **#2013-050** – an ordinance authorizing an amendment to the agreement for development for Joint County Industrial Park by and between Anderson County, South Carolina, and Greenville County, South Carolina, to locate certain real property located in Greenville County in the Joint County Industrial/Business Park; and other related matters. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - d. **#2013-051** – an ordinance authorizing the amendment of the agreement for development of Joint County Industrial and Business Park within Abbeville County, South Carolina (Enviro Project) executed on January 8, 2008 by and between Anderson County, South Carolina and Abbeville County, South Carolina, providing for the development of a Joint County Industrial and Business Park so as to include additional property in Abbeville County as part of the Joint County Industrial Park, and other matters relating thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
10. **RESOLUTIONS:**
 - a. **#R2013-064** – a resolution authorizing the execution and delivery of an inducement agreement by and between Anderson County, South Carolina, and Company A and Company B (collectively, **Project Choco**) whereby, under certain conditions, said Companies will acquire, by construction or purchase or lease/purchase property in Anderson County and Anderson County will provide certain economic development inducements to Company A and Company B for the project, and execute certain documents and enact certain further legislation for said companies' project involving an expected over one million dollars (\$1,000,000) in investment and the creation and maintenance of certain jobs. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - b. **#R2013-065** – a resolution authorizing the execution and delivery of an inducement agreement by and between Anderson County, South Carolina, and **Project Fleur** (the "Company") whereby, under certain conditions, said Company will acquire, by construction, lease and purchase, certain property in Anderson County and Anderson County will execute fee-in-lieu-of-tax agreement(s) and provide certain economic development inducements to the company for the project, and execute certain documents and enact certain further legislation for said company's project involving some ten million dollars (\$10,000,000) in total investment; and matters related thereto. – Mr. Rusty Burns/Mr. Mike Pitts (allotted 10 minutes)
 - c. **#R2013-066** – a resolution authorizing the acquisition of certain airport aviation easements; and matters related thereto. Mr. Holt Hopkins (allotted 10 minutes)
 - d. **#R2013-067** – a resolution authorizing the County's attorneys to pursue an appeal in Anderson County v. Preston, et al; and matters related thereto. – Ms. M. Cindy Wilson (allotted 30 minutes)
11. **ACCEPTANCE OF THE 2014 FULL DEPTH PATCHING AND SINGLE TREATMENT PLAN – FUNDING REQUEST** – Mr. Holt Hopkins (allotted 15 minutes)
12. **REPORT FROM THE ANIMAL WELFARE COMMITTEE:** (November 12, 2013 meeting) – Chairman Tom Allen (allotted 5 minutes)
 - a. Public Review of Draft Ordinance
13. **REPORT FROM THE PERSONNEL COMMITTEE:** (November 12, 2013 meeting) – Chairman Francis M. Crowder (allotted 5 minutes)
 - a. Executive Session – Recommendation from Personnel Committee regarding Clerk of Council
14. **REPORT FROM THE FINANCE COMMITTEE:** (November 14, 2013 meeting) – Chairman Tommy Dunn (allotted 25 minutes)
 - a. PetCo Grant
 - b. Broadway Water Meter Reading Agreement
 - c. Transfers
 - d. Aviation Easements (Possible Executive Session)
 - e. Executive Session:
 1. Personnel Matter
 - f. Executive Session – Economic Development Matters:
 1. Project Fleur
 2. Project Choco
15. **APPOINTMENTS:** Various Boards/Commissions - All Districts (allotted 5 minutes)
16. **REQUESTS BY COUNCIL MEMBERS:** All Districts (allotted 14 minutes)

17. **ADMINISTRATOR'S REPORT:** (allotted 10 minutes)
 - a. Letters of Appreciation:
 1. For: Sheriff John Skipper From: Greenwood Chief of Police Gerald Brooks
 2. For: Officer Dustin McQueen From: Ms. Amy Heard
 3. For: Mr. Charles Pinson From: Mr. John D. Henderson
 4. For: Mr. Matthew Schell From: Ellen Clark
 - b. Building and Codes October Monthly Activity Report
 - c. Single Treatment and Crack Sealing Contracts – November 4 – November 8, 2013
18. **CITIZEN COMMENTS:** Other Matters
19. **REMARKS FROM COUNCIL MEMBERS**
20. **ADJOURNMENT**

EXHIBIT 2

RESOLUTION NO. R2013-067

A RESOLUTION AUTHORIZING THE COUNTY'S ATTORNEYS TO PURSUE AN
APPEAL IN ANDERSON COUNTY v. PRESTON et al.; AND MATTERS RELATED
THERE TO

WHEREAS, Anderson County, South Carolina ("County") filed a civil action in the Anderson County Court of Common Pleas styled Anderson County v. Preston et al., C.A. No. 2009-CP-04-04482;

WHEREAS, the case has been tried and the trial court issued rulings adverse to the County and, further, the trial court denied all post-trial motions filed by the County;

WHEREAS, Anderson County Council respectfully disagrees with the trial court's rulings and, therefore, desires to authorize the County's attorneys to take all action necessary to notice and pursue an appeal before the appellate courts of the State of South Carolina.

NOW, THEREFORE, be it resolved by County Council, in meeting duly assembled, that:

1. The County's attorneys are hereby authorized to take all necessary action to notice and fully pursue an appeal in the aforementioned litigation.
2. This Resolution shall take effect and be in full force immediately upon enactment.

RESOLVED in meeting duly assembled, this 19th day of November, 2013.

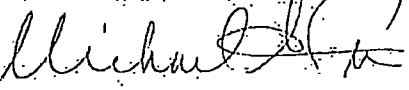
ATTEST:

Rusty Burns
Interim Anderson County Administrator

Francis M. Crowder, Sr., Chairman

Linda N. Eddleman, Clerk to Council

APPROVED AS TO FORM:



Michael S. Pitts, Anderson County Attorney

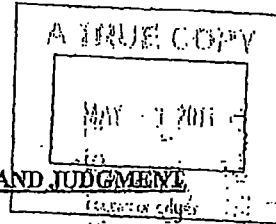
EXHIBIT 3

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-04-4482

Anderson County,)
Plaintiff,)
vs.)
Joey Preston and the South Carolina)
Retirement System,)
Defendants.)



FINAL ORDER AND JUDGMENT

The Court held a non-jury trial in the above-captioned matter between October 29, 2012 and November 5, 2012. Plaintiff Anderson County ("County" or "Plaintiff") appeared and was represented by Ted Gentry, Troy Tessier, and Tally Parham of Wyche, P.A. Lane Davis of Nelson Mullins Riley & Scarborough, LLP and Candy Kern-Fuller of the Upstate Law Group, LLC appeared on behalf of Defendant Joey Preston ("Preston"). Before trial, and upon request from its counsel, the Court excused the South Carolina Retirement System ("SRS") from appearing at trial since Plaintiff named SRS only as a stakeholder and SRS had no direct interest in the trial's outcome. The County and Preston consented to SRS's request not to appear.

PROCEDURAL BACKGROUND

The instant lawsuit arose out of a severance agreement ("Severance Agreement") executed between the County and Preston on November 18, 2008. On November 13, 2009, the County sued Preston seeking rescission of the Severance Agreement. The County's Complaint alleged eleven (11) causes of action. Plaintiff's claims included: (1) rescission based upon violation of South Carolina Ethics Act and Anderson County Code §2-37(g); (2) rescission based upon violation of public policy; (3) rescission based upon breach of fiduciary duty; (4) rescission based upon fraud; (5) rescission based upon constructive fraud; (6) rescission based upon

negligent misrepresentation; (7) rescission based upon capriciousness, lack of reasonability, and a result of fraud; (8) rescission based upon fundamental and substantial breach of the Severance Agreement; (9) rescission based upon breach of fiduciary duties relating to back-dated documents; (10) imposition of a constructive trust as to funds held by SRS; and (11) rescission based upon unjust enrichment. The County amended its Complaint in March of 2012 to include additional factual allegations but no additional causes of action.

Preston answered the County's Amended Complaint on May 4, 2012. Preston's Answer to the Amended Complaint counterclaimed for damages resulting from Plaintiff's alleged breach of the Severance Agreement.¹ The County thereafter filed a timely Reply. The parties were allowed to submit their closing arguments in writing to the court after the conclusion of the trial. Both sides submitted their closing arguments within the weeks following the trial.

After the trial of this action an opinion was issued by the South Carolina Court of Appeals in the case of *Cunningham v. Anderson County*, Appellate Case No. 2011-194209. The Court Of Appeals filed the opinion on January 16, 2013, which was subsequently withdrawn and refiled February 27, 2013. Since the issues decided in the *Cunningham* case may have had some relevance to the issues before this Court, the parties were asked to submit briefs as to the effect, if any, that this opinion might have on the issues in this case. Both sides filed briefs, which have been made Court's Exhibits, which touched on the issues. In their communications, they asked this Court to consider certain issues from that decision. The Plaintiff argued that *Cunningham* stood for the propositions that: 1) The decision by Council to enter into the Severance Agreement was arbitrary and capricious because Preston's original employment contract would have been unenforceable; 2) That *Cowart* was affirmed and council should have followed

¹ Preston's Answer to the Amended Complaint contained several other counterclaims which were settled before the trial of this case. As such, the Court's decision only addresses Preston's remaining claim for breach of contract.

Attorney Bright's advice to do nothing. The Defendant argued: 1) The Severance Agreement was executed, funded and completed prior to the new council taking office and, therefore, *Cunningham* had no application; 2) Council could not have foreseen the exact outcome of the litigation surrounding the *Cowart* line of cases, and therefore, their action was still "fairly debatable" at the time they took it; 3) The 2008 Council was within its discretion to decide a severance agreement that would be completed within their term without restricting the discretion of the 2009 Council.

The Court considered the issues raised by counsel for the parties as a result of the *Cunningham* case in reaching this decision.

OUTSTANDING EVIDENTIARY ISSUES

The Court took under advisement a number of evidentiary issues raised by both Parties during the trial of this case. Table A, which the Court attaches to this Order and incorporates herein by reference, provides the Court's evidentiary rulings as to the outstanding issues.

FINDINGS OF FACT

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. Who was at fault in bringing about this environment is not as important to the Court's conclusions as is the fact that it existed. This toxic environment dominated the political discourse in Anderson County for some time before the execution of the Severance Agreement in question in this case.

Some of the factors giving rise to this environment included, but were not limited to, the following:

- A council person, Cindy Willson, came onto Council carrying a personal grudge against the County Administrator as a result of decisions made by the administrator in a

condemnation case involving her or her family's land. (*See, e.g.*, Def. Ex. 17; Def. Ex. 18; Def. Ex. 23; Def. Ex. 24; McAbee Tr. Test. (Day 2); Floyd Tr. Test. (Day 5));²

- Repeated accusations and claims, concerning various matters, by Cindy Wilson and others surrounding her concerning the County Administrator. (*See, e.g.*, Def. Ex. 21; Def. Ex. 23; Def. Ex. 24; Def. Ex. 121; Def. Ex. 132; Floyd Tr. Test. (Day 5));
- Candidates and Council members-elect prejudging issues slated to come before them without affording themselves and others the opportunity to gather facts, hold hearings, or be heard. (*See, e.g.*, Brown Tr. Test. (Day 6); Def. Ex. 25; Def. Ex. 26; Def. Ex. 46; Def. Ex. 87; Def. Ex. 89; Def. Ex. 91);
- Council members disregarding the legal "chain of command" established by the Home Rule Act. (*See, e.g.*, Def. Ex. 50, ¶¶27 & 29);
- Council members involving the news media in the decision making processes of Council to the exclusion of other duly elected Council members. (*See, e.g.*, Def. Ex. 71; Def. Ex. 91; Def. Ex. 101; Def. Ex. 102; Def. Ex. 103; Def. Ex. 104; Def. Ex. 105; Floyd Tr. Test (Day 5); Allen Tr. Test. (Depo.), 18:1-19:25);
- Council members and Council-elect involving the news media in "stunts" to gain political advantage over the County Administrator or other Council members. (*See, e.g.*, Def. Ex. 18; Def. Ex. 20; Def. Ex. 50, ¶22; Ex. 71; Ex. 92; Ex. 93; Ex. 97; Ex. 101; Ex. 102; Ex. 103; Ex. 104; Ex. 105);

² The Court's citation to the Record in this Order is intended as merely illustrative, not exhaustive. Ample evidence supports the Court's conclusions throughout the decision beyond what is cited. The Parties have also raised a wide array of legal arguments in this case. After careful review and consideration, the Court addresses those it deems material herein. To the extent an argument has not been deemed worthy of discussion by the Court, it should be deemed as having been fully reviewed and rejected by the Court as without legal basis under the facts of the case *sub judice*.

- A County Administrator who appeared to be defensive in how he provided information and responded to inquiries of Council members. (*See, e.g.,* Waldrep Tr. Test. (Day 1); Def. Ex. 34);
- A County Administrator who conducted himself in his personal and professional actions so as to give rise to suspicion and mistrust. (*See, e.g.,* Waldrep Tr. Test. (Day 1));
- Council-elect conducting meetings, before taking office, with individuals who would later constitute a majority of County Council, where the participants planned specific actions to be taken once they had taken their seats. The meeting participants excluded others on Council with whom they would be serving. (*See, e.g.,* Waldrep Tr. Test. (Day 1); Moore Tr. Test. (Depo.), 271: 7-25; Allen Tr. Test. (Depo.), 35:1-41:25; *Compare* Def. Ex. 111 with Def. Ex. 140);
- Council members engaging in actions carrying with them an appearance of impropriety. (*See infra.*)
- See Exhibit "A" attached hereto for additional evidence on this point.

The above examples reflect the leadership wasteland existing in Anderson County, on both sides of these issues, at the time County Council approved Preston's Severance Agreement.

As a result of the above cited behavior litigation had begun between Joey Preston, both personally and as the County Administrator, and members of the Council he served. This litigation included Preston bringing suit against the Town of Williamston, Cindy Wilson and others concerning allegations made against Preston surrounding his obtaining a BMW roadster. This case resulted in a settlement and the payment of damages from the defendants, including Cindy Wilson, a council member, to Mr. Preston.

Also, Preston as County Administrator sued Robert Waldrep and Cindy Wilson, alleging the need for injunctive relief and civil damages. That case resulted in the issuance of a

Temporary Restraining Order by Judge Nicholson restraining the two named Council members for violating the Home Rule Act in their dealings with employees of the County and Preston. See Compl., *Preston v. Waldrep & C. Wilson*, 2008-CP-04-2776.³

Further, C. Wilson brought an action against Preston in his official capacity as County Administrator seeking a Writ of Mandamus to obtain financial records of the County, *Wilson v. Preston*, 378 S.C. 348, 662 S.E. 2d 580, (SC 2008). Her petition was denied by the Circuit Court. This decision was affirmed by the South Carolina Supreme Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court's legal and factual findings as to the claims asserted by the parties are as follows:

- I. **First Cause of Action: County Council's Actions Violated: S.C. CODE ANN. §§ 8-13-100 et seq. ("State Ethics Act"), Anderson County Code §§2-37(g) & 2-288 ("County Code"), and the Common Law.**

Anderson County's first claim alleges County Council violated the State Ethics Act, the Anderson County Code, and common law by approving Preston's Severance Agreement. Under this claim, Plaintiff challenges the entire process of passing the Severance Agreement, not just particular votes. (See Am. Compl., ¶35 which alleges that, "The Severance Agreement was adopted by Anderson County Council in violation...".)⁴ Consistent with the allegations put in issue by Plaintiff, the Court has analyzed all Council members' votes as to the passage of the Severance Agreement. After doing so, the Court finds in favor of Preston for the reasons stated below.

³ Throughout the trial, the Court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (See, e.g., Def. Ex. 50; see also Waldrep Trial Testimony; C. Wilson Testimony (Depo.)) To the extent necessary, the Court also takes judicial notice of the entirety of the allegations from the Complaint in that case, which are a matter of public record. See Rule 201(c), SCRE.

⁴ The Ninth Affirmative Defense in Preston's Answer to the Amended Complaint, which invokes application of the Supreme Court's decision in *Baird v. Charleston County*, 333 S.C. 519 (1999), similarly compels the Court to analyze the votes of all Council members.

All seven members of Anderson County Council attended the November 18th, 2008 meeting of County Council. All voted on various motions concerning the approval of Preston's Severance Agreement. The Council members in attendance included: Larry Greer ("Greer"), Gracie Floyd ("Floyd"), Bill McAbee ("McAbee"), Michael Thompson ("Thompson"), Ron Willson ("R. Willson"), Cindy Willson ("C. Willson"), and Bob Waldrep ("Waldrep").

In analyzing County Council's actions, the Court finds that the Anderson County's Code is more restrictive than the State Ethics Act concerning conflicts of interests and the reasons for recusal by a council member. Specifically, the State Ethics Act primarily prohibits elected officials from participating in governmental decisions where an official or his family members derive a direct economic benefit. *See, e.g.*, S.C. CODE ANN. § 8-13-700. By contrast, Anderson County Code (hereinafter "ACC") §2-37(g)(4)(e), entitled when "members may not vote," more broadly disallows Council members from participating in decisions where their involvement creates: "a substantial appearance of impropriety." ACC §2-37(g)(4)(e).

With these principles in mind, the Court analyzes County Council's votes in relation to Preston's Severance Agreement, as follows:

Larry Greer & Gracie Floyd

No evidence of record called into question the propriety of the votes cast by Greer or Floyd. No party has suggested any impropriety on the part of Greer and Floyd. As a result, the Court finds both the votes of Greer and Floyd as valid and proper.

Bill McAbee

The County questioned the propriety of McAbee's vote on the Severance Agreement. After considering all evidence of record, however, the Court finds McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same. The Court

likewise finds neither the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety.

The Court finds McAbee undertook certain economic development travel, about which the County complains, in an effort to promote economic activities he deemed worthwhile for the County. (*See, e.g., McAbee Tr. Test. (Day 2)* (discussing benefits of pursuing heavy rail and coal gasification.)) No evidence linked McAbee's travel to Preston's Severance Agreement or the surrounding issues. The evidence established McAbee's economic development travel occurred over an extended period of time and did not relate to Preston's Severance Agreement.

The County also complains of a real estate commission received by McAbee in April of 2008. (*See Pl. Ex. 60.*) The Court rejects the notion that the April of 2008 commission somehow tainted McAbee's Severance Agreement vote. The commission arose out of a real estate contract originating several years before. (*See Def. Ex. 59.*) McAbee received the commission over five months before Preston's employment dispute even arose in September of 2008, before the June of 2008 primaries, and over seven months before the Severance Agreement vote occurred. (*Compare Pl. Ex. 60 with Def. Ex. 59.*) Whenever County Council undertook decisions relating to the transaction from which the commission arose, McAbee recused himself. (*See Def. Ex. 58.*)

No evidence of record reflects Preston had anything to do with the commission received by McAbee. No evidence of record establishes any link between the commission and McAbee's vote in favor of the Severance Agreement. No evidence of record reflects that the commission was somehow improper. Accordingly, the Court finds McAbee's vote was valid and proper.

Michael Thompson

Thompson similarly derived no financial benefit from Preston's Severance Agreement. However, the Court does find Thompson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial

appearance of impropriety prohibition. At the time Thompson cast his vote, he was seeking future employment from Anderson County through Preston. Also, Preston had approved County-funded training for Thompson. To a casual observer of the Severance Agreement vote, the Court finds such facts and circumstances created a substantial appearance of impropriety. Therefore, Thompson should have refrained from voting on Preston's Severance Agreement.

Ronald Wilson

R. Wilson similarly derived no financial benefit from the Severance Agreement vote. But, like Thompson's, the Court finds R. Wilson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial appearance of impropriety prohibition. In the weeks before the Severance Agreement vote, R. Wilson's adult, emancipated daughter received an extension of her personal services contract ("Services Contract") with Anderson County. To an observer of these transaction, the Court finds such facts and circumstances would have created a substantial appearance of impropriety. Therefore, R. Wilson should have refrained from participating in the vote.

In so holding, the Court acknowledges the County failed to introduce any evidence directly linking the Services Contract's extension to R. Wilson's Severance Agreement vote. R. Wilson received no direct benefit from the Services Contract's extension. And, no evidence establishes R. Wilson knew of the Services Contract's extension when he voted. Indeed, the evidence of record suggests otherwise. (*See, e.g.,* Schaum Tr. Test. (Day 6).)

By operation of ACC §2-37(g)(4)(a), however, a Council member has a disqualifying interest when a direct descendant has a financial interest in the transaction. Thus, while lacking a direct financial interest in the Severance Agreement vote and Services Contract, the Court finds R. Wilson should not have voted on Preston's Severance Agreement since his daughter had recently received a substantial benefit from Administrator Preston. Such vote, in the Court's view, improperly carried a substantial appearance of impropriety.

C. Wilson & Waldrep

The circumstances surrounding the respective votes of C. Wilson and Waldrep mirror each other and, as such, the Court treats them collectively herein. For the reasons set forth below, the Court finds both C. Wilson and Waldrep possessed direct financial interests in the Severance Agreement vote and their respective votes carried a substantial appearance of impropriety. As such, the Court finds neither C. Wilson nor Waldrep should have participated in the Severance Agreement vote. In reaching this conclusion, this Court notes that neither of these parties had an extended period of time in which to analyze their participation in this vote. Further, this Court notes that they both voted against their respective interests. Nevertheless, this Court must analyze their votes on the same standard as the other votes cast in this matter.

At the time of the Severance Agreement's adoption, C. Wilson and Waldrep were named, in their individual capacities, in a lawsuit brought by Preston. The complaint in that case sought costs and attorney's fees as well as injunctive relief. *See Compl., Preston v. Waldrep & C. Wilson*, 2008-CP-04-2776.⁵ Preston alleged C. Wilson and Waldrep interfered with the execution of his job as County Administrator. *Id.* After the lawsuit commenced and well in advance of the Severance Agreement vote, Preston, by and through his personal attorney, also gave notice to County Council of both his claim for anticipatory breach of contract and tort claims he intended to pursue against two County Council members—C. Wilson and Waldrep. (*See Pl. Ex. 22.*) These are some of the same issues upon which the *Cunningham* case was allowed by the Court of Appeals to go forward toward trial.

⁵ Throughout the trial, the Court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (*See, e.g.,* Def. Ex. 50; *see also* Waldrep Trial Testimony; C. Wilson Testimony (Depo.)) To the extent necessary, the Court also takes judicial notice of the entirety of the allegations from the Complaint in that case, which are a matter of public record. *See* Rule 201(c), SCRE.

During trial, testimony from Waldrep and C. Wilson (by deposition) confirmed Preston was asserting tort claims against them personally. (See Waldrep, Tr. Test. (Day 1); Tr. Test. C. Wilson (Depo.), 59: 14-18; 75: 1-8; Pl. Ex. 22.)⁶ In turn, Paragraph Six of the Severance Agreement states:

In consideration of the County's agreement to provide Employee [Preston] with the severance payments described in this Agreement, Employee, for himself, his heirs, his legal representatives, and his assigns, hereby covenants irrevocably never to make any claim or demand, or to commence, cause, or permit to be instituted or prosecuted, any suit, charge, proceeding, or action at law or in equity, ~~against the County for any of its Council members, employees, managers, officers, board members, or any of its affiliated parts, entities, or subsidiaries, as well as the successors and assigns of those entities and persons, by reason of any claim, demand, or cause of action which Employee may now have, or may hereinafter acquire, relating to his employment, with the County, expressly including, but not limited to, the termination of and/or the conditions of his employment with the County.~~ The parties expressly covenant for themselves, their legal representatives, their heirs, and assigns, that this Agreement may be treated as a complete defense to any legal, equitable, or administrative action that may be brought, instituted, or taken by Employee against the County, related to Employee's employment, and/or the termination of his employment, or the conditions of his employment, and shall forever be a complete bar to the commencement or prosecution of any action, suit, charge, claim, or legal proceeding relating in any way to Employee's employment or termination of employment.⁷

⁶ At trial, the County also argued the release contained in the Severance Agreement conferred identical benefits upon all Council members. According to the County, to the extent the release conferred benefits on all Council members, all votes were improper for the same reason. The Court rejects this analysis. As noted above, Anderson County Code §2-37(g) (4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." Here, Preston filed a lawsuit against C. Wilson and Waldrep individually, which remained pending at the time of the Severance Agreement vote. Moreover, Preston had supplied notice of an intent to pursue tort claims against two Council members, which C. Wilson and Waldrep acknowledged referred to them. By contrast, at the time of the Severance Agreement vote, Preston had not filed a lawsuit nor given notice of his intent to pursue tort claims against any other member of County Council. Thus, as to C. Wilson and Waldrep, the Severance Agreement conferred personal and financial benefits greater than that of the general Anderson County public, while the release conferred no benefits on the remaining members of Council (against whom no lawsuit was filed or claims asserted) different than those of the public.

⁷ By contrast, Preston's Master Employment Agreement required him only to: "execute and deliver to the County a release, releasing the County of all further claims that the Administrator may have against the County." (Pl. Ex. 1, p. 4, TE (Emphasis added).)

(Pl. Ex. 7, p. 2, ¶6.)⁸ Since Preston agreed not to pursue any further claims against any County Council member, Waldrep and C. Wilson had a direct economic interest in the outcome of the vote regardless of the vote's outcome. Therefore, due to a potential appearance of substantial impropriety, Waldrep and C. Wilson should not have participated in a vote on Preston's Severance Agreement while Preston maintained a lawsuit against them individually. ACC §2-37(g).

~~According to Plaintiff, the votes of Waldrep and C. Wilson should nonetheless be~~
counted because they voted against Preston's Severance Agreement. The Court disagrees. Waldrep and C. Wilson had personal and financial interests "greater than that of the general Anderson County public" thereby prohibiting their participation and vote. In such instances, ACC §2-37(g)(4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public."⁹ No exception exists based upon how a Council member votes. Accordingly, the Court finds Waldrep and C. Wilson should not have voted on the Severance Agreement or any related issues.

Having found the votes of Thompson, R. Wilson, C. Wilson, and Waldrep as improperly cast, the Court next analyzes what impact flows from such findings. In that regard, the Court finds the Supreme Court's holding in *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controlling. 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*

⁸ Having found Preston's Severance Agreement as a valid contract, as discussed below, the Court also finds Paragraph 6 of the Severance Agreement establishes Preston's seventh affirmative defense of release.

⁹ In addition, and as noted *supra*, personal financial interest also includes matters where a Council member's "participation in the matter at hand would create a substantial appearance of impropriety." ACC §2-37(g).

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 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955) ("[T]he Council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.")¹⁰

¹⁰ Numerous decisions around the country accord with the *Baird* Court's analysis. See *Marshal v. Ellwood*, 189 Pa. 348, 354, 41 A. 994, 995 (1899) ("It would be an astonishing proposition to submit that an ordinance...which was passed by a considerable majority of perfectly qualified votes, should be declared illegal because it had received the supporting vote of one member who was disqualified."); *Anderson v. City of Parsons*, 209 Kan. 337, 342, 496 P.2d 1333, 1337 (1972) ("It is also the rule that where the required majority exists without the vote of the disqualified member, his presence and vote will not invalidate the result"); *Hodge v. Princeton*, 227 Ky. 481, 13 S.W.2d 491 (1929) (considering the disqualification of one of four votes); *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N.W. 953 (1916) (reducing number of votes to fifteen due to failure of nine members to participate); *Commonwealth ex rel. Whitehouse v. Raudenbush*, 249 Pa. 86, 94 A. 555 (1915) (disqualifying vote of interested council member); *Alamo Heights v. Gerety*, 264 S.W.2d 778 (Tex. Civ. App. 1954); *Sup'rs of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879); *Woodward v. City of Wakefield*, 236 Mich. 417, 210 N.W. 322 (1926); *Saks & Co. v. Beverly Hills*, 107 Cal. App. 2d 260, 237 P.2d 32 (1951) (five votes, three disqualified, left one to one vote) (overruled on other grounds as to meaning of the term "trial de novo" at issue in *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 776, 537 P.2d 375, 379 (1975)); *State ex rel. Oakey v. Fowler*, 66 Conn. 294, 32 A. 162, 163 (1895) ("If his own vote was necessary to give a majority of the board of selectmen, we should feel compelled to hold his election to be void."); *Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N.E. 215, 217 (1892) ("sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton"); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 292 (1931) ("The vote was unanimous and he was but one of three."); *Beale v. Santa Barbara*, 32 Cal. App. 235, 162 P. 657 (1916); *Murach v. Planning & Zoning Commission of City of New London*, 196 Conn. 192, 203, 491 A.2d 1058, 1065 (1985) ("Where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result."); *Klindt v. Pembina County Water Resource Bd.*, 2005 N.D. 106, 697 N.W.2d 339, 350 (2005) (question is whether vote was "determinative"); *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A.2d 92 (1956); *Board of Com'rs of Richmond County v. Thompson*, 216 Ga. 348, 349, 116 S.E.2d 737, 738 (1960) (reducing vote count by two).

Relying upon authority from other jurisdictions, Anderson County argues only one tainted vote sufficed to rescind the Severance Agreement.¹¹ However, the Court relies upon the *Baird* decision in concluding the "one tainted vote rule" does not control in South Carolina.¹² Moreover, *Baird* does not indicate that South Carolina's courts would consider the political position or relative strength of those advocating for one side or another in determining which votes to allow.

No South Carolina authority supports the County's premise wherein it argues that South Carolina's courts should weigh the potential sway of participating individual officials when reviewing the validity of governmental votes. To the contrary, here, all elected officials owed the same legal duties to their constituents. The Court treats each public official equally and finds their respective votes warrant equal weight and independence.¹³

¹¹ Had it not elected to follow the *Baird* holding, the Court may very well have had to consider what impact other tainted votes of Waldrep and C. Wilson had on the County's ability to bring the instant lawsuit and the Court's jurisdiction to hear Plaintiff's claims. For example, votes approving the investigation of the Severance Agreement and to commence and maintain the instant lawsuit could prove void if, as Plaintiff urges, one tainted vote (such as those cast by C. Wilson and Waldrep) invalidated Council action. (See, e.g., Def. Ex. 138; Anderson County Meeting Minutes, Nov. 12, 2009 (publicly available at: http://www.andersoncountysc.org/web/Council_Minutes01.asp.) In light of the Court's decision, however, the Court finds further factual development and legal analysis, in this regard, proves unnecessary to the current analysis.

¹² Consistent with the balance of this decision, the Court notes the superiority of the analytical framework established by the *Baird* Court. Under Plaintiff's urged approach, the validity and finality of an otherwise valid action of a legislative body could be rendered uncertain by virtue of a judicial challenge arising out of an alleged appearance of impropriety, regardless of whether the challenged vote proved outcome determinative. The Court rejects such approach as inconsistent with the holding of *Baird* and the other authority discussed herein. See, e.g., *Evans v. Reading Parking Authority*, 385 Pa. 592, 604, 124 A.2d 92, 98 (1956) ("However, it is equally true that where a Resolution or Ordinance is passed or adopted by a sufficient number of legal votes, it will not be invalidated by improper illegal votes if the contract or subject matter in question was lawful and there is no fraud or statutory restriction. To hold otherwise would injure the public interest or stifle government,").

¹³ The County characterizes County Council's approval of the Severance Agreement as "judicial" in nature. The Court rejects the County's distinction in this regard. The "appointment and removal of a public officer is a governmental function..." *Piedmont Pub. Serv. Dist. v. Cowart*,

The Court, therefore, rejects Plaintiff's premise that because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence somehow overwhelmed the independent judgment of County Council's remaining elected officials. Indeed, even if such inquiry proved appropriate, the evidence of record establishes otherwise. As discussed *infra*, each of the Council members whose votes the Court has found as properly cast in favor of the Severance Agreement, articulated independent and lucid grounds supporting their respective votes. (See Greer Tr. Test. (Day 4); McAbee Tr. Test. (Day 2); Floyd Tr. Test. (Day 5).)

The Court's reasoning, in this regard, also accords with South Carolina precedent. South Carolina law disfavors substituting judicial determinations for the decision-making of officials elected to make such judgments. In so finding, the Court references the decisions of *Segars-Andrews v. Judicial Merit Selection Commission et al.* and *Bear Enterprises v. The County of Greenville et al.*, wherein South Carolina's appellate courts have afforded great deference to legislative bodies and their decision-making, both legislatively and judicially. *Segars-Andrews*, 387 S.C. 109, 130, 691 S.E. 2d 453, 469 (2010) (declining judicial intervention into political determinations conferred to a legislative body due to Separation of Powers constraints); *Bear Enterprises*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("If the propriety of the Council's decision is even 'fairly debatable,' we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed."); see also S.C. CODE ANN. § 4-9-620

324 S.C. 239, 241 (1996). Indeed, it is a statutory power conferred upon County bodies to exercise within their legislative discretion. S.C. CODE ANN. § 4-9-620. In addition, the County also characterizes the Severance Agreement as conferring solely an "individual benefit." The Court likewise rejects this characterization. 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. Some of the rationales included *inter alia*: a desire to avoid a significant downside risk to the County, to avoid further political infighting that had proved deleterious to the County, to help the County Council move forward with County business, which had been stymied, and to help ensure the County could hire competent County Administrators later.

(conferring upon County Council the discretion to hire and remove County Administrators in Council-Administrator form of government),¹⁴

The Court next examines how many votes were necessary to approve the Severance Agreement. Pursuant to ACC § 2-37(g)(3), approval of the Severance Agreement required a simple majority of those members present and voting. ACC § 2-37(g)(3) ("[A] majority vote of those members present and voting shall decide all questions, motions, and other votes."). Upon applying the *Baird* holding and ACC § 2-37(g)(3) to the facts at bar, the Court finds a majority of votes of those present and properly voting approved Preston's Severance Agreement.

Specifically, the Court finds the votes approving Preston's Severance Agreement included the following:

- Motion to Amend the Agenda: Passed 5-2, with Thompson and R. Wilson voting Aye; with Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 23, ll. 28-30.)
 - Motion to Amend Proposed Amendment to Agenda: Failed 2-5, with Waldrep and C. Wilson voting Aye; Thompson and R. Wilson voting Nay; Removing Improper Votes, Failed 0-3. (Pl. Ex. 5, p. 23, ll. 22-26.)
- Motion to Adopt the Severance Agreement: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 27, ll. 36-39.)
 - Question called for: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 27, ll. 28-32.)

¹⁴ See also *Griggs v. Hodge*, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) ("As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency."); *Schroeder v. O'Neill*, 179 S.C. 310, 184 S.E.2d (1936) ("The Court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious"); *Plunkett v. Aiken*, 159 S.C. 97, 108-09, 156 S.E. 245 (1931) ("The exercise of that discretion so long as it is not unreasonable or capricious, is a matter of policy with which the Courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the City Council, and we cannot sustain the decree of the Circuit Judge on this additional ground, as urged by the respondents.").

- Motion to Approve Transfer of Funds to Fund the Agreement: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and R. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 30, ll. 41-45.)
 - Motion to Table Motion to Transfer Funds: Failed 2-5, with Thompson and R. Wilson voting Nay; Waldrep and C. Wilson voting Aye; Removing Improper Votes, Failed 0-3. (Pl. Ex. 5, p. 30, ll. 15-20.)
 - Question Called For on Motion to Transfer Funds: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 30, ll. 30-38.)
- ~~Motion to Reconsider the Transfer of Funds Motion: Passed 6-0-1, with Thompson, R. Wilson and Waldrep voting Aye; C. Wilson Abstaining; Removing Improper Votes, Passed 3-0-1. (Pl. Ex. 5, p. 32, ll. 3-5.)~~
- Second Vote on Motion to Transfer Funds: Passed 5-2, with Thompson, R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 33, ll. 7-8.)
 - Question Called For: Passed 5-2, with Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 3-0. (Pl. Ex. 5, p. 32, ll. 43-46.)
- Motion to Reconsider Approval of the Severance Agreement: Passed 4-0-3, with Thompson voting Aye; R. Wilson, C. Wilson and Waldrep abstaining; Removing Improper Votes, Passed 3-0-3. (Pl. Ex. 5, p. 33, ll. 30-43.)
 - Question Called For: Passed 4-3, Thompson and R. Wilson voting Aye; Waldrep and C. Wilson voting Nay; Removing Improper Votes, Passed 2-1. (Pl. Ex. 5, p. 33, ll. 34-39.)¹⁵

¹⁵ Of all the votes leading up to the approval of the Severance Agreement, only the parliamentary vote to call for the question on the motion to reconsider was close. The Court finds, however, that even if Waldrep and C. Wilson could have voted, no change in outcome would have manifested. First, under Robert's Rules of Order Article 1, §7, debate would have eventually expired regardless of the outcome on the subject vote to call for the question. Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (See, e.g., McAbee Tr. Test.; Greer Tr. Test.; Floyd Tr. Test.) The County has not introduced any evidence to the contrary. Second, had such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement. As noted above, this did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. Third, adverse parliamentary rulings can be appealed under the Anderson County Code. See ACC § 2-37(g). Here, no appeal occurred. (See Pl. Ex. 5.) Finally, 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) ("That is merely a

- Second Vote on Severance Agreement: Passed 5-1-1, with Thompson and R. Wilson voting Aye; C. Wilson voting Nay; Waldrep Abstaining; Adjusted Vote, Passed 3-0-1.

(See Pl. Ex. 5.)

Therefore, under Plaintiff's first cause of action, Preston's Severance Agreement does not warrant rescission. After discounting the improper votes, the Court finds a majority of members present and voting duly passed Preston's Severance Agreement.

II. Second Cause of Action: Public Policy Voids County Council's Actions; and Seventh Cause of Action: County Council's Actions Were Arbitrary and Capricious.

Plaintiff's second and seventh causes of action respectively alleged County Council's vote approving the Severance Agreement warrants rescission because such vote contravened public policy and constituted arbitrary and capricious decision-making. (See Am. Compl., ¶¶37-39 & 71-74.) As the second and seventh causes of action present interrelated issues, the Court addresses them together, and for the reasons set out below, rejects both claims as unsupported by fact or law. Accordingly, the Court finds in favor of Preston as to the second and seventh causes of action.

As to the second cause of action, the Court finds that public policy renders neither the Severance Agreement nor the vote adopting the same as void as against public policy. While paragraphs 37 through 39 of the Amended Complaint never specify how the Severance Agreement's approval violated public policy, the Court finds greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body. As noted *supra*, in furtherance of strong public policy in this state, South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute. *Segars-Andrews*,

matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate 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) ("[C]ourts will not disturb a ruling on a parliamentary question made by a legislative . . . body having authority necessary to make rules for its government . . .").

387 S.C. at 130, 691 S.E. 2d at 469; *Bear Enters.*, 319 S.C. at 140, 459 S.E. 2d at 886; *see also* S.C. CODE ANN. § 4-9-20; *supra*, n. 8. The Court, therefore, finds in favor of Preston as to the second cause of action.

As to the seventh cause of action, the Court finds County Council's vote in favor of Preston's Severance Agreement did not constitute arbitrary decision-making. In reaching this conclusion, the Court relies upon the decision of *Bear Enterprises v. County of Greenville*. Quite simply, *Bear* stands for the proposition that: "[i]t is not the prerogative of the courts to pass upon the wisdom of County Council's decision . . ." *Bear Enters.*, 319 S.C. at 140, 459 S.E.2d at 885. "The party challenging a governmental body's decision bears the burden of proving the decision is arbitrary." *Pressley v. Lancaster Cnty.*, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). Importantly, "The decision of the legislative body is presumptively valid and the [opposing party] has the burden of proving otherwise." *Bear Enters.*, 319 S.C. at 141, 459 S.E.2d at 885 (citing *Lenardis v. City of Greenville*, 316 S.C. 471, 471, 450 S.E.2d 597, 597 (Ct. App. 1994)).

Anderson County was required, but did not, prove the arbitrariness of County Council's action "by clear and convincing evidence." *Bear Enters.*, 319 S.C. at 141, 459 S.E.2d at 886 (citing *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991)). "If the propriety of the Council's decision is even 'fairly debatable,' [the court] cannot inject [its] judgment into a review of [the Council's] decision, but must leave that decision undisturbed." *Id.* at 140, 459 S.E.2d at 885 (citing *Lenardis*, 316 S.C. at 472, 450 S.E.2d at 598) (holding the county's decision in refusing to rezone an area was not arbitrary or capricious). Applying these standards to the case at bar, the Court finds County Council's vote approving the Severance Agreement did not constitute arbitrary and capricious action.

According to Plaintiff, the financial value of the Severance Agreement rendered County Council's vote approving the same arbitrary and capricious. Specifically, Anderson County compares severance amounts owed under the strict terms of Preston's Master Employment Agreement with the financial value of the Severance Agreement. Because the latter exceeds the former, Plaintiff concludes the Severance Agreement was arbitrary and capricious. The Court disagrees.¹⁶

The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious. In light of the information available to County Council when it approved the Severance Agreement, and in light of events occurring since, the Court finds Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice. (See Bright Tr. Test. (Day 1) (Conceding advice to Personnel Committee included several potential options including settling with Preston; conceding he informed Personnel Committee of potential downside of litigation); see also Def. Ex. 28, p. 4, ¶F.)¹⁷

The reasonability of County Council's decision-making proves especially true in light of the steps the Council-elect had leaked to the public as their intended course of action upon taking office. Based on what the members of County Council knew at the time, such actions could very

¹⁶ As an initial matter, it is worth noting that 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. (See Pl. Ex. 22; see also Bright Tr. Test. (Day 1).) Moreover, the release contained in the Severance Agreement exceeds the scope of the release contemplated by Preston's Master Employment Agreement. (Compare Pl. Ex. 1, p. 4, ¶E with Pl. Ex. 7, p. 2, ¶6.) Preston's Master Employment Agreement also contained an indemnity provision, which survived the Agreement, but was terminated under the Severance Agreement. (Compare Pl. Ex. 1, p. 8, §14 with Pl. Ex. 7, p. 2, ¶6.) Thus, contrary to Plaintiff's suggestions, County Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious.

¹⁷ Importantly, the County's employment lawyer alluded to subsequent events before County Council acted upon the Severance Agreement.

well have violated Preston's legal and contractual rights. Both Preston's Master Employment Contract and South Carolina statute provided for a hearing before dismissal or suspension without cause. (*See, e.g., Pl. Ex. 1, p. 7, ¶13; S.C. CODE ANN. § 4-9-620.*)

By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It is clear to this Court that the matter had been prejudged by the majority of Council-elect. To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million (\$2,000,000.00) dollars. (*See McBee Tr. Test. (Day 2); Greer Tr. Test. (Day 4); see also Floyd Tr. Test. (Day 5); Bright Tr. Test. (Day 1).*) Also, it is noted that the *Cunningham* case has been allowed to go forward toward trial on issues relating to his wrongful discharge. These are some of the same issues that may have been asserted by Preston had the plan developed by the councilmen and councilmen-elect in the time leading up to this vote been allowed to proceed as had been planned.

Each of the Council members who the Court has found properly voted for the Severance Agreement provided independent and lucid reasons supporting their votes.¹⁸ Certainly their

¹⁸ (*See, e.g., Greer Tr. Test. (Day 4)* (testifying that he voted in favor of the Severance Agreement because *inter alia*: he hoped it would end political infighting that he observed as having impaired the County's ability to conduct business; he sought to avoid the potential downside risk of two million (\$2,000,000.00) dollars, as articulated by the County's employment counsel; he sought to avoid risk to economic development caused by political infighting; and he deemed it important to treat the County Administrator fairly so as not to impair County's ability to find another Administrator); *Floyd Tr. Test. (Day 5)* (testifying that she voted in favor of the Severance Agreement because, *inter alia*: she believed the County faced over two million (\$2,000,000.00) dollars in liability if it lost to Preston; she hoped the Severance Agreement would end the political infighting she had observed as interfering with County Council's ability to complete business; she believed the Severance Agreement was the honest and fair thing to do; she believed it was important for the County to treat Preston honestly and fairly; and by voting in favor of the Severance Agreement, an outcome deleterious to the County could be avoided.);

decisions were unpopular with segments of the community and with Council-elect. However, Courts should not weigh the decisions of legislative bodies based upon the popularity of their decisions. Courts must instead judge whether a reasonable basis existed for making the decision in question. Reasonable decisions made by legislative bodies can often be unpopular when they are made. That fact does not make the decisions in question arbitrary, capricious or illegal.

As was stated in the *Bear Enterprises* case, if the decision made by County Council was "fairly debatable" the decision should remain undisturbed. 319 S.C. at 140, 459 S.E.2d at 885. Here, this Court has determined the decision to approve the Severance Agreement was "fairly debatable." It is noteworthy that, upon taking office, Council-elect did take actions to initiate this litigation on similar issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this litigation and the underlying investigation have exceeded the County employment attorney's 2008 estimate of two million (\$2,000,000.00) dollars. (See, e.g., Allen Tr. Test (Depo.), 20:25-21:1-8 (Testifying "investigation in this lawsuit" was already nearing two million dollars (\$2,000,000.00) in January of 2012).) Therefore, the Court finds that Anderson County Council's decision to enter into Preston's Severance Agreement was neither arbitrary nor capricious.¹⁹

McAbee Tr. Test. (Day 2) (testifying that he voted in favor of the Severance Agreement because *inter alia*: he wanted to avoid the downside risk of in excess of two million (\$2,000,000.00) dollars, if the County lost the dispute with Preston, as articulated by the County's employment lawyer; he hoped the Severance Agreement could put behind the contentious period of County Council, which had already lasted several years and impaired County Council's ability to move forward.))

¹⁹ The County has raised subsequent precedent to the Court regarding the potential unenforceability of Preston's Master Employment Agreement. Such precedent, however, does not change the Court's decision. At the time of the Severance Agreement's approval, no such precedent existed. Legislative bodies do not have to foresee what an appellate court may decide five (5) years later. The question before the Court is whether, based upon the information then available, County Council's decision-making was fairly debatable. The Court finds that it was. If the issue was so clear, the County's employment attorney would not have identified a potential downside risk of up to two million (\$2,000,000.00) dollars.

III. Third Cause of Action: Preston Breached His Fiduciary Duty to Anderson County.

Plaintiff's third cause of action seeks rescission of the Severance Agreement due to Preston's alleged breach of fiduciary duty resulting from violations of the State Ethics Act and Anderson County Code. (See Am. Compl., ¶¶40-46.) As an initial matter, the Court finds no evidence supporting Plaintiff's contention that Preston breached a fiduciary duty by violating the State Ethics Act or Anderson County Code.²⁰ (See *infra* (discussing County Council members as those individuals who owed disclosure duties, to the extent applicable). As found above, the Court has discounted the favorable votes of Thompson and R. Wilson as contrary to the Anderson County Code inasmuch as such votes carried a substantial "appearance of impropriety" and that they personally had a greater stake in the outcome than a member of the general public in Anderson County. See *supra*. After doing so, the Court finds in favor of Preston in relation to the County's third cause of action.

The analysis applied by the Court follows the Supreme Court's holding in *Baird*, 333 S.C. at 519, 511 S.E.2d at 69. In *Baird*, the State Ethics Commission advised the tainted voter not to vote on a Bond Ordinance. When the tainted voter ignored the State Ethics Commission and nonetheless voted, the remedy, as determined by the *Baird* Court, was to invalidate the tainted vote "in determining the necessary majority for valid action." *Id.* at 535, 511 S.E.2d at 77. The remedy was not to overturn the entire vote. *Id.* The Court finds the instant remedy should be no greater than in *Baird*.

Pursuant to the Supreme Court's holding in *Baird*, then, this Court should discount the tainted votes and then determine whether County Council would have still adopted the Severance Agreement. *Id.*, 511 S.E.2d at 78 (The court has jurisdiction to undo legislative action if the

²⁰ As to the specific nuclei of allegations (*i.e.*, Thompson, McAbee, and Wilson), the Court has set out additional analysis below, which similarly applies to Plaintiff's third cause of action. The Court incorporates by reference analysis later in this opinion to the extent it applies to the County's third cause of action.

requisite number of votes "would not [have] exist[ed] but for the improper vote[s].") Unlike *Baird*, however, when the Court discounts the tainted votes in this case, the result of the vote remains unchanged.²¹ Accordingly, Anderson County Council still approved Preston's Severance Agreement. Further, this would be true even if the votes of Waldrep and C. Wilson remained undisturbed for the reasons set forth above. Therefore, the Court finds in favor of Preston as to Plaintiff's third cause of action.

IV. Fourth Cause of Action: Preston Committed Fraud; Fifth Cause of Action: Preston Committed Constructive Fraud; Sixth Cause of Action: Preston Committed Negligent Misrepresentation.

As to the fourth, fifth, and sixth causes of action, Plaintiff respectively alleges Preston committed fraud, constructive fraud, and negligent misrepresentation warranting the Severance Agreement's rescission. (See Am. Compl., ¶¶40-70.) The Court finds Anderson County failed to prove the necessary elements of such claims. See *Kahn Construction Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 271 S.E.2d 414 (1980) (reciting nine elements of fraud required to be proven by clear, cogent, and convincing evidence); *Woods v. State*, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993) (reciting nine elements of constructive fraud); *Baptist Foundation for Christian Education v. Baptist College*, 282 S.C. 53, 317 S.E.2d 453 (Ct. App. 1984) (noting clear, cogent, and convincing proof for constructive fraud); *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847, 852 (Ct. App. 1997) (reciting six elements required for negligent misrepresentation claim); *Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1987). Accordingly, the Court finds in favor of Preston as to the fourth, fifth, and sixth causes of action.

²¹ The Court similarly finds no evidence of record establishes any of the remaining votes of County Council would have changed had such Council members known the information about which Plaintiff complains. Indeed, the evidence of record demonstrates none of the remaining proper votes would have voted differently. Moreover, as noted above, Anderson County failed to prove any connection linking the Thompson Allegations and R. Wilson Allegations to the Severance Agreement. The Court instead discounted Thompson's vote and R. Wilson's vote due to the appearance of impropriety.

The County predicates its fourth, fifth, and sixth claims on the McAbee, Thompson, and R. Wilson allegations. As noted *supra*, the Court finds no evidence supports any impropriety as to the McAbee allegations. As to Thompson and R. Wilson, the County failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement. Moreover, to the extent duties of disclosure existed, the impacted *elected officials* possessed positive legal duties to disclose any issues implicating ethical matters. But, in any event, Plaintiff failed to prove such disclosures were material to the outcome, as Plaintiff has not shown such disclosures, even if made, would have changed the votes of McAbee, Greer, and Floyd. Indeed, the evidence of record supports an opposite conclusion.

Moreover, by November 18, 2008, the Court finds Preston did not possess a duty to disclose information about his employment claims to County Council. It is clear to this Court that by October and November of 2008, Preston and County Council had assumed positions adverse to each other. By that time, Preston had already sued two Council members individually, asserting claims for injunctive relief, payment of costs, and attorney's fees. (*See, e.g.*, Def. Ex. 50.) Preston had further employed personal counsel to advance a claim of anticipatory breach of his employment contract by Council and the Council-elect. (*See, e.g.*, Pl. Ex. 23.) Preston had likewise given notice of tort claims he intended to bring against individual Council members and Council-elect. (*Id.*) The County and the individual Council members each had retained their own attorneys to protect their interests. It is clear to this Court, that at that time, the Parties were in adversarial positions to each other concerning the continued employment of Joey Preston.

In effect, in October and November of 2008, Preston was a claimant against certain Council members and Council itself. Because of their adversarial positions, open and known to both parties, any responsibility Preston may have had to keep County Council fully informed of his position in this matter had been necessarily greatly diminished or negated. Under these

circumstances, Preston did not owe a duty, and this Court has found scant authority to support such a fiduciary duty to one's employer in such a litigious situation as existed in Anderson County at that time. Accordingly, the Court finds Preston did not owe County Council a duty to furnish information adverse to his claim: when both parties had employed attorneys, when both parties were preparing for litigation, and when the involved Council members themselves had positive legal duties to disclose the ethics issues cited by Plaintiff. Further, this Court has invalidated any tainted votes and the result of the voting remains unchanged.

The County also complains that Preston failed to correct information supplied by Thompson to a local newspaper. According to Plaintiff, in June of 2008, Thompson publicly denied in a newspaper interview that he sought employment with the County. (See Am. Compl., ¶¶ 16, 44, 48.)²² The Court rejects Plaintiff's claims as unsupported. However, even assuming Preston somehow owed a duty to correct misstatements of sitting Council members (his employers) to the media, Plaintiff failed to prove that Preston had anything to do with Thompson's statement to the media, or that Preston even knew about Thompson's statement when the Severance Agreement vote occurred. Moreover, no evidence established County Council's members knew and relied upon Thompson's statement. Similarly, no evidence demonstrated that had such information been known, it would have materially affected the outcome of the Severance Agreement vote. Based upon the totality of evidence presented during six (6) days of trial, the Court finds it would not have changed the outcome.

As to the Schaum issues, the Court finds the Services Contract was a public file and Preston had no duty to inform Council of public information. See, e.g., S.C. CODE ANN. § 30-4-40(a)(5)(A). It had been widely known that Schaum had a Services Contract with the County

²² The County also cites Preston's failure to correct Thompson's alleged misstatement in support of its third cause of action. The same analysis would apply to that cause of action. That is to say, assuming a duty existed to correct Thompson's statement, the County failed to prove Preston even knew of the same.

long before Preston asserted any claims against the County. Schaum's relationship with R. Wilson was likewise known. No evidence proved the Services Contract's renewal was in any way material or related to County Council's decision to approve Preston's Severance Agreement. The evidence further failed to prove County Council would not have approved the Severance Agreement, regardless. Indeed, the Court finds the evidence of record proves otherwise.

Therefore, the Court finds no fraud, constructive fraud, or negligent misrepresentation arose by virtue of Preston's remaining quiet during the Severance Agreement vote. The Court similarly finds the Severance Agreement was not the product of fraud nor was it an abuse of power. Accordingly, the Court finds in favor of Preston in relation to Plaintiff's fourth, fifth, and sixth causes of action.

V. Eighth Cause of Action: Preston Breached the Severance Agreement by Back-dating Documents & Ninth Cause of Action: Breach of Fiduciary Duties by Back-dating Documents.

Plaintiff bottoms its eighth and ninth causes of action on allegations relating to former Anderson County Economic Development Director, Heather Jones. (Am. Compl, ¶¶ 75-80.) According to Plaintiff, Preston participated in back-dating memoranda relating to Jones' employment with the County. (See Am. Compl., ¶¶ 11(a), (b), & (c).) After reviewing the evidence of record, the Court finds Preston did not breach the Severance Agreement by executing back-dated memoranda and had he done so the breach would not have justified the relief sought.

No evidence of record demonstrates that any document executed by Preston changed the County's existing employment or contractual obligations to Jones. The documents in question memorialized agreements that had been previously made and acted upon by all parties. (See, e.g., Jones Tr. Test. (Depo.), (relating to SUV allegations: 125: 9-19; 127: 20-25; 128: 1-13; 128: 24-25; 129: 1-5; 129: 18-25; 130: 1-4 Def. Ex. 66; Def. Ex. 138); (relating to Educational Reimbursements: 122: 5-20; 123: 10-12; 123: 17-25; 124: 14-25).) Moreover, the County failed

to prove that Preston executed any memoranda on or after December 1, 2008, as alleged.²³ (See Am. Compl., ¶¶ 11(a), (b), & (c).) Accordingly, the Court finds none of the alleged actions relating to Jones breached the Severance Agreement, nor did the execution of Jones' employment memoranda harm the County in any way.

For a breach of contract to warrant rescission, the breaches must prove so substantial and fundamental as to defeat the contract's purpose. *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) ("The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract."); *Smith v. First Provident Corp.*, 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965); *Davis v. Cordell*, 237 S.C. 88, 99, 115 S.E.2d 654, 655 (1960); *Martin v. Carolina Water Serv., Inc.*, 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984).

Even if Preston somehow breached the Severance Agreement, which is rejected as unsupported, the Court finds that any such breaches would not rise to the level of justifying a rescission of the contract. *Brazell v. Windson*, 384 S.C. 512, 517, 682 S.E.2d 824, 826 (2009) (citing *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989); 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 68:21 (4th ed. 1999 & Supp. 2012) (instructing that the breach must be "of a most substantial character and pervade[] almost the entire contract" such that the breach would "defeat its purpose in nearly every respect."). Accordingly, the Court finds in favor of Preston as to the eighth and ninth causes of action.

VI. Tenth Cause of Action: Seeking a Constructive Trust for Funds Held by SCRS.

²³ The Court notes that the evidence demonstrated Jones had use of a County vehicle from December of 2006 until her departure in 2009, which was standard and necessary for her job. Jones never submitted any educational reimbursements. As to the travel memorandum, Preston never executed the memorandum and Jones never took the contemplated trip. (See Jones Tr. Test. (Depo.), 117: 22-23.) Thus, none of the Jones' allegations impacted the County whatsoever.

In its tenth cause of action, Anderson County seeks the imposition of a constructive trust over funds "in possession of" SCRS. (Am. Compl., ¶¶81-84.) Given the remaining findings of the Court, as set forth in this decision, Plaintiff's cause of action for constructive trust no longer remains viable. Accordingly, the Court finds in favor of Preston as to the tenth cause of action.

VII. Eleventh Cause of Action: Unjust Enrichment.

Plaintiff's eleventh cause of action purports to seek rescission based upon the remedy of unjust enrichment. No evidence supports a finding of unjust enrichment in this case. Preston and the County each retained attorneys who negotiated the terms of the Severance Agreement. As noted above, County Council approved the Severance Agreement by a majority of Council members present and voting.

The Court finds the County's unjust enrichment claim is misplaced. Unjust enrichment does not provide grounds for the rescission of a contract. Unjust enrichment does not provide an equitable remedy when a valid contract exists. And, unjust enrichment does not create a vehicle to recoup a contract benefit—after the fact—if a party no longer views the exchange of consideration as desirable. In any event, the Court finds the evidence of record fails to establish Preston's retention of the benefits conferred by the Severance Agreement constitutes a condition under which it would be unjust for him to retain the same. Accordingly, the Court finds in favor of Preston as to the County's eleventh cause of action.

VIII. Further Grounds Supporting Judgment in Favor of Preston.

The Court declines to rescind Preston's Severance Agreement for two additional reasons. They include:

- A. Rescission Proves Unavailable In This Case Because the Court Cannot Return the Parties to Their *Status Quo* Before the Severance Agreement's Formation.**

In order to invoke its equitable powers to rescind a contract, and in the absence of fraud, the Court must be able to return the parties to their *status quo* before the contract's formation.²⁴ See *Kling v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984) ("In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract.") (citing *Rice and Santos, Inc. v. Jones*, 279 S.C. 201, 305 S.E.2d 74 (1983); *Hester v. New Amsterdam Casualty Co.*, 268 F. Supp. 623 (D.S.C. 1967)).²⁵ Indeed, controlling South Carolina precedent holds the ability to return the parties "to the status quo prior to the contract" as a "fundamental prerequisite for rescission." *Rice and Santos, Inc. v. Jones*, 279 S.C. at 204. "This includes the requirement that [Anderson County,] the party seeking rescission[,] must restore [Preston,] the opposite party[,] the benefits received" from Preston. *Id.* Applying such principles to the case *sub judice* renders rescission unavailable as an equitable remedy.

Here, returning the parties to the *status quo* prior to the Severance Agreement's adoption proves fundamentally impossible. The Court cannot return Preston to his position of County Administrator; someone else now holds the position and the parties' relationship has deteriorated such that Preston's restoration to his prior position is impossible. Preston's employment contract has now lapsed and, thus, no longer remains in force and effect. (See Pl. Ex. 1, Preston Master Employment Agreement, § 2.) Nor can the Court reinstate the elected Anderson County Council present in November of 2008. Furthermore, the South Carolina Retirement System has used and invested portions of the severance proceeds, while Preston has substantially depleted the

²⁴ The Court notes an exception to this rule is fraud. However, consistent with the Court's Order, Plaintiff has failed to prove fraud, constructive fraud, or even negligent misrepresentation in this case. Accordingly, the exception does not apply.

²⁵ See also *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004) ("Rescission, as a remedy, returns the parties to the status quo ante.") (citing *Gov't Emps. Ins. Co. v. Chavis*, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970)).

remaining funds. (See, e.g., Pl. Ex. 90; Pl. Ex. 91; Preston's Tr. Test.; see also Preston Depo.)

Accordingly, the Court finds rescission proves unavailable as a viable remedy in this case.

B. The Doctrine of Unclean Hands And The Availability of Adequate Remedies at Law Bar Plaintiff from Invoking the Court's Equitable Jurisdiction.

Invoked by Preston as a fifth affirmative defense, the doctrine of unclean hands likewise bars Anderson County from seeking the equitable remedy of rescission in this case. "An action to rescind a contract is in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702

(Ct. App. 1993) (citing *Davis v. Cordell*, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1966)). In turn,

"The doctrine of unclean hands precludes a plaintiff from recovering in equity if [it] acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Straight v. Goss*, 383 S.C. 180, 206, 678 S.E.2d 443, 457 (Ct. App. 2009) (quoting *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998)). Here, the Court finds Anderson County has unclean hands and, therefore, it cannot invoke the Court's equitable powers.

It is axiomatic: "[h]e who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). It is well understood that unclean hands will preclude rescission of a contract. See *Fattorusso v. Urbanowicz*, 774 N.Y.S.2d 658, 662 (Sup. Ct. 2004) (holding that where the plaintiff came to court with unclean hands and was not entitled to rescind the purchase of a racehorse); *Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App. 1990) (holding that where a plaintiff was found negligent or guilty of wrongful conduct, the plaintiff was precluded from the remedy of rescission).

The requirement that a party seeking the aid of equity, such as rescission, must do so with clean hands is often referred to by the equitable maxim: "[h]e who seeks equity must do equity." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011) (quoting *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994)). "This principle applies to one who affirmatively seeks equitable relief." *Id.* "In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity." *Id.* Consequently, the Court finds the County lacks clean hands and cannot invoke equitable relief. See *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) (declining to grant a plaintiff's request for specific performance where the plaintiff misled the defendants); *Shumaker v. Shumaker*, 234 S.C. 421, 427, 108 S.E.2d 682, 686 (1959) ("Plaintiffs who come into Court invoking the aid of equity should be required to do equity in order that justice might be done between the parties."); *Anderson v. Purvis*, 211 S.C. 255, 266, 44 S.E.2d 611, 616 (1947) (discussing the maxim that he who seeks equity should do equity).

The record proves replete with evidence of the County's unclean hands. An illustrative, but non-exhaustive list of actions by sitting councilmen whose legal fees for actions surrounding the following were later paid by the county, includes the following:

- Waldrep and C. Wilson cast votes against Preston's Severance Agreement when this court has found they should have recused themselves under the Anderson County Code. (*See supra.*)
- A series of meetings occurred at sitting Council member Bob Waldrep's office ("Waldrep Meetings") starting in July of 2008 and extending through January of 2009 wherein two sitting Council members (Waldrep and C. Wilson) met with three Council-elects (Allen, Moore, and Dunn) to plot the course of Anderson County Council in 2009, including adverse employment actions against Joey Preston. The Court has little doubt the group attending the Waldrep Meetings had prejudged the issue of Preston's employment and had decided to pursue his dismissal. (Waldrep Tr. Test.; Allen Tr. Test. (Depo.), 49:1-52:25; Moore Tr. Test. (Depo.), 100:23-106:17.)

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p 32

- Allen, Moore, and Waldrep all testified that specific County employees were discussed during the Waldrep Meetings. Waldrep conceded on the witness stand that the group of employees discussed during the Waldrep meetings have subsequently left County employment. Allen, Moore, and Waldrep conceded Preston was discussed during the Waldrep Meetings. (See, e.g., Allen Tr. Test. (Depo.), 49:14-55:21; Moore Tr. Test. (Depo.), 100:23-106:17; Waldrep Tr. Test. (Day 1).)
- While outwardly denied by the attendees of the Waldrep meetings, a series of E-mails from Council-elect, Eddie Moore, reflect the true intent of the group with regard to Joey Preston. (See Def. Ex. 46, 8/14/08 E-mail (Preston "is desperate and just wants to freeze everything so we can't run him off."); Def. Ex. 87, 08/04/08 Moore E-mail to Trammel ("Hopefully we can get [Preston] run out of Anderson County soon..."); Def. Ex. 89, 08/13/06, Stan Welch (reporter) E-mail to Moore ("If you can get the witchhunters to understand what should be done, you are the man!"); Def. Ex. 91, 10/20/08 E-mail from Moore to reporter Welch and WAIM Radio ("Well, I told radio hog Saturday that they had been trying to get rid of Joey for 10 years and we did by just winning a primary"); see also Def. Ex. 20, Bright Notes 10/13/08 ("[H]e's heard her say 'let's fire him.'"))
- In early fall of 2008, Joey Preston sued Bob Waldrep and Cindy Wilson individually for interfering with his duties as County Administrator. (See Ex. 50, 12/29/08, Order Granting Preliminary Injunction.) At the time, both Waldrep and C. Wilson were sitting County Council members. Among a host of other findings, the court determined: "The County Administrator's duty to supervise his employees is being intentionally and purposefully thwarted by [Waldrep and C. Wilson]." (Ex. 50, ¶27.) The Court also found: "The actions of [Waldrep and C. Wilson] have interfered with the County Administrator's ability to do his job." (Ex. 50, ¶29.) Finding Preston was likely to win on the merits of his suit, the Court issued a preliminary injunction against Waldrep and C. Wilson. (Ex. 50.) According to Waldrep, the County later paid his attorney's fees ratifying his actions as within his official scope of duties, despite being found by the Court as contrary to South Carolina law. Cindy Wilson confirmed this was consistent with her recollection but, unlike Waldrep, did not seek reimbursement of her personal attorney's fees from public funds. (Tr. Test. C. Wilson (Depo.), 68: 2-15.) Thus, Plaintiff has accepted Waldrep's actions, which violated Home Rule and interfered with Preston's duties, as official conduct attributable to Plaintiff. Such conduct occurred in the months just prior to the Severance Agreement's approval.
- On November 17, 2008, Council members Bob Waldrep and Cindy Wilson and Council-elect Tommy Dunn, Eddie Moore, and Tom Allen sent a letter to Preston directing him to freeze County hiring effective immediately. (See Ex. 71, 11/17/08 Letter.) At that time, Dunn, Moore, and Allen had not been sworn-in, nevertheless, the correspondence was sent on Anderson County letterhead and copied to: "All Media Outlets." (Id.) No action on this subject had been taken by the sitting County Council.

- Eddje Moore testified that the group met at Bob Waldrep's office on the Sunday directly prior to the January 6, 2009 meeting. That meeting would have occurred on January 4, 2009. During the meeting the group discussed agenda items and probably looked at "some of the resolutions." (Moore Tr. Test. (Depo.), 271: 7-25.)
- Gracie Floyd testified that Cindy Wilson used FOIA information requests as a club to harass Preston, over and over again. Indeed, Defense Exhibit 34, which is an opinion from the Supreme Court of South Carolina confirms this tactic. As of 2005, Wilson had already requested over 59,000 pages of documents from Preston. (Ex. 34, p. 5, 2008 Opinion of *Wilson v. Preston*.) Thereafter, the evidence at trial indicated C. Wilson's information requests were unending.
- See Exhibit "A" for additional matters which were not considered by this Court in reaching these conclusions since they were done by persons who were not yet county officials when they took these actions, and therefore, their actions should not be attributed to the county on this issue. However, these do matters do serve as a basis for the atmosphere that surrounded the actors in this case and as a basis for Preston's claim of anticipatory breach of contract as mentioned earlier.

Accordingly, when taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as County Administrator.

The Court finds such behavior prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance. The above described conduct is at the very least conduct that this Court finds to be ethically questionable, if not illegal. Accordingly, the Court finds the County lacks clean hands in this case and cannot invoke the Court's equitable powers to rescind the Severance Agreement, even if it could otherwise supply a basis for doing so, which it cannot. *See Straight*, 383 S.C. at 206, 678 S.E.2d at 457.

The County has stated in this action it wished to question the legality of the Severance Agreement. If that was the County's intention, that goal could have been accomplished by the bringing of a declaratory judgment action questioning the legality of the actions of the former

council, without suing Mr. Preston directly for rescission. In the current case, allegations are advanced in direct violation of Paragraph Eight of the Severance Agreement since they are based on matters that are "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 action taken by Mr. Preston within the scope and course of his employment as County Administrator." This Court finds that an adequate remedy at law does exist. Generally, in South Carolina "equitable relief is unnecessary when an adequate remedy ... is available at law. *Montelth v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939); *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) ("[E]quitable relief is generally available where there is no adequate remedy at law...."); *Carolina Park Associates, LLC v. Marino*, 2012 WL 4711857 (S.C. 2012)

IX. Preston's Counterclaim for the Breach of Paragraph Eight of the Severance Agreement.

The Court finds Anderson County breached the unambiguous terms of Paragraph Eight of the Severance Agreement by bringing this action. Paragraph Eight states as follows:

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. (Pl. Ex. 7, p. 3, ¶8.)²⁶

²⁶ Similarly, Paragraph Six of the Severance Agreement states in material part:

The parties expressly covenant for themselves, their legal representatives, their heirs, and assigns, that this Agreement may be treated as a complete defense to any legal, equitable, or administrative action that may be brought, instituted, or taken by Employee against the County, related to Employee's employment, and/or the termination of his employment, or the conditions of his employment, and shall forever be a complete bar to the prosecution of any action, suit, charge, claim, or legal proceeding relating in any way to Employee's employment or termination of employment.

(Pl. Ex. 7, p. 2, ¶6.)

Having found Preston's Severance Agreement valid and enforceable by virtue of its adoption by the remaining untainted votes of County Council, and hearing no argument that the agreement was not legally entered into other than the issues raised in the Complaint, the Court finds Plaintiff's initiation and prosecution of the instant action breached Paragraph Eight of the Severance Agreement.

According to the County, the instant lawsuit merely attacks the Severance Agreement, not Preston's actions while County Administrator. The Court rejects this argument. It is clear the County based the instant lawsuit upon actions taken by Preston while performing his job as Administrator. (See, e.g., Am. Compl., ¶¶12, 13, & 17 (Preston's attempted hiring of Thompson); *Id.* at ¶¶25-28 (renewing Services Contract with R. Wilson's daughter); *Id.* at ¶¶30-33 (challenging Preston's processing of McAbee's travel reimbursements); *Id.* at ¶¶11(a)-(c) (Preston's back-dating of memos regarding Jones' employment).) In fact, several of Plaintiff's causes of action attempt, albeit unsuccessfully, to invoke Preston's employment as a predicate to stating a claim. (See Am. Compl., Fifth Cause of Action (Constructive Fraud); Sixth Cause of Action (Negligent Misrepresentation); Seventh Cause of Action (Breach of Fiduciary Duty); Ninth Cause of Action (Breach of Fiduciary Duty other grounds).)

Had the County wanted the courts to determine the validity of the Severance Agreement itself and make it the focus of the litigation, it could have done so by instituting a declaratory judgment action focusing solely on the contract and its validity.²⁷ Instead, the County brought

²⁷ The County also attempts to draw the distinction that the Severance Agreement is beyond the covenant not to sue, which should not be construed as what it characterizes as an "incontestability clause." The Court rejects this analysis. The covenant not to sue is clear and unambiguous. (See Pl. Ex. 8, p. 2, ¶6.) The covenant not to sue does not, as the County suggests, contain an exception to challenge the actions taken by Preston while County Administrator, so long as those challenges are raised in contesting the Severance Agreement's validity. (*Id.*) Thus, the Court finds the County breached the covenant not to sue when it

this action against Preston and the Retirement System as named defendants seeking rescission of the Severance Agreement and the return of all monies and costs.

Accordingly, the Court finds the County's filing of the instant lawsuit constitutes a breach of the Severance Agreement's covenant not to sue provisions as contained in Paragraph Eight of that Agreement. Numerous Courts examining the issue have ruled that obvious breaches of covenants not to sue support the award of damages in the amount of attorney's fees incurred as a result of the breach. *See S&D Mech. Contractors, Inc. v. Entling Water Conditioning Systems, 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, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 377*, 700 F.2d 1067, 1072 (6th Cir. 1983); *Prospect Energy Corp. v. Dallas Gas Partners, LP*, 761 F. Supp. 2d 579, 592 (S.D. Tex. 2011). *See, e.g., Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302, 1306 (5th Cir. 1992) (holding that where an action is brought in obvious breach of covenant not to sue, court has wide discretion to impose liability for litigation expenses, including attorney's fees); *McKissick v. Gemstar-TV Guide Int'l, Inc.*, Ca. No. 04-262, 2006 WL 211950, at *2 (N.D. Okla. Jan. 27, 2006) (granting summary judgment in favor of defendant where plaintiff's suit was "in violation of a broad and unambiguous covenant not to sue"), *aff'd in part, vacated in part on other grounds, and remanded*, 618 F.3d 1177 (10th Cir. 2010); *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1027 (W.D.N.Y. 1990) (holding party is entitled to attorney's fees for "suits brought in obvious breach or otherwise in bad faith" where plaintiffs' allegations arose directly from events surrounding the settlement agreement and were in obvious breach of the covenant); *Quill Co., Inc. v. A.T. Cross Co.*, 477 A.2d 939, 943 (R.I. 1984) ("In the absence of contrary evidence, sufficient effect is given the usual covenant not to sue if, in addition to its service as a defense, it challenged the Severance Agreement's validity based upon conduct allegedly occurring during Preston's tenure as Administrator. To hold otherwise would render the provision meaningless.

is read as imposing liability only for suits brought in *obvious breach or otherwise in bad faith*") (emphasis added).

A similar result was reached in a recent South Carolina Court of Appeals decision filed on October 24, 2012. In *Benedict College v. National Credit Systems, Inc. v. Ford*, 400 S.C. 538, 735 S.E.2d 518 (Cl. App. 2012), the South Carolina Court of Appeals analyzed whether attorney's fees and costs could be pursued as special damages in a civil conspiracy claim where certain parties conspired to alter previously existing contract rights. The *Benedict* Court allowed the claim for special damages in the form of attorney's fees and costs arising out of the pending action.

The *Benedict* decision supports the general proposition underlying the decisions cited above, namely, that attorney's fees and costs can form an element of recoverable damages—if—as in this case, they flow from the complained of wrong. Here, Plaintiff plainly violated a clear and unambiguous covenant not to sue and the damages incurred by Preston proximately flowing from the same are the fees and costs of this action.

The above cited cases represent a common law approach to the awarding of attorney's fees. It appears that there is no case law from South Carolina directly on point which establishes a common law right to attorney's fees involving breach of a covenant not to sue. This especially true for cases in which the State or one of its political subdivisions is a moving party. However, the Court does find that the legislature has provided a statutory right to collect attorney's fees in cases which are initiated by governmental entities, as was done in this case. This statute sets forth the basis for the award of attorney's fees and also sets the prerequisites which must be followed by the Courts in making such an award. The statutory authority for the awarding of attorney's fees is S.C. Code 15-77-300 which provides:

§ 15-77-300. Allowance of fees

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

(B) Attorney's fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate. Factors to be applied in determining a reasonable rate include:

(1) the nature, extent, and difficulty of the case;

(2) the time devoted;

(3) the professional standing of counsel;

(4) the beneficial results obtained; and

(5) the customary legal fees for similar services.

The judge must make specific written findings regarding each factor listed above in making the award of attorney's fees. However, in no event shall a prevailing party be allowed to shift attorney's fees pursuant to this section that exceed the fees the party has contracted to pay counsel personally for work on the litigation.

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

This Court finds that this statute is in derogation of the common law on the award of damages against a sovereign body. "If the statute is in derogation of a common law right, it must be strictly construed and not extended in application beyond clear legislative intent." *Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338 (2012)(quoting *Doe v. Marion*, 361 S.C. 463, 473 (Cl. App. 2004)). This Court finds that S.C. Code § 15-77-310 provides the method that should be followed by a claimant seeking attorney's fees in this case. Section 15-77-310 states "The party shall petition for the attorney's fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request."

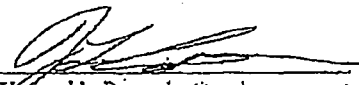
Accordingly, the Court finds that the issue concerning an award of attorney's fees in this matter should be held in abeyance pending the final disposition of this case and the filing of the petition as required by law.

CONCLUSION

The Court finds the witnesses supporting the Severance Agreement, specifically Gracie Floyd, Larry Greer, and Bill McAbee, to be the more credible witnesses in the trial. Other testimony at trial was evasive and not credible concerning issues surrounding the meetings held at councilman Bob Waldrep's office. This Court further finds testimony concerning the emails between those parties that did not support the approval of the severance package untrustworthy (See exhibit A and Finding of Facts). Therefore, as to all causes of action asserted by Plaintiff, the Court finds in favor of Defendant Preston and enters judgment consistent with this decision. As to Preston's counterclaim, the Court finds in favor of Defendant Preston and holds the question of attorney's fees in abeyance until the final disposition of this case and any petition filed according to statute.

IT IS SO ORDERED.

May 3, 2013


The Honorable Roger L. Conch
Circuit Court Judge

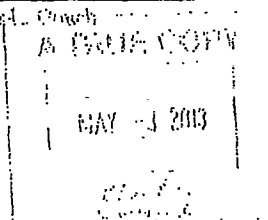


TABLE A

EXHIBIT NUMBERS	DESCRIPTION	COURT'S RULING
Pl. Ex. 33	3/21/06 Council Mtg. Transcript	Admitted.
Pl. Ex. 92	Jones screen print and memo to Preston Re/ Germany Trip	Admitted.
Pl. Ex. 93	Jones screen print and memo to Preston Re/ ed. reimb. 11/26/08 and 10/16/06	Admitted.
Def. Ex. 121	Agt. Donohue SLED Memo. Interviewed C. Wilson, Morgan & Poliakoff Re/ lawsuit against Big Creek Landfill.	Admitted.
Def. Ex. 122	Statement by Cole to SLED, Re/ Conversation with C. Wilson, Polk Re/ allegations Preston used public money to buy people drinks	Excluded, Irrelevant & Hearsay.
Def. Ex. 123	12/3/05 Preston Statement, Re/ Felton Meeting with C. Wilson.	Excluded; Hearsay.
Def. Ex. 125	10/6/05 letter to Preston. Re: Extramarital affairs in Anderson and Lt. Briggs	Excluded; Hearsay.
Def. Ex. 126	Kelly Nichols letter to County Council Re/ Cindy Wilson slandering her	Excluded: Nichols denied its truth and testified Cunningham & Preston authored.
Def. Ex. 132	2/15/2005 Preston v. Wilson <i>et al.</i> Judg. Re/ Award to Preston for \$ 3,500.00	Admitted: Public Record & Preston Statement.
Def. Ex. 134	3/27/06 SLED memo by special agent Kindley Re/ Threats received by C. Wilson	Excluded; Relevance & Hearsay.
Def. Ex. 139	Allen email to Dunn from 12/24/08	Admitted.
Kelly Nichols' Testimony concerning her affair with Joey Preston		Excluded as Irrelevant; Information was not available to Council when the vote occurred and did not enter into the decision-making process. The Court further finds that Preston was not untruthful to County Council on this subject, so testimony would be impeachment on a collateral matter and thus inadmissible.

Page 41

Anderson County vs. Joey Preston
09-CF-04-4482
May 1, 2013
Exhibit A

- Brooks Brown testified Tom Allen, current County Council Chairman, told him in July of 2008 (at the Waldrep campaign victory party) that the incoming Council knew how to get rid of "his boy"—the new Council intended to give Preston a command he could not obey and fire him for insubordination. (*See also* Def. Ex. 26, Bright Notes 11/04/08 ("[M]eeting held—they would give him something to do that he could not perform and that he would be fired for insubordination.")) Brown further testified that when Allen learned Brown had divulged his comments to Preston, Allen threatened him with an investigation. Notably, at the time of such threat, Allen served as the Chairman of Anderson County's investigative subcommittee and C. Wilson also served on the subcommittee. (Allen Tr. Test. (Depo.), 47: 3-25.)
- Council-elect Moore sent correspondence to Preston about a paper shred day for the public on November 13, 2008 at 9:24 AM requesting that Preston "hold off on doing any shredding of any kind of documents from Anderson County at the present time" and "that no financial records be part of this action." (Ex. 92, 11/13/08 Moore E-mail to Preston). However, Exhibit 93 reflects that Moore already knew no County documents would be shredded as of 6:58 AM the same morning. (Ex. 93, 11/13/08 Moore E-mail to King.) Moore blind-copied both Council-elect Tom Allen and Council member Bob Waldrep on the earlier E-mail to Gail King with Anderson County, which stated: "Thanks for the quick response. We new council members just want to make sure no county documents are destroyed at all before our auditors examine them." (*Id.*) As reflected in Preston's response in Exhibit 92, WAIM Radio had been misreporting that county documents were being shredded. Exhibit 92, which blind-copies Allen, Waldrep, the County Council Clerk, and WAIM Radio, reflects a further response from Moore: "Thanks for your quick response...I have always been a no nonsense guy." (Ex. 92, 11/13/08 Moore E-mail to Preston). Then, Moore again writes to Rick Driver at WAIM Radio, who had been misreporting county documents were being shredded when they were not, as had been clarified by Preston, and states: "Rick, keep Preston's response confidential..." (Ex. 94, 11/13/08 Moore E-mail to Rick Driver at WAIM Radio.) So, in essence, Moore sent an E-mail simply to harass Preston and then instructed WAIM Radio to keep Preston's response confidential so the public would remain misled about county documents being shredded.
- On November 25, 2008, before taking office, and before the County ever conducted any investigation, Council-elect Moore wrote to the Attorney General requesting an investigation of Preston's buyout. (Ex. 101, 11/25/08 Moore E-mail to Attorney General.) Moore copied Tom Allen and Council member Bob

Waldrep. Moore blind-copied the County Council clerk, Rick Freemantle, reporter Stan Welch, and WAIM Radio. On 12/01/08, Williamston Journal reporter, Stan Welch, wrote to Moore asking if he could run the story for publication. (Ex. 102, 12/01/08 Welch E-mail to Moore.) On 12/01/08, Eddie Moore forwarded the Attorney General's response to his correspondence to Tom Allen and Bob Waldrep. Moore again blind-copied WAIM Radio, Rick Freemantle, Jenna Trammell, and reporter Stan Welch. Later on 12/01/08, Moore wrote to Stan Welch stating: "Ask Rusty about it. I have to tread gingerly on this until next week. I don't want to play our hand just quite yet. But if Rusty thinks we need to go public we can." (Ex. 104, 12/01/08 E-mail from Moore to reporter Stan Welch.) During his deposition, Moore confirmed the "Rusty" referred to is current County Administrator, Rusty Burns. (Moore Tr. Test. (Depo.), 257: 18-20.) On 12/01/08, reporter Stan Welch wrote to Moore, "I spoke with Rusty. We agree there is nothing to be lost by running with this story..." (Ex. 105, 12/01/08 Welch E-mail to Moore). So, before the County ever spent the first dime on its multi-million dollar investigation, Moore had already begun manipulating the media by leaking "news" about an Attorney General investigation into Preston.

- Allen, under oath, adamantly denied drafting an E-mail on December 24, 2008, attaching a draft agenda of fourteen (14) items, which mirrored exactly what the newly constituted County Council did in its first meeting on January 6, 2009. (Compare Def. Ex. 111, 12/24/08 E-mail with attached agenda with Def. Ex. 138, 1/6/09 Council Meeting Minutes with Allen Tr. Test. (Dep.), 109-114; 119-141 (Testifying E-mail is "100 forgery" and then going through every item on "forged" agenda and locating them on Meeting Minutes).) Importantly, Allen's E-mail was produced from the work E-mail account of Eddie Moore by the Fluor Corporation; from its server, pursuant to a subpoena; and was first produced, by Court Order, to counsel for Eddie Moore, before production to Preston. By contrast, Eddie Moore was questioned about the same E-mail. Moore testified he in no way fabricated or manipulated Allen's E-mail stating: "If it come from Fluor Daniel, that the way it come." (Moore Tr. Test. (Depo.), 267: 2-6.) The documents confirm the resolve of the group attending the Waldrep Meetings to implement a detailed course of action, which at one time included Preston's suspension and dismissal, once they were seated.
- Council-elect Moore repeatedly leaked information to WAIM Radio to cause baseless problems for Preston as County Administrator. (See, e.g., Ex. 97, 9/23/08 Moore E-mail to WAIM Radio; Ex. 101, 11/25/08 E-mail blind-copying WAIM Radio; Ex. 103, 12/01/08 Moore E-mail blind-copying WAIM Radio.)

EXHIBIT 4



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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

COURT OF COMMON PLEAS NONJURY

ANDERSON COUNTY,

PLAINTIFF,

VS.

JOEY PRESTON AND THE SOUTH
CAROLINA RETIREMENT SYSTEM,

DEFENDANTS.

TRANSCRIPT

OF

RECORD

2009-CP-04-4482

October 29th - November 2nd, 2012
November 5th, 2012
Anderson, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

TROY A. TESSIER, JAMES GENTRY, and TALLY PARHAM
ESQ.
Attorneys for the Plaintiff

LANE W. DAVIS and CANDY M. KERN-FULLER
ESQ.
Attorneys for the Defendant

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

1 A. Yes.
2 Q. Do you have hers?
3 A. Absolutely.
4 Q. Does she have your home phone number?
5 A. Yes.
6 Q. Do you have hers?
7 A. Yes.
8 Q. How long have you had your current computer?
9 A. My other one fried and I had to get a new one. I'm
10 not exactly sure how long I've had it. It's probably a
11 little over a year. Whenever my last computer got hit by
12 lighting, we lost TV and all kinds of stuff, whenever that
13 was. I'd have to look back. It's been at least a year,
14 over a year.
15 Q. And what months did your last computer get struck
16 by lightning?
17 A. I don't -- I can't recall -- can not recall the
18 exact date. But it's been over a year ago.
19 Q. Was that before or after you received a subpoena
20 for the information on your computer?
21 A. It was during that time. I'm not exactly sure
22 whether it was before or after. I'd have to go back and
23 look.
24 Q. You don't remember -- do you remember receiving a
25 subpoena?

1221

1 emails.

2 Q. I'd like to show you what I'm gonna mark as exhibit
3 1 to your deposition.

4 Is this document an email from Jenna Trammell to you
5 dated April 23rd of 2008?

6 A. Yes.

7 Q. Does this top email from Jenna Trammell to you
8 relate to the article she wrote for or about you that was
9 published in The Times Examiner?

10 A. Yes.

11 Q. That was the original introductory article we
12 talked about?

13 A. Yeah.

14 Q. Were you the source of the information that was
15 contained in The Times Examiner article?

16 A. She asked me a question.

17 Q. Turn to Page 2.

18 Down below, about the middle of the page, do you see
19 where it says candidate questions?

20 A. Uh-huh. (Affirmative)

21 Q. Is that information that you provided to Jenna
22 Trammell?

23 A. Yes.

24 Q. Can you turn the page?

25 The bottom of the page that is Bates stamped FE100329,

1 do you see that down in the bottom of the corner of the
2 page?

3 The Bates stamp is in the bottom of the page.

4 A. Yeah.

5 Q. About halfway down, not even halfway down, about a
6 third of the way down, there's a sentence that begins with
7 because of all my engineering training, do you see that?

8 A. Yeah.

9 Q. Does that sentence say, and I quote, "because of
10 all my engineering training, I have been a P.E. licensed
11 engineer in six different states?"

12 A. That's not correct.

13 Q. You provided that information, didn't you?

14 A. It's not correct.

15 Q. Did you provide that information?

16 A. Yes.

17 Q. That information was untrue?

18 A. That's not right.

19 Q. Did you understand that this information was going
20 to be put into a newspaper article?

21 A. Yes.

22 Q. Did you understand that you were going to have
23 information about you biographically that was going to be
24 inaccurate as published in a newspaper in public
25 circulation?

1 A. Yes.

2 Q. The sentence right before the Paragraph Number 3,
3 do you see where it says, and I quote, "I have a unique
4 ability for smelling out rotten apples. We have an
5 abundance of them right now in Anderson County"?

6 A. Yes.

7 Q. Do you have a unique ability to smell out rotten
8 apples?

9 A. I do.

10 Q. Down below it says, and I quote, "I am a real
11 fiscal conservative who hates a large and wasteful county
12 government."

13 Do you see that?

14 A. Yes, I do.

15 Q. Are you a real fiscal conservative?

16 A. Yes.

17 Q. What do you mean by a real fiscal conservative?

18 A. Transparent. Watch where you spend your dollars.

19 Q. On the next page, the page that is Bates numbered
20 FE100330, do you see that?

21 A. Yeah.

22 Q. There's a sentence right below where it says,
23 Number 7, and it begins, and I quote, "having been
24 responsible for large budgets in the hundreds of millions of
25 dollars, as well as being an estimator, design supervisor,

1 construction and office engineer, auditor, cost controls
2 engineer, and construction management, gives me a unique
3 insight as to what needs to be done for economic development
4 and cost control."

5 Do you see that?

6 A. Yeah.

7 Q. Were you a construction engineer?

8 A. I've been a construction engineer in the field,
9 yes:

10 Q. How can you be a construction engineer without
11 having an engineering degree?

12 A. I worked my way up in the field from a pipefitter
13 and taking a lot of courses and stuff with my job, and when
14 you go out on overseas assignments, it was like a field
15 engineer.

16 Q. What is a cost control engineer?

17 A. Cost control watches how many hours are being spent
18 on a job, and you kind of watch and know exactly where every
19 hour is being spent by every discipline.

20 Q. What is an auditor?

21 A. Auditor would go in on a job. Like one in Kuwait,
22 we'd go in and we'd check all the hours and the people and
23 make sure everything matches up, do the payroll, check the
24 payroll. Do things like that.

25 Q. What is an office engineer?

1 A. Basically when you go in on -- like when I was over
2 in Taiwan, you just -- an office engineer, you just work
3 with different job sites that's in the area, and you have
4 designers working under you.

5 Q. In the State of South Carolina, you can't call
6 yourself an engineer unless you actually have an engineering
7 degree and license, isn't that right?

8 A. That's correct.

9 Q. And this is an article that was being published in
10 a South Carolina newspaper?

11 A. Right.

12 Q. What is your understanding, if any, about what the
13 law is about calling yourself an engineer in South Carolina
14 without the requisite licensure?

15 A. I understand that you can't do that in South
16 Carolina if you work in South Carolina.

17 Q. Because it's a crime, right?

18 A. Right.

19 Q. Mr. Moore, did you give a deposition in the case of
20 William Phillips, as personal representative of the estate
21 of Elizabeth Walsh versus Edwin Moore, Civil Action Number
22 2001-CP-04-2579 on February 22nd of 2012?

23 A. Yes.

24 Q. Did you take a sworn oath during that deposition?

25 A. Yes.

1 Q. Did you swear to tell the truth, the whole truth,
2 and nothing but the truth so help you God?
3 A. Yes.
4 Q. Did you understand that the deposition was taken
5 under the penalty of perjury?
6 A. Yes.
7 Q. During that deposition, did Attorney Tom Dunnaway
8 ask you, and I quote, "okay. And what do you do for a
9 living"?
10 Do you recall being asked that question?
11 A. Yes.
12 Q. First let me ask you this.
13 Do you remember being asked what you do for a living
14 during that deposition?
15 A. I do remember, yeah.
16 Q. And your response in that deposition was, and I
17 quote, "I'm an engineer with Jacobs Engineering?"
18 Isn't that right?
19 A. I don't remember that. I thought I said I'm in
20 engineering at Jacobs, but maybe I did.
21 Q. I just showed you your transcript -- deposition
22 transcript from February 22nd of 2012, did I not?
23 A. Yes.
24 Q. And Line 24, could you read that into the record
25 please?

1233

1 A. I'm an engineer with Jacobs Engineering.
2 Q. Okay. And the truth is you're not an engineer,
3 correct?
4 A. No.
5 Q. You weren't an engineer on February 22nd of 2012?
6 A. No.
7 Q. And that testimony is false?
8 A. Yes.
9 Q. Sure.
10 Let the record reflect that all the documents that I
11 intend to use today are Bates numbered with the FE prefix.
12 For example, Exhibit 2 is FE100509. I will note for the
13 record that the FE prefix reflects that these were all
14 documents that are in the possession of Mr. Moore's personal
15 counsel, who is Kurt Gibson, who is here today, and they're
16 from Mr. Moore's Fluor Daniel email account.
17 Mr. Moore, is this an email from you to an email
18 address of waimradio@yahoo.com dated April 24th of 2008?
19 A. Right. Yeah.
20 Q. Whose email address is waimradio@yahoo.com?
21 A. That's WAIM Radio, which is a radio station.
22 Q. That's Rick Driver's email address, isn't it?
23 A. Yes.
24 Q. Who is blind copied on your email?
25 A. Trammell.

1234

1 suggesting, you would put Joey Preston on administrative
2 leave and he would be prohibited from any further contact
3 with county employees, is that correct?

4 A. Yes.

5 Q. Mr. Moore, is Exhibit 14 an email from you to Jenna
6 Trammell?

7 A. Yes, it is.

8 Q. Is it dated August 4th of 2008 at 10:26AM?

9 A. Yes.

10 Q. The first question I have for you about this
11 document, when you state, and I quote, "everything you do
12 for me is confidential," what was it that Jenna Trammell was
13 doing for you that was being kept confidential?

14 A. She proofread any of my ads or anything. She
15 proofread to check the grammar because she was an English
16 major.

17 Q. Did she also help you draft things?

18 A. No, not really. She just proofread it for errors.

19 Q. Did she write articles that helped advance the
20 audit that you were advocating for?

21 A. She wrote a lot of articles. I didn't read all of
22 them. So, I can't say exactly what all she wrote. But she
23 did write a lot of articles. A lot of them were about
24 audits.

25 Q. In fact, with respect to the articles that were

1 published in a newspaper, she sent you each and every one of
2 them before she published them, didn't she?

3 A. Are you saying she thanked us?

4 Q. No.

5 She sent them to you before she published them?

6 A. I think so, yes.

7 Q. The next sentence there states, and I quote,
8 "hopefully we can get him run out of Anderson County soon
9 and you can return."

10 Do you see that?

11 A. Yes.

12 Q. It is true, is it not, that you're referring to
13 Joey Preston?

14 A. Yes.

15 Q. Can we agree that you had an intent to try to run
16 Joey Preston out of Anderson County?

17 A. If he didn't conform to transparency, yes.

18 Q. Now, does your sentence say if Joey Preston doesn't
19 conform to transparency, hopefully we can get him run out of
20 Anderson County soon?

21 A. No.

22 Q. What you say is hopefully you can get him run out
23 of Anderson County soon, right?

24 A. Yes.

25 Q. Was this inaccurate?

1 Q. On August 13th of 2008, are you emailing Stan
2 Welch about the audit that you believe is important to
3 Anderson County?

4 A. Yes, how to do it.

5 Q. Is this four months before you would be sworn in?

6 A. Yes.

7 Q. And you're discussing something that you view as
8 important to Anderson County with a reporter?

9 A. Yes.

10 Q. At some point during August of 2008, do you recall
11 a lawsuit that Joey Preston filed against Bob Waldrep and
12 Cindy Wilson?

13 A. I remember something about that.

14 Q. Let me show you what we're going to mark as our
15 next exhibit.

16 Mr. Moore, is this an email from you dated
17 August 14th of 2008?

18 A. Uh-huh. (Affirmative).

19 Q. Is it to Kelly at waldreplaw.com?

20 A. That's right.

21 Q. Is that Bob Waldrep's email address?

22 A. Yes.

23 Q. Do you write in the body of your email, and I
24 quote, "I just heard about the stupid lawsuit. He is
25 desperate and just wants to freeze everything so we can't

1 run him off."

2 Did you write that?

3 A. Yes, I did.

4 Q. Before we go home today, sir, I'd like to give you
5 an opportunity.

6 Is there anything you would like to change about your
7 testimony in relation to your intent to run Mr. Preston off
8 or replace him as the county administrator?

9 A. That's what the audit was all about. If he didn't
10 adhere to the audit, we'd run him off.

11 Q. Is that what this email reflects?

12 A. Exactly. If you look that day before, that's
13 exactly what we're talking about, audit.

14 Q. In fact, wasn't the audit just the vehicle that you
15 intended to use as a process whereby you could get rid of
16 him?

17 A. No.

18 Q. The plan all along was to set up an audit that
19 would find something that you could use as some sort of
20 basis to terminate Mr. Preston, right?

21 A. No.

22 Q. Is it your sworn testimony no, that wasn't the
23 plan?

24 A. We weren't going to do an audit and audit the
25 county finances to see what we found and that's it. Excuse

1 and Rick Driver dated October 20th of 2008?

2 A. Yes.

3 Q. And it states, and I quote, "well, I told Radio Hog
4 Saturday that they been trying to get rid of Joey for ten
5 years, and we did it just by wining a primary and good
6 detective work."

7 Do you see that?

8 A. Yes.

9 Q. Did you write that?

10 A. Yes.

11 Q. Did that express your intent properly?

12 A. Expressed what happened.

13 Q. First of all, who is Radio Hog?

14 A. Charles Crowe. It's his nickname on the radio.

15 Q. And is it true that there's a group that has been
16 trying to get rid of Joey for ten years?

17 A. I think, if you ever listen to the radio show, you
18 would think there probably is a group.

19 Q. There is a group, isn't there?

20 A. I guess anyone talks on the radio show.

21 Q. Or there was a group?

22 A. Yeah.

23 Q. Why, in October of 2008, did you feel like you had
24 gotten rid of Joey by winning a primary?

25 A. That's when they started the letter and everything,

1 radio. I feared that was confidential between he and I.

2 Q. If you felt like it was confidential between you
3 and Mr. Preston, why did you share it with Mr. Driver?

4 A. They had been talking about the shredding and
5 everything on the radio, and I sent the response to him that
6 he gave me.

7 Q. What were they talking about on the radio?

8 A. I don't remember. They were talking about the
9 shredding. They were concerned about the shredding.

10 Q. Were they referencing the shredding of county
11 documents on the radio?

12 A. I think they were.

13 Q. And you asked Mr. Preston about that, right?

14 A. Yes.

15 Q. And Mr. Preston clarified for you that there would
16 be no shredding of the documents that belonged to the
17 county, right?

18 A. Yes.

19 Q. And that's what you asked Mr. Driver to keep
20 confidential?

21 A. That probably was it.

22 Q. What is the time on that email?

23 A. 7:12AM.

24 Q. I'll show you what we'll mark as Exhibit 26.
25 Is this an email from you to Rick Driver dated

1 indictment that there was going to be a possible buy-out of
2 Mr. Preston?

3 A. Yes.

4 Q. During the Family Court proceedings, Mr. Moore, did
5 you represent to the Court that you were an engineer with
6 Fluor Daniel?

7 A. I think I was a field engineer at the time. I
8 think I was on a job site. I need to explain about -- we
9 have classifications there. You have numbers and you have
10 like on the engineering side, and you have, on the design
11 engineering side of the field. You would have like a Level
12 20, Level 20. And if we went out to the field, we would go
13 back and forth with the same level, and that's the way it
14 works. But I was a field engineer on the job site.

15 Q. Is the answer to my question yes?

16 A. Yes.

17 Q. Did you ever make a representation to the Court
18 that you were not in possession of certain furniture that
19 was found out later that you, in fact, were in possession
20 of?

21 A. Yes, family heirlooms that belonged to my family.

22 Q. Did they find that furniture in your garage?

23 A. They found some in the garage.

24 Q. With a lock on it?

25 A. Yes.

1 Q. And you supplied Rick Driver, at WAIM, with a lot
2 of information as well, don't you?

3 A. Yes.

4 Q. A lot of information about county council business?

5 A. He records the county council and he talks about
6 the county council on his radio. Anderson County politics
7 is pretty much his number one story.

8 Q. Mr. Moore, is Exhibit 46 an email that you sent to
9 the South Carolina Attorney General on November 25th of
10 2008?

11 A. Yes.

12 Q. Had you been sworn into office at that point?

13 A. No, I was doing it as a citizen.

14 Q. Do you carbon copy Tom Allen?

15 A. Yes.

16 Q. Do you also carbon copy Bob Waldrep?

17 A. Yes.

18 Q. Do you blind copy George Haynie?

19 A. Yes.

20 Q. Do you blind copy the clerk of council, Linda
21 Gilstrap?

22 A. Yes.

23 Q. Do you blind copy Rick Driver?

24 A. Yes.

25 Q. Do you blind copy Rick Freemantle?

1 A. Yes.

2 Q. Do you blind copy Tom Beckwith?

3 A. Yes.

4 Q. Do you blind copy Stan Welch?

5 A. Yes.

6 Q. As of November 25th of 2008, had Anderson County

7 conducted an investigation of Mr. Preston?

8 A. No.

9 Q. Mr. Moore, is this an email from Stan Welch to you
10 dated December 1st of 2008?

11 A. Yes.

12 Q. Is Mr. Welch asking you whether he can run a story
13 on your letter---

14 A. Yes.

15 Q. ---to Attorney General McMaster?

16 A. Yes.

17 Q. As of December 1st of 2008 had you been sworn in?

18 A. No.

19 Q. As of December 1st of 2008 had the county commenced
20 its investigation of Mr. Preston?

21 A. No.

22 Q. I'll show you what we're going to mark as
23 Deposition Exhibit 48.

24 Mr. Moore, does Exhibit 48 reflect your forwarding of
25 the response from the South Carolina Attorney General to Tom

1 Allen and Bob Waldrep?
2 A. Yes.
3 Q. Is it dated December 1st of 2008?
4 A. Mine says 12/1/2008.
5 Q. In your experience, is December the twelfth month
6 of the year?
7 A. Yes.
8 Q. Do you blind copy on this email George Haynie?
9 A. Yes.
10 Q. Do you blind copy on this email Rick Driver?
11 A. Yes.
12 Q. Do you blind copy Rick Freemantle?
13 A. Yes.
14 Q. Rick Freemantle, he is, himself, a current
15 plaintiff against Anderson County; is he not?
16 A. Yes.
17 Q. Do you blind copy Tom Beckwith?
18 A. Yes.
19 Q. And Jenna Trammell?
20 A. Yes.
21 Q. And Stan Welch?
22 A. Yes.
23 Q. Mr. Moore, is this an email dated -- is Exhibit 49
24 an email dated December 1st of 2008 from you to Stan Welch?
25 A. Yes.

1317

1 Q. Is the Rusty that you refer to in the first
2 sentence of your email the current interim county
3 administrator?

4 A. Yes.

5 Q. Do you write, and I quote, "I don't want to play
6 our hand just quite yet"?

7 A. Yes.

8 Q. As of December 1st of 2008, had you been sworn in?

9 A. No.

10 Q. Had Anderson County Council conducted an
11 investigation of Mr. Preston as of December 1st of 2008?

12 A. No.

13 Q. As of December 1st of 2008 were you just not ready
14 to play your hand?

15 A. Do what now?

16 What was your question?

17 Q. Mr. Welch, in fact, ran a story, did he not?

18 A. Ran a lot of stories. I can't tell you what he
19 wrote. He run a lot of stories.

20 Q. You have no recollection of him writing a story
21 about the investigation by the South Carolina Attorney
22 General that you had initiated?

23 A. I'm not sure whether this email you're talking
24 about here is related to that or not. But, yes, I remember
25 him writing a story about the Attorney General, yes.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUN 18 2014

SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

APPELLANT'S RETURN TO RESPONDENT JOEY PRESTON'S MOTION TO
DISMISS APPEAL

J. Theodore Gentry (No. 64038)
Troy A. Tessier (No. 13354)
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Attorneys for Appellant

I. Introduction and Summary of Argument

Appellant Anderson County (“Anderson County”) filed and served a timely notice of appeal in accordance with the South Carolina Appellate Court Rules. The resulting appeal has been pending for over six months. Respondent Joey Preston (“Preston”) does not claim that Anderson County has departed from the Rules in any way. Despite this, Preston asks this Court to dismiss the appeal on the basis of his claim that two members of Anderson County Council should have been disqualified from voting on a resolution authorizing an appeal. This motion should be denied, for several independent reasons:

- **The Appeal Complies with the Rules.** Preston has not identified any procedural defect in Anderson County’s appeal. Because the appeal is regular on its face, it is not subject to dismissal.
- **A Summary Motion at the Appellate Level Is Not a Proper Vehicle for a Challenge to County Council Votes for Bias.** An appellate motion is poorly suited for a challenge to County Council votes for bias. Reinforcing the proposition that this Court should not look behind the fact that Anderson County’s notice of appeal complies fully with the Rules, such an inquiry cannot be carried out with a “record” that was created before the challenged vote even took place. Preston asks the Court to invalidate a County Council resolution on the basis of a brief motion, and on the basis of selected excerpts from the record of a lawsuit that contained no allegations concerning the vote to appeal. (To state the obvious, the record in this case *could not* directly address the propriety of the vote to approve the appeal, as that vote post-

dated the trial court's order.) Preston cites no cases dismissing an appeal under similar circumstances.

- **This Motion Is Untimely.** The notice of appeal in this case was filed November 22, 2013. The 1,627-page trial transcript was completed on December 16, 2013, and Anderson County filed its 60-page initial brief on February 26, 2014. Preston has since sought and obtained (with Anderson County's consent) two extensions of time to file his own initial brief. Preston should have filed this motion long ago, and it is now prejudicially late.
- **The Appeal Was Independently Authorized by the Interim County Administrator and the County Attorney.** Even assuming that the vote to authorize the appeal could be disregarded, this appeal was still validly authorized. Both the County Administrator and the County Attorney independently authorized the appeal, an act within their respective authorities.
- **Preston Has Not Carried the Burden Required to Disqualify Votes.** Anderson County has shown this Court, in its own argument on the merits of this appeal, that clear evidence exists sufficient to invalidate the vote in favor of Preston's Severance Agreement. However, Anderson County acknowledges that votes should not lightly be disqualified for bias, and Preston's meager showing here fails. The only concrete interest that Cindy Wilson is purported to have in the underlying Severance Agreement was moot long before this vote, and the general claim that Wilson and Moore

disapproved of Preston confuses the possession of articulated views on a topic with an appearance of impropriety.

II. Anderson County Complied with the Rules in Perfecting Its Appeal

Anderson County filed and served a timely notice of appeal, signed by its counsel of record in this case. Preston does not argue or allege that Anderson County has failed to comply with any Rule governing the appellate process. Instead, he argues that the notice of appeal on file in this case should be disregarded because it was not duly authorized.

Preston cites no authority that this Court can or should look behind a duly filed appeal to gauge its authenticity. That is not surprising given that our Supreme Court has actually *rejected* a litigant's invitation to do this. In *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977), a landowner who had prevailed before the circuit court in seeking a variance to a zoning ordinance moved to dismiss the city's appeal of the circuit court's decision. At that time the rules allowed such a motion to be heard by the circuit court, and the circuit court denied the motion to dismiss. The landowner then appealed that decision to Supreme Court. The landowner's counsel alleged that although he had received oral notice within the time allowed for service of the notice of intention to appeal, written notice was received outside the timeframe and had been "predated" by him to the same date he had received oral notice. This acceptance and predating, the landowner's counsel contended, had been "conditional." The Supreme Court took little time in rejecting the landowner's argument that the Court should look behind a valid notice of appeal to extraneous facts:

We first discuss the Landowner's appeal. Counsel for the Landowner contends that the acceptance of service of the notice of intention to appeal and its predating was conditional, and would have us look behind this instrument to find an alleged irregularity. *The instrument, signed and dated by counsel, is valid on its face* and we refuse to allow him to impeach his own signature under the circumstances of this case.

268 S.C. at 47, 232 S.E.2d at 16 (emphasis added).

The *Hartman* Court's refusal to "look behind" an appeal document that was regular on its face reflects the broader judicial skepticism toward attempts to dismiss appeals. See *Haughton v. Order of United Commercial Travelers of Am.*, 108 S.C. 73, 74-75, 93 S.E. 393, 393-94 (1917) ("Our decisions show that this court is very reluctant to dismiss appeals on technical grounds. Therefore we have construed the statutes and rules of court liberally in favor of the right to appeal."); *O'Rourke v. Atlantic Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) (courts "should give a liberal construction to the Constitution and statutes, in favor of the right to appeal"); see also *J. R. Quaid, Inc. v. Cyclone Fence Co.*, 76 So.2d 409, 411 (La. 1954) ("An appeal is a remedy that is favored in law and is an important right which should never be denied unless its forfeiture or abandonment is clearly shown.").

Similarly, a leading treatise explains

Since motions to dismiss appeals must be considered from the point of view that the law favors appeals, and that a hearing or review on the merits is favored over dismissal or other disposition, motions to dismiss are not looked on with favor, and in a doubtful case the appeal will be maintained.

5 C.J.S. APPEAL & ERROR § 764 (footnotes omitted).

Anderson County has complied with this Court's rules for noticing and preserving an appeal. The Court should decline Preston's invitation to "look behind" that clear compliance. See *Hartman*, 268 S.C. at 47, 232 S.E.2d at 16.

III. A Motion to Dismiss an Appeal Is Not a Proper Vehicle for an Attempt to Void an Action of County Council

For similar reasons, a motion to dismiss directed to this Court is not a proper vehicle for challenging the votes cast in favor of this appeal by certain Councilmembers. The materials on which Preston relies in his motion to dismiss are from the trial in this case. Obviously, the vote to authorize this appeal was *not* a subject of that trial, since the vote

occurred months later. Simply put, the motives and proprieties of the votes that Preston now seeks to challenge were not issues – even peripherally – in the trial of this case. Yet Preston asks this Court to make findings of fact and conclusions of law concerning the vote to authorize this appeal, based on a slender collection of exhibits selectively pulled from the record in this case – a case that was focused on a different vote altogether.

Invalidating votes of County Council members should be a serious undertaking. In this case, for example, Anderson County has shown indisputable and substantial financial improprieties that should have prevented the votes of key proponents of Preston's severance package. The facts concerning those votes were subjected to detailed discovery and probing examination. By contrast, in this motion Preston asks this Court to examine a handful of statements lifted from the record in this case and to rely on those statements to rule on a topic that was not (and could not have been) at issue in the trial of this case. There is no way that such a meager showing could be relied on to undo a County Council resolution.¹

A motion to dismiss is not the proper vehicle for a challenge seeking to void an act of County Council for bias, and Preston's motion should be denied for that reason as well. Such an undertaking would require a separate civil action, commenced in circuit court.

IV. The Motion Should Be Denied Because It Is Prejudicially Late

This appeal has been pending over six months. A large trial transcript has been produced, and Anderson County has prepared and filed its brief.

¹ For similar reasons, we do not believe that an opposing litigant has standing to attack a vote like this one. While the County's opponent in litigation would plainly *care* about whether that litigation was properly authorized, there is a substantial question about whether that is the kind of interest the courts would recognize as conferring standing. Preston did not file this motion out of concern with the propriety of the public acts of Anderson County; his motive is purely adversary. Allowing such motions would promote collateral attacks on any litigation brought by a government body – or indeed a private corporate body.

In the meantime, it appears Preston sat on his motion to dismiss the appeal until the end of the last briefing extension available to him from the Court. Every fact relied on in Preston's motion predated the filing of Anderson County's notice of appeal. Indeed, Preston's counsel wrote a letter to counsel for the County and the County Attorney in July of 2013 contending that the "continuing participation" of Councilmember Wilson in matters relating to this lawsuit was improper. See Affidavit of Michael S. Pitts ¶ 6 & Exhibit A thereto (Pitts Affidavit is Exhibit A to this Return). Plainly, nothing prevented Preston from filing this motion months sooner than he did.

Courts faced with similar belated motions to dismiss an appeal, filed long after the facts supporting the motions were known and long after the appellant had expended significant resources on the appeal, have denied them. In *Mortimer v. Pacific States Sav. & Loan Co.*, 141 P.2d 552, 553 (Nev. 1943), the Nevada Supreme Court denied a motion to dismiss an appeal that was filed approximately four months after the appeal had been perfected, and after the parties' briefs had been filed and the case set for oral argument. The court also observed that – just as in this case – the respondent (and a receiver) had "obtained stipulations extending time to file briefs on the merits." Under these circumstances, the court explained, "the right to move to dismiss an appeal so belatedly and unilaterally made . . . ought to be disregarded." The basis for the respondent's motion to dismiss – that the receiver and not the appellant was the aggrieved party – could also have been asserted by the respondent before the trial court but had not been, leading the Nevada Supreme Court to note that "the element of estoppel is involved." *Id.* (finding "prejudice"). Similarly, in *Henry L. Doherty & Co. v. Youngblut*, 185 P. 257, 257-58 (Colo. 1919), the Colorado Supreme Court denied a respondent's second motion to dismiss an appeal where the grounds

of that motion “were available at the time of the former motion” and where the appellants had “expended large sums in the preparation and printing of abstracts and briefs.” *Id.*; *cf. id.* (“A dismissal evades a test of the merits of the controversy and ought not to be favored.”).

The reasoning of these decisions also animates the rules and practice of numerous federal circuit courts of appeal. *See, e.g., East v. Crowds*, 302 F.2d 645, 646 (8th Cir. 1962) (stating that the court’s rules required filing of a motion to dismiss “prior to the time the record on appeal was lodged in this Court”); 8th Cir. R. 47A(b) (“Except for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed with 14 days after the court has docketed the appeal.”); Fed. Cir. R. 27(f) (“A motion to dismiss for lack of jurisdiction or to remand should be made *as soon after docketing as the grounds for the motion are known*. After the appellant or petitioner has filed the principal brief, the argument supporting dismissal for lack of jurisdiction or remand should be made in the brief of the appellee or respondent.” (emphasis added)); 10th Cir. R. 27.2(A)(3)(a) (a motion to dismiss must be filed within “14 days after the notice of appeal is filed unless good cause is shown”).

Anderson County filed its notice of appeal on November 22, 2013, and its initial brief on February 26, 2014. This motion, held back for *six months* after Anderson County perfected its appeal and *three months* after it filed its brief on the merits, should be denied.

V. The Appeal Was Authorized by Anderson County’s County Administrator and County Attorney

Each of Anderson County’s Interim County Administrator and its County Attorney gave independent authorization for the filing of this appeal. *See* Affidavits of Michael S. Pitts and W. Russell Burns, attached as Exhibits A and B.

At least in the absence of an express directive by County Council to the contrary, each of those officials has independent authority to oversee litigation and authorize an appeal on behalf of Anderson County. With respect to the County Attorney, the Anderson County Code of Ordinances sets out a broad-based grant of authority for management of the county's legal affairs. Among other things, the County Attorney is charged with the following:

(a) The county attorney is hereby authorized to represent and to render professional legal services to the county . . . in the performance of the duties prescribed in this Code.

(b) The county attorney is authorized to and shall perform the following duties in such manner as he deems appropriate . . . :

(1) Representation of the county, its departments, employees, boards, commissions and agencies, in all legal matters, whether or not an action has been commenced.

. . . .

(9) Procuring the services of, assisting, supervising and monitoring the work of other attorneys as needed for county matters.

Anderson County Code § 2-178. In addition, the county attorney "shall . . . perform such other duties as the office may require or as the county administrator may require" *Id.*

§ 2-178(c). Taken together, these provisions plainly give the County Attorney the authority to approve an appeal in pending litigation.

The County Administrator has broad authority over the County's business. State law states that the powers and duties of the County administrator "include," but are not limited to, serving as the County's "chief administrative officer" and "direct[ing] . . . administrative activities of the county government." S.C. Code Ann. § 4-9-630.² These broad powers would include making decisions in lawsuits to which the County is a party. Indeed, if the

² Anderson County Code of Ordinances § 2-156 states that the administrator "shall have those powers and duties provided for in S.C. Code 1976, § 4-9-620 *et seq.*"

County Administrator and County Attorney were not empowered to make such decisions, all such decisions would have to go to County Council for a vote – a plainly absurd result.

We would emphasize that this is not a situation in which these officials were acting contrary to County Council's instructions. Even if Preston's challenge to the Wilson and Moore votes were sound, the invalidation of those votes would not undo the independent authorizations of the County Administrator and Attorney. At most, the result of invalidating the Wilson and Moore votes would be a ruling that County Council did not affirmatively approve an appeal. It would *not* generate a County Council *prohibition* on an appeal. So even if the County Council vote were somehow invalidated, the independent authority of these two officers to approve this appeal would remain.

The independent authorization of this appeal by each of the Interim County Administrator and the County Attorney further undermines Preston's contention that the notice of appeal was unauthorized.

VI. Preston Has Not Carried His Burden of Showing the Resolution Authorizing This Appeal Should be Voided

Preston claims that two members of County Council, Cindy Wilson and Eddie Moore, should not have voted on the resolution approving this appeal.

With respect to Councilmember Wilson, Preston argues (i) that the finding below by the trial court that she had an interest in the Severance Agreement that is in dispute in this case should have prevented her from voting on the appeal; and (ii) that she should have been disqualified to vote on the appeal because the trial court's order contained findings that she had a "personal animus" against Preston.

Preston argues that Councilmember Moore should be disqualified (i) because he too had a personal animus toward Preston; and (ii) because (as we understand Preston's

briefing) Moore is a bad person. None of these arguments supports voiding the resolution approving this appeal.

A. *Cindy Wilson*

Preston first argues that the trial court's *sua sponte* finding that Cindy Wilson had an economic interest in Preston's Severance Agreement should operate to disqualify her from voting on the resolution authorizing this appeal. Putting to one side the extraordinary procedural history of this ruling and the fact that it is, itself, a subject of this appeal,³ the finding that Councilmember Wilson had an economic interest in the Severance Agreement will not support the relief Preston seeks. That purported economic interest, if it ever existed, had disappeared before the vote on the appeal.

Preston's Severance Agreement contained routine language releasing claims against the County and its Councilmembers. At the time, a lawsuit ("*Preston v. Waldrep*") brought in Preston's name was pending against Councilmembers Cindy Wilson and Bob Waldrep. (The core allegation of the action was that Wilson and Waldrep were improperly interfering in Preston's authority to supervise County employees.) Although the release in the Severance Agreement ran in favor of all Council members, and although Councilmember Wilson voted against her purported interest (in obtaining this release) in opposing the

³ In its Amended Complaint, Anderson County alleged that three invalid votes were cast in favor of the Preston Severance Agreement – votes of Michael Thompson, Ron Wilson, and Bill McAbee. Anderson County did not challenge any other votes. Nor did Preston seek invalidation of any votes. Despite this, the trial court's Order purported to invalidate a total of four votes – two of the three challenged by Anderson County, plus the votes of Cindy Wilson and Bob Waldrep. The Court then undertook to recount all votes on the Preston Severance Package after excluding those four. As Anderson County explains in detail in its merits brief, one result of this decision by the trial court was a holding that the Severance Package passed by a 2-1 vote – a legal impossibility because three votes does not constitute a quorum. While Anderson County submits that it was error for the trial court to invalidate the Waldrep and Cindy Wilson votes, it is unavoidable that if those votes are invalid the Severance Package should be rescinded for lack of a quorum.

Severance Package, the trial court held that the presence of the release language in the Severance Agreement disqualified Cindy Wilson and Bob Waldrep from voting on the Severance Package.

The critical point – which Preston’s motion utterly fails even to mention to this Court – is that *Preston v. Waldrep* was dismissed long before the vote to authorize this appeal, and not on the basis of the release contained in the Severance Package. Instead, once Preston left office he was succeeded as County Administrator by Michael Cunningham. *Preston v. Waldrep* was thereafter recaptioned, with Cunningham replacing Preston as the named plaintiff. Then, County Council directed Cunningham to dismiss the lawsuit, and he did so on January 29, 2009. *See* Exhibits C & D hereto (substitution of Cunningham for Preston as Plaintiff, and dismissal of action on January 29, 2009).

The remaining “economic interest” found by the trial court – a general threat that Preston would bring unspecified tort claims against at least two Councilmembers if his severance demand was not satisfied – will not support a finding that Councilmember Wilson should not have voted, years later, on whether to appeal. First, to the extent any interest of hers is implicated at all, Ms. Wilson would have been voting against it in voting to appeal, since the appeal seeks rescission of the agreement containing the release that is of purported special benefit to her. Second, this general threat is too vague to support a finding of a disqualifying conflict of interest. Third, the general, boilerplate release contained in the Severance Agreement was not specific to Councilmember Wilson, and so the argument that it affects her differently from any other Councilmember fails.

Once *Preston v. Waldrep* was dismissed, on January 29, 2009, the only particularized special economic interest that the trial court attributed to Cindy Wilson was

gone. The validity of the Severance Agreement and the release it contained could no longer have any effect on that dismissed lawsuit. When Cindy Wilson voted in favor of this appeal on November 19, 2013, that vote was not affected by any “economic interest.”⁴

The remainder of Preston’s allegations regarding Cindy Wilson’s vote to authorize this appeal simply will not satisfy the burden Preston must shoulder in order to disqualify a vote for appearance of impropriety. The conclusory propositions that Cindy Wilson carried a “grudge” or made “accusations and claims” against Preston lack the clarity and specificity required for such a step. In particular, the mere fact that there is a history of disputes or disagreements between Cindy Wilson and Preston does not establish impropriety; if it did, political rivals could never take any actions that involved one another. That surely proves far too much.

Furthermore, Preston’s motion relies exclusively on statements (largely or exclusively dicta, we believe) in the trial court’s Order concerning Cindy Wilson; obviously, none of those statements could have been directed specifically to Councilmember Wilson’s vote to authorize this appeal, as that vote had not occurred when the trial court Order was signed. Indeed, many of the underlying facts lie years in the past. This reinforces the point made above that a motion at the appellate level, based on a record created for different purposes altogether and with no regard to the vote that is being challenged, is not an appropriate vehicle for such a challenge.

⁴ Anderson County does not concede that Councilmember Wilson had a disqualifying economic interest at any time with respect to the Severance Agreement or related matters.

B. Eddie Moore

Preston's case for disallowing Eddie Moore's vote concerning the appeal is equally tenuous. First, Preston does not even attempt to argue that Councilmember Moore had any economic interest in the vote, either actual or apparent.

Instead, Preston points to a handful of statements Moore made *before* he took office in 2009, in which he expressed a desire to "run Preston off." As with Preston's argument that Cindy Wilson and Preston had disagreements, these out-of-context utterances will not carry the burden of disqualifying a voter. They are as readily attributable to policy differences as to any sort of disqualifying conflict of interest, and colorful political language should not normally operate to disqualify the speaker from acting on the topic.

The remainder of Preston's argument regarding Councilmember Moore appears to be that he is a "bad person" and therefore should not have voted to approve this appeal – or, presumably, on anything else. Obviously, this "bad person" argument proves far too much. Preston cites no authority for his argument that a sufficiently bad person can never exercise a voting right; it is hard to see any other motive for this argument than an attempt to smear Councilmember Moore, presumably in the hope that this will somehow affect the Court's view of Anderson County. This argument should be disregarded entirely.

As with the arguments regarding Councilmember Wilson, Preston's attack on Councilmember Moore is completely divorced from the specific vote Preston seeks to invalidate. Most of the conduct attributed to Moore occurred before he took office on January 1, 2009, and thus *five years* or more before the vote that Preston challenges. Preston has completely failed to carry the burden of showing that Moore's vote should be invalidated.

VII. Conclusion

Anderson County filed its notice of appeal six months ago. That appeal satisfied this Court's rules. Preston's challenge to the vote approving that appeal is late, it fails to make an adequate showing, and it is inappropriate for resolution on a motion. This appeal was properly authorized, both by Anderson's County Council and by other appropriate officials. The motion to dismiss the appeal should be denied.

Respectfully submitted,

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June 12, 2014

RECEIVED
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No.: 2013-002499

Anderson County, ...Appellant,

v.

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

PROOF OF SERVICE

The undersigned counsel for Appellant certifies that the Appellant's Return to Respondent Joey Preston's Motion to Dismiss Appeal has been served upon all other counsel of record on June 12, 2014 by depositing copies of same in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Respectfully submitted,



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Attorneys for Appellant

RECEIVED
JUN 16 2014

Sec Court of Appeals

EXHIBIT A

AFFIDAVIT OF MICHAEL S. PITTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

AFFIDAVIT OF MICHAEL S. PITTS

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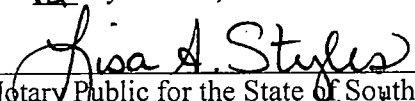
PERSONALLY appeared before me Michael S. Pitts who, being duly sworn, says that:

1. I am over the age of 18. I make this affidavit of my own personal knowledge.
2. I currently, and at all times described in this affidavit, fulfill the role of County Attorney for Anderson County, South Carolina.
3. On or about November 21, 2013, I authorized appeal on behalf of Anderson County in the above-captioned action (the "Action"), and I communicated this authorization to counsel for Anderson County in this Action.
4. I gave this authorization in my capacity as County Attorney for Anderson County.
5. Also on or about November 21, 2013, I was informed by Interim County Administrator W. Russell Burns that Mr. Burns was also authorizing an appeal of the Action. I accordingly informed counsel for Anderson County in this Action that an appeal was also authorized by the Interim County Administrator.
6. Attached hereto as Exhibit A is a true and correct copy of a letter sent to me by Joey Preston's attorney, dated July 18, 2013. In that letter, Mr. Preston's attorney took the position that Cindy Wilson should not participate in County Council decisions concerning the Action because of an alleged conflict of interest.

FURTHER AFFIANT SAYETH NOT.


Michael S. Pitts

Sworn to before me
this 12th day of June, 2014


Notary Public for the State of South Carolina
My Commission expires 9/18/23.

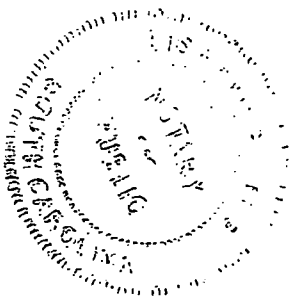


EXHIBIT A

TO PITTS' AFFIDAVIT

JULY 18, 2013 LETTER

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July 18, 2013

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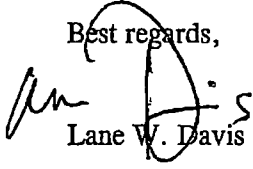
Michael S. Pitts, Esq.
Collins and Lacy
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Re: *Anderson County v. Joey Preston, et al.*, 2009-CP-04-4482
NMRS File No. 31268/01501

Dear Ted, Troy & Mike:

On behalf of Mr. Preston, an Anderson County ("County") taxpayer, please allow this letter to memorialize our prior conversations concerning the continued participation of M. Cindy Wilson on matters relating to the County's lawsuit against Preston. By virtue of the Court's Order, Council-member Wilson has a direct economic interest relating to Preston's Severance Agreement and the lawsuit seeking to undo the same. Council-member Wilson's continued participation in such matters likewise carries a substantial appearance of impropriety. Indeed, the County's most recent motion to amend seeks affirmative relief, in part, based upon Wilson's conflict of interest. The County must have had a good faith basis for affirming such facts. In turn, also by virtue of the County's court filings, the County appears to be of the mindset that other County officials and employees, besides M. Cindy Wilson, bear responsibility for ensuring her compliance with state and local ethics provisions. If the County is to be believed, such responsibilities are currently being abdicated. Immediate corrective action is requested.

Best regards,


Lane W. Davis

FILE NO. 1582-133

JUL 23 2013

REC'D MSP/leh
COLLINS & LACY

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

EXHIBIT B

AFFIDAVIT OF W. RUSSELL BURNS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County Appellant,

vs.

Joey Preston and The South Carolina Retirement System Respondents.

AFFIDAVIT OF W. RUSSELL BURNS

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Attorneys for Appellant

PERSONALLY appeared before me W. Russell Burns who, being duly sworn, says that:

1. I am over the age of 18. I make this affidavit of my own personal knowledge.
2. I am currently, and was at all times described in this affidavit, the Interim County Administrator for Anderson County, South Carolina.
3. On or about November 21, 2013, I authorized appeal on behalf of Anderson County in the above-captioned action (the "Action").
4. I gave this authorization in my capacity as Interim County Administrator for Anderson County
5. I communicated this authorization to Michael Pitts, County Attorney for Anderson County, and directed Mr. Pitts to inform counsel for Anderson County in this Action of my authorization of an appeal.

FURTHER AFFIANT SAYETH NOT.



W. Russell Burns

Sworn to before me
this 12th day of June, 2014

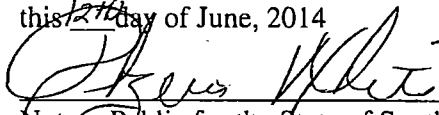

Notary Public for the State of South Carolina
My Commission expires 9-21-20

EXHIBIT C

**12/22/08 ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUBSTITUTION OF PARTY**

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF ANDERSON

JUDGMENT IN A CIVIL CASE
CASE NO: 08-CP-04-2726



JOEY PRESTON VS. ROBERT WALDREP, JR., ET. AL.

CHECK ONE:

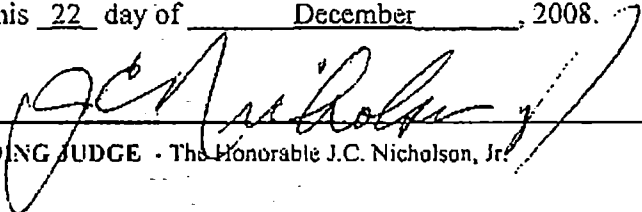
- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: Failure to Appear
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Plaintiff's motion for substitution of party is granted. Michael Cunningham is substituted for Joey Preston. This case will now be referred to as Michael Cunningham v. Robert L. Waldrep, Jr., et, al.

Dated at Anderson, South Carolina, this 22 day of December, 2008.

Court Reporter: _____


PRESIDING JUDGE - The Honorable J.C. Nicholson, Jr.

This judgment was entered on the 22nd day of Dec., 2008, and a copy mailed first class this 22nd day of Dec., 2008, to attorneys of record or to parties (when appearing pro se) as follows:

Nancy Bloodgood

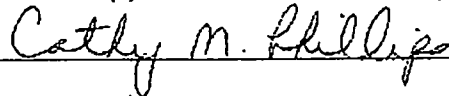
COMMON PLEAS AND
GENERAL SESSIONS

Larry Richter, Ross Plyler

ATTORNEY(S) FOR THE PLAINTIFF(S) 010 22 DEC 2008

ATTORNEY(S) FOR THE DEFENDANT(S)

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ANDERSON SC



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EXHIBIT D

1/29/09 STIPULATION OF DISMISSAL

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

MICHAEL CUNNINGHAM,
ANDERSON COUNTY
ADMINISTRATOR)

PLAINTIFF,)

vs.)

ROBERT L. WALDREP, JR., and M.
CINDY WILSON, in their individual
capacities,)

DEFENDANTS.)

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

CASE NO. 2008-CP-04-2726



STIPULATION OF DISMISSAL

The parties in this matter have stipulated per *South Carolina Rules of Civil Procedure*,
Rule 41 (a) to dismiss this action.

YOUNG CLEMENT RIVERS, LLP

By: Nancy Bloodgood

Nancy Bloodgood, Esquire
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Attorneys for the Plaintiff

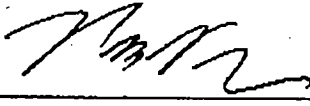
Date: 1-27-09

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GENERAL SESSIONS

COLLINS & LACEY

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Attorneys for Defendant M. Cindy Wilson

Date: JAN. 12, 2009

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GENERAL SESSIONS

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THE RICHTER & HALLER LAW FIRM, P.A.

o/permission
AEE

By: Lawrence E. Richter, Jr.

Larry Richter, Esquire

P.O. Drawer 1089

Mt Pleasant, SC 29465

Telephone: (843) 849-6000

Fax: (843) 881-1400

E-mail: larkin@richterfirm.com

Attorneys for Defendant Robert L. Waldrep, Jr.

Date: Jan. 26, 2009

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COMMON PLEAS AND
GENERAL SESSIONS

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ANDERSON SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002499

Anderson County, ... Appellant,

v.

Joey Preston and the South Carolina Retirement System, Respondents.

RESPONDENT JOEY PRESTON'S REPLY

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Candy M. Kern-Fuller
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Easley, S.C. 29640
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RECEIVED

JUN 20 2014

SC Court of Appeals

Attorneys for Respondent Joey R. Preston

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Joey R. Preston ("Preston") respectfully submits the instant Reply in response to Anderson County's ("County") Return.

I. THE COUNTY'S RETURN MAKES SERIAL CONCESSIONS.

The County makes several important concessions in its Return to Preston's Motion to Dismiss ("Preston's Motion"). They include:

- The citations on pages 3-5 of Preston's Motion accurately reflect passages from the lower court's order. (Preston's Mot. at 3-5.)
- Wilson's voting on matters wherein she possessed a financial interest continues to subject her to financial and disciplinary sanctions under the Anderson County Code. (Preston Mot. at 3, FN2) (citing ACC §§1-7, 2-288, 2-90.)
- The passages attributed to Moore on pages 6-7 accurately reflect the evidence from the trial of the case. (Preston's Mot. at 6-7.)
- The Supreme Court's holding in Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controls the issue of how to treat votes cast by officials with conflicts of interest. (Preston's Mot. at 8.)
- If counsel for the County filed a notice of appeal on Plaintiff's behalf without proper authorization, the notice of appeal filed by the County constitutes an unauthorized, *ultra vires* action, which was void *ab initio*. (Preston's Mot. at 8.)
- "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." (Preston's Mot. at 9) (citing Elam v. S.C. DOT, 361 S.C. 9, 14-15 (2004).
- The issue of appellate jurisdiction to hear the instant case is a threshold issues for the Court to decide. (Preston's Mot. at 9) (citing Capital City Ins. Co. v. B.P. Staff, Inc., 382 S.C. 92, 100 (Ct. App. 2009).

The County's Return does not dispute any of the bullet points listed above.

II. THE COUNTY VIOLATED RULE 203(b)(1) SCACR, AS CITED IN PRESTON'S MOTION.

The County first contends Preston failed to identify any "Rule governing the appellate process" that Anderson County violated. (County Return at 3.) Not so. On page 8 of the Motion to Dismiss, Preston specifically stated: "Pursuant to Rule 203(b)(1), SCACR, the County was required, but did not, file a valid notice of appeal no later than December 8, 2013." (Preston Mot. at 9.)

To bolster its errant contention, the County cites the inapplicable decision of *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977). *Hartman* has no application to facts *sub judice*. *Hartman* involved a zoning appeal (arising from an earlier appeal to the Circuit Court) where Respondent's counsel executed an acceptance of service of Appellant's notice of appeal. *Id.* at 47. After executing the same, Respondent's lawyer then tried to disavow the date on the acceptance of service he signed. *Id.* "Under [those] circumstances," the *Hartman* Court disallowed Respondent's counsel to challenge the timeliness of the appeal by impeaching "his own signature." *Id.* *Hartman*, a decision limited to its facts (*i.e.*, "under the circumstances" presented), has no application to the case at bar, which presents facts not even remotely similar.

Contrary to the County's suggestions, Preston has cited ample authority supporting his Motion to Dismiss. It is axiomatic, and the County's Return does not contest, that this Court must answer questions pertaining to its jurisdiction at the threshold. And, contrary to the County's suggestions, see County Return at 4, this Court has "no authority or discretion to 'rescue' the [County] by extending or ignoring

the deadline" imposed by 203(b)(1), SCACR. Elam v. S.C. DOT, 361 S.C. 9, 14-15 (2004); see also Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5 (Ct. App. 1999) ("[F]ailure to [follow Rule 203(b), SCACR] divests this court of" jurisdiction and "results in dismissal of the appeal.")

III. THIS COURT MAKES DETERMINATIONS ABOUT ITS OWN APPELLATE JURISDICTION.

The County likewise argues Preston effectively has no remedy if the County--without proper authorization--files an *ultra vires* notice of appeal thereby depriving this Court of jurisdiction to act.¹ According to the County, Preston would have to pursue a whole "separate civil action, commenced in circuit court" in order to raise issues concerning this Court's jurisdiction to hear this appeal. (County Return at 5.) This analysis errs for several reasons.

First, contrary to the County's suggestions, Preston's Motion does not require this Court to make any factual findings whatsoever. To resolve Preston's Motion, this Court needs to consider:

- The Final Judgment and Order of Judge Roger Couch dated May 3, 2013;
- The South Carolina Ethics Act. See S.C. Code §8-13-700 et seq.;
- Anderson County Code §2-37(g)(4); and
- The undisputed citations set forth in Preston's Motion.

¹ Throughout its Return, the County makes serial representations about what it "proved" during trial. Preston specifically denies the statements as baseless. After a week of trial and after the County spent well over three million dollars (\$3,000,000.00) pressing its lawsuit to nowhere, the County utterly failed—in every material respect—to prove any of its eleven (11) claims. To suggest on appeal that "Anderson County has shown indisputable and substantial financial improprieties" is, and has been for the past five (5) years, a complete and total canard.

For both Wilson and Moore, resolution of Preston's Motion presents legal determinations under the South Carolina Ethics Act and the Anderson County Code.

A. Wilson Had a Disqualifying Conflict of Interest.

As to Council Member Wilson ("Wilson"), the Court need only compare and contrast Judge Couch's Order with the State Ethics Act and Anderson County Code to determine whether Cindy Wilson possessed a conflict of interest, which disqualified her participation in the County's vote whether to pursue the instant appeal ("Appeal Vote"). Judge Couch's Order, the judgment the County now appeals, makes specific findings about Wilson's ethical conflicts of interest. The lower court found Cindy Wilson possessed a direct financial interest in Preston's Severance Agreement. (See Preston Mot. at 3-4.) Such finding—binding on the County--subjects Wilson to both financial and disciplinary sanctions under the Anderson County Code. See ACC §§1-7, 2-288, 2-90. The County does not dispute the same.

Wilson also should not have participated in the Appeal Vote for another reason. As noted above, Judge Couch's Final Order and Judgment, see Preston Mot. at Ex. 3, pp. 3-4, 6, 10-13, made a specific finding (*inter alia*) that Cindy Wilson had a conflict of interest when she voted on Preston's Severance Agreement. Wilson's participation in a vote about whether to appeal an Order—containing an adverse ethical finding about her--garnered a "substantial appearance of impropriety," which the Anderson County Code prohibited.² See ACC §2-37(g)(4); see also Preston Mot. at 2-5.

² The County mischaracterizes the trial court's ruling about Cindy Wilson as a *sua sponte* finding. As reflected by the Record, Preston argued Cindy Wilson and Bob Waldrep possessed conflicts of interest both at trial and in his written closing. There

The average Anderson County citizen cannot discern whether Wilson voted to pursue the appeal for the County's benefit or in an effort to vindicate her own ethical missteps. This is precisely the type of prohibition embraced by Anderson County Code §2-37(g)(4). Moreover, the fact that the County challenges the specific finding, see County Return at 10, makes the conflict more concrete, not less. That is to say, Wilson voted to perpetuate an appeal specifically seeking to reverse a finding of a conflict of interest about her.³

B. Moore Had a Disqualifying Interest.

The County does not contest a long train of unbecoming facts about Moore became public solely due to publicity surrounding the lawsuit against Preston. Instead, the County tries to spin Preston's argument to mean that Moore should not have voted because he was a bad guy. This is untrue.

No one can contest that an amazing amount of media coverage surrounded the lawsuit filed by the County. In that coverage, the facts that surfaced about Moore from the lawsuit (see e.g., providing false testimony in his deposition and other court proceedings, misrepresenting himself in campaign promotions as a licensed engineer when he never graduated from college, his former participation in the Klu Klux Klan,⁴

was nothing *sua sponte* about the ruling. The County's attempt to distort the Record, in this regard, is regrettable.

³ For some reason, the County references a quorum argument that it raised for the first time in a Motion to Reconsider. In a lengthy ruling, the lower court explained why the County's quorum argument had no merit. Yet, the County persists in raising the same even in response to the instant, unrelated Motion. Preston will respond fully to the quorum argument if this appeal goes forward but notes, for now, that the argument is baseless.

⁴ Moore's former participation in the Klu Klux Klan hit the national news.

serial documented efforts to "get Joey Preston") were *so* unbecoming and *so* highly publicized that Moore should have refrained from participating in any further votes about the case. Due to the facts that surfaced, and due to the attendant media coverage, Moore's vote became afflicted with a substantial appearance of impropriety under the Anderson County Code.

Regardless of how Moore voted, his participation appeared tainted. If Moore voted to continue the appeal, it would be perceived—by an average Anderson County citizen-- as an effort to vindicate himself and exacting political payback. If Moore voted to stop the appeal, it would be perceived—by an average Anderson County citizen--as a measure to thwart further dissemination of the facts unbecoming to him and surrounding media attention. Either way, Moore's participation gave rise to a substantial appearance of impropriety that this Court can and should adjudge based upon the undisputed facts before it.

Second, this Court has an unflagging duty to inquire into the existence of its own jurisdiction to act. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 100 (Ct. App. 2009) (Noting Subject Matter Jurisdiction as a "threshold" issue requiring resolution at the onset.) Without power to hear the case, the instant appeal proves a nullity. And, as a litigant, Preston possesses both procedural and substantive Due Process Rights to seek a ruling on issues concerning whether this Court possesses the authority even to hear the County's appeal. To suggest otherwise, as the County attempts, is devoid of merit.

Third, Preston must raise the issue to the Court of Appeals, as only this Court (or the Supreme Court) can adjudge matters concerning appellate jurisdiction. Upon

the County's filing the notice of appeal, jurisdiction detached from the Circuit Court. Moreover, the County's suggestion that Preston must file a whole new action so as to collaterally attack—at the Circuit Court level—an appeal pending before this Court is obviously wrong. And, notably, the County cites no authority supporting the same.⁵

IV. PRESTON'S MOTION WAS TIMELY AND TIMING COULD NOT CREATE APPELLATE JURISDICTION WHERE NONE EXISTS.

The County, to no avail, next argues that Preston's Motion should be denied because it is prejudicially late.⁶ The County's argument fails for three (3) reasons:

A. Preston Filed His Motion in a Timely Manner.

Preston's Motion to Dismiss was not untimely. Preston filed his Motion to Dismiss as a timely response to the County's Initial Brief. For purposes of its Return, the County just invents non-existent timing restrictions. Preston's Motion fully

⁵ Preston believes the instant Motion to Dismiss raises concerns of sufficient public importance to warrant oral argument before any further proceedings are initiated. Accordingly, Preston would ask the Court for the same. Alternatively, if the Court finds further factual development is necessary to determine whether it has jurisdiction to hear this case, then Preston asks the Court to stay the appeal and remand the matter for the limited purpose of compiling evidence on whether the Notice of Appeal was appropriately authorized. In the second alternative, if for some reason the Court elects to have Preston raise the issues presented by his Motion in Respondent's Initial Brief, Preston would respectfully ask for a limited amount of additional time to incorporate the argument into Respondent's Initial Brief. To include the same will require structural editing to Preston's Brief.

⁶ In Footnote 1, the County suggests that Preston does not have standing to file a Motion to Dismiss in a lawsuit where he is a party. Unsurprisingly, the County fails to cite any authority for such a novel approach to the standing doctrine. The County is plainly wrong. To accept the County's argument would deny Preston the opportunity to be heard in connection with arguments pertaining to the Court's appellate jurisdiction.

complied with South Carolina's Appellate Court Rules.⁷ The County cites no South Carolina Rules supporting its argument. No South Carolina decision supports the County's position.⁸

Instead, to support its argument, the County cites: a 1943 opinion from Nevada; a 1919 opinion from Colorado; an Eighth Circuit opinion from 1962; Federal Circuit Rule 27; and 10th Circuit Rule 27.2(A). Yet, the instant appeal is not pending in: Nevada, Colorado, the Eighth Circuit, the Federal Circuit, or the 10th Circuit. None of what the County cites has any footing under South Carolina law. And, what the County does not cite is actual, relevant authority from South Carolina that supports a legal position that it simply invented.⁹

Without any supporting evidence, the County likewise suggests that it was unduly prejudiced somehow. Presumably, the County references the costs and fees it voluntarily incurred pursuing this appeal so far. Yet, even before filing its appeal, the County had spent over 3 Million Dollars (\$3,000,000.00) seeking the rescission of a \$1.14 Million Dollar severance package. The County's unsupported cry of financial "prejudice," on this backdrop, rings both hollow and untrue.

⁷ The County also notably omitted the fact that Preston freely gave it two (2) extensions to file its initial brief meaning that four of the six months of "delay" the County attributes to Preston were caused by the County or in awaiting the transcript.

⁸ The County instead resorts to citing a 1943 opinion from Nevada and a 1919 opinion from Colorado. Obviously, these opinions have no precedential value in this State.

⁹ As an aside, this is an ongoing theme for the County. For the past five (5) years, the County has cited over and over again law from states other than South Carolina in hopes of mixing and matching enough different legal theories to press its claims.

Moreover, the County knew of the defective vote of Wilson all along. As the County points out, Preston alerted the County to Wilson's tainted vote before it voted to pursue the instant vote. See Pitts' Affidavit, Ex. A (Davis' Letter dated July 18, 2013.) Even though the issue was raised at the time of the Appeal Vote, the County did not follow its procedure in determining whether Wilson had a conflict. See e.g., ACC §2-289 (County Attorney furnishes applicability opinion). Because the measure would not pass without Wilson's tainted vote, the County knowingly allowed Wilson to participate in violation of the State Ethics Act and the Anderson County Code. Now, the County attempts to whitewash the illegality of its actions by claiming the passage of time somehow cured the disqualified votes.

B. The Passage of Time Cannot Create Appellate Jurisdiction.

Issues concerning appellate jurisdiction such as those *sub judice* cannot be waived. Elam v. S.C. DOT, 361 S.C. 9, 14-15 (2004); see also Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5 (Ct. App. 1999) ("[F]ailure to [follow Rule 203(b), SCACR] divests this court" of jurisdiction and "results in dismissal of the appeal.")¹⁰ Nor could the doctrines of estoppel or waiver operate to create appellate jurisdiction when none otherwise existed. In short, the County's argument that the passage of time could create appellate jurisdiction, where none otherwise exists, has no merit. And, notably, the County can supply no authority to support the position it advocates.

¹⁰ Consider Elam, for example. In Elam, the Court raised the timeliness of the Notice of Appeal *sua sponte*. By the County's analysis, the Court in Elam would automatically have jurisdiction by operation of the amount of time that had lapsed. Not so. No South Carolina authority supports the County's unusual legal argument.

V. NEITHER THE COUNTY ADMINISTRATOR NOR THE COUNTY ATTORNEY COULD AUTHORIZE THE INSTANT APPEAL.

Neither the County Administrator nor the County Attorney possessed the legal authority to authorize the filing of a legal action. First, the County Administrator and the County Attorney both suggest that if the County Council voted against pursuing the appeal, they could somehow veto the legislative body's directive. Untrue.¹¹

A. The County Administrator and County Attorney Must Abide By County Council's Directive.

Both the County Administrator and Attorney serve at the will of the County Council to execute the directives of the council, not *vice versa*. See, e.g., S.C. Code §4-9-620 (Administrator shall serve "at the pleasure of the council"); S.C. Code §4-9-630 (Administrator shall "execute the policies, directives, and legislative actions..."); ACC §2-178(a) ("The County attorney is hereby authorized to represent...the County...") Once a matter is conferred to the County Council and the Council makes a decision, one way or another, neither the County Administrator or the County Attorney possess the authority to override the County Council's directive, nor do they possess the authority to veto the will of the County Council. Both must follow the directive of the County Council. Candidly, it is extremely odd that the County now suggests otherwise.¹²

¹¹ If Wilson's vote is disqualified, then the vote authorizing the filing of the Notice of Appeal failed 3 to 3. If Moore's vote is disqualified, then the vote failed 3 to 2.

¹² Moreover, the County's Return also suggests that the nature of the vote did not prohibit the County Administrator and Attorney from pursuing the appeal. (County Return at 9.) The County's efforts to justify its actions betray what is really going on here—a *post facto* rationalization to legitimize its illegitimate actions. When the County voted whether to pursue the appeal, the vote failed but for the disqualified votes. Everything else the County now advances is empty wordplay.

B. Omitted by Appellant, County Council Placed Express Restrictions on the County Administrator's Authority to Authorize Legal Filings:

The County altogether failed to inform the Court that express restrictions exist over what the Anderson County Administrator could authorize by way of legal actions *without* Council's direction. By operation of Ordinance 2013-005 (enacted in March of 2013), the County Administrator's authority in legal actions was limited to authorizing debt collection actions in Magistrate's Court.¹³

As the County Attorney, a current affiant, himself stated during the initial reading of Ordinance 2013-005:

County Attorney: Yes, sir, Mr. Chairman. This is the first reading of an ordinance that would give the administrator limited authority to approve the filing of debt collection lawsuits in small claims court, which is our Magistrate's Court....So it would only be for debts seventy-five hundred dollars or less that would allow the administrator to give the green light to file those collection actions...

(Ex. A, 2/23/2013 Meeting Minutes, 37:19-34.)¹⁴

Regarding Ordinance 2013-005, council member Francis Crowder noted, "And this does not give the administrator the right to file legal suits...Well, only in the case of collection of a debt...And only in Magistrate's Court...So, you know you've got two

¹³ In actuality, the County Administrator's authority was broadened by Ordinance 2013-005 since prior to its enactment the County Administrator had no authority over such matters. See also Ex. D (2/5/2013 Anderson Independent Mail Article (The ordinance "approved by the county council does not give [County Administrator] Burns the authority to approve any high-dollar lawsuits, [County Attorney] Pitts said. Indeed, Every major decision in this case did, in fact, receive a vote of the County Council.

¹⁴ Preston would supply the Court with a link to the full transcript of the meetings if that were possible. However, for some reason, the three meetings where Ordinance §2013-005 was enacted have been removed from Anderson County's website.

safeguard[s] there." Id. at 38:2-16.¹⁵ The County enacted Ordinance 2013-005 on March 5, 2013 by third reading. See Ex. C (3/5/2013 Meeting). It is both telling and troubling that the County—which submitted the affidavits of both its County Administrator and County Attorney—would omit disclosing an Ordinance restricting the County Administrator's ability to authorize legal filings while simultaneously representing the County Administrator had such authority.

C. Like Every Other Attorney, the County Attorney Merely Represents the County; He Does Not Make Decisions for His Client.

The County cites ACC §2-178 to support the argument that the County Attorney possessed legal authority to authorize the instant appeal. Plainly untrue. Like every other attorney in the State of South Carolina, the County Attorney is an agent of the County, his principal. ACC §2-178 proves the point. The Ordinance merely authorizes the County Attorney "to represent" the County. Id.

The County Attorney, by operation of ACC §2-178, does not magically transform into the client/principal in the attorney-client relationship. Just like every other attorney in the State of South Carolina, the County Attorney must receive and abide by the directive of his client, his principal. To suggest otherwise, as the County currently does, has no basis whatsoever and ignores the exact provisions the County itself cites.

¹⁵ On February 19, 2013, the County Attorney stated: "This is second reading on an ordinance that would give the county administrator the authority to file debt collection lawsuits on behalf of the County, as long as it was just a debt collection suit. And it was a matter within the Magistrate's Court jurisdiction, which like small claims court, and that's seventy-five hundred dollars." (Ex. B, 2/19/2013 Minutes, 15:31-39.)

VI. PRESTON CARRIED THE BURDEN ON HIS MOTION AND THE COUNTY FAILED TO REBUT THE SAME.

Preston discussed the specific claims regarding Wilson and Moore above in Section III. Preston incorporates his prior discussion herein by reference. As discussed *supra*, the issues pertaining to Wilson and Moore constitute legal conclusions that this Court can make upon the fixed Record presented to it. The County does not contest the factual issues cited in Preston's Motion (*i.e.*, the Court's findings and the unbecoming and public evidence about Moore). It is both necessary and required for the Court to make these preliminary determinations so as to evaluate whether appellate jurisdiction exists.

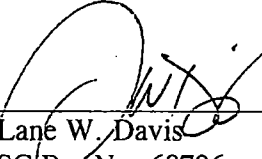
CONCLUSION

For nearly five years, the County has been willing to do and say just about anything to prop-up its baseless lawsuit against Preston. The County's Return proves no different. The County knew Wilson and Moore had conflicts of interest when they participated in the Appeal Vote. The County did not care. In violation of state law and local ordinance, the County pressed the Appeal Vote and allowed Wilson and Moore to participate without even addressing the conflict of interest. The County did so because it knew if Wilson and Moore did not participate, the vote would fail.

When the Court applies the Baird decision to the instant facts, the Appeal Vote fails. Accordingly, this Court should: inquire into its own jurisdiction; grant an oral argument on Preston's Motion; determine the notice of appeal was not properly authorized; and then dismiss this appeal for want of jurisdiction. Alternatively, if this Court determines further factual development is warranted regarding the jurisdictional issue, then the Court should stay

the instant appeal and remand the case for the limited purpose of developing a record at the Circuit Court level concerning whether the County properly authorized its Notice of Appeal. In the second alternative, if for some reason the Court elects to have Preston raise the issues presented by his Motion in Respondent's Initial Brief, Preston would respectfully ask for a limited amount of additional time to incorporate the argument into Respondent's Initial Brief.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

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200 E. Main St.

Easley, S.C. 29640

(864)-855-3114

Attorney for Joey R. Preston

Greenville, South Carolina

June 17, 2014

EXHIBIT A

1 ROBERT CARROLL: I just noticed one item and
2 it's just a mistype, but I'll bring it to your
3 attention. Just so you'll know, on page eight of
4 thirteen. ---
5 FRANCIS CROWDER: Eight of thirteen.
6 ROBERT CARROLL: --- Section 2.640. I want
7 to make sure you understand that is twenty-five hundred
8 and not twenty-five thousand. So don't anybody get
9 alarmed there.
10 FRANCIS CROWDER: Yeah. Yeah.
11 ROBERT CARROLL: It's twenty-five hundred.
12 FRANCIS CROWDER: Thank you, sir. All those
13 in favor on first reading to move it forward? Let the
14 record show it was unanimous. Thank you.
15 All right. We now move to ---
16 TOMMY DUNN: D.
17 FRANCIS CROWDER: Yeah. At this time it's
18 2013-005, Mr. Pitts?
19 MIKE PITTS: Yes, sir, Mr. Chairman.
20 This is first reading of an ordinance that would give
21 the administrator limited authority to approve the
22 filing of debt collection lawsuits in small claims
23 court, which is our Magistrate's Court. This came up
24 because we have a tenant at the airport that owes us
25 some money. And despite attempts to collect the debt,
26 we need to go forward and file a small claim action to
27 collect the debt in the Magistrate's Court. And we
28 thought it might be more efficient to pass a blanket-
29 type ordinance for small claims like this. In the
30 Magistrate's Court jurisdiction, it's seventy-five
31 hundred dollars. So it would only be for debts
32 seventy-five hundred dollars or less that would allow
33 the administrator to give the green light to file those
34 collection actions.
35 FRANCIS CROWDER: Do I have a motion?
36 CINDY WILSON: Second.
37 FRANCIS CROWDER: We have a motion by Ms.
38 Wilson. Do we have a second?
39 TOMMY DUNN: Second.
40 FRANCIS CROWDER: Discussion?
41 EDDIE MOORE: Mr. Chairman?
42 FRANCIS CROWDER: Yes, sir.
43 EDDIE MOORE: I just want to make sure
44 that when stuff like that is going to happen that we're
45 notified, the county council is notified. We don't
46 want to get in a situation of the past administrator
47 filing all these lawsuits on people. I want to know
48 about it.
49 FRANCIS CROWDER: Well, keep in mind, I agree
50 with that fully. But I've already talked to several

1 people on the telephone that heard about it. And this
2 does not give the administrator the right to file legal
3 suits.
4 EDDIE MOORE: Yes, it does in ---
5 FRANCIS CROWDER: Well, only in the case of
6 collection of a debt.
7 MIKE PITTS: It's limited to debt
8 collection.
9 TOMMY DUNN: And only in Magistrate's
10 Court.
11 FRANCIS CROWDER: And only in Magistrate's
12 Court.
13 MIKE PITTS: It's only in Magistrate's
14 Court. That's right.
15 FRANCIS CROWDER: So, you know, you've got two
16 safeguard there.
17 MIKE PITTS: And, also ---
18 FRANCIS CROWDER: It's got to be a debt and
19 it's got to be in Magistrate's Court.
20 TOM ALLEN: Mr. Chairman.
21 FRANCIS CROWDER: Yes, sir.
22 EDDIE MOORE: Excuse me.
23 TOM ALLEN: Oh, I'm sorry. Go ahead,
24 Eddie.
25 FRANCIS CROWDER: Yes, sir. Go ahead, Mr.
26 Moore.
27 EDDIE MOORE: That's fine. Well, you
28 know, being the recipient of numerous lawsuits, I'm a
29 little touchy about that.
30 FRANCIS CROWDER: Yeah. I understand, yeah.
31 GRACIE FLOYD: You ought to be.
32 CINDY WILSON: Don't forget I exceed you.
33 TOM ALLEN: Mr. Chair?
34 FRANCIS CROWDER: Yes, sir, Mr. Allen.
35 TOM ALLEN: I just have a question. How
36 was this done prior?
37 FRANCIS CROWDER: Pardon?
38 TOM ALLEN: How was this done prior to
39 this ordinance? Who filed the suit?
40 MIKE PITTS: We haven't had to file one
41 since I've been the county attorney. This is the first
42 time it's popped up with this particular tenant at the
43 airport. But it certainly has the potential to repeat
44 itself into the future, especially as the airport
45 starts doing more business. And then credit, things
46 like that.
47 TOM ALLEN: Okay. Thank you.
48 FRANCIS CROWDER: All right. Any other
49 discussion? We've had a motion and a second. All
50 those in favor? Let the record show it was unanimous.

EXHIBIT B

1 conflicted with other things. And quite frankly, I,
2 individually, I concurred with that since the Chairman
3 and the Vice Chairman has to be at the opening. I would
4 prefer to come on a date that we already had an activity
5 going on instead of having to designate every Friday as a
6 time to be here.

7 CINDY WILSON: Okay.

8 FRANCIS CROWDER: So self-preservation, to be
9 honest. So any other questions? So at this particular
10 point in time, do we vote on the amended motion first?

11 TOMMY DUNN: Yes, sir.

12 MIKE PITTS: I think we need to close the
13 public hearing, Mr. Crowder, just so the record's clear.

14 FRANCIS CROWDER: All right. Yes, sir, I was --
15 are there any other discussions? Hearing no other
16 discussions, I close the public hearing. At this time do
17 I have a motion to accept the amended motion to the
18 ordinance?

19 TOMMY DUNN: I second your amendments.

20 FRANCIS CROWDER: You second. All right. Any
21 further discussion? All those in favor of the amended
22 motion, please raise your right hand. Let the record
23 show it was unanimous.

24 Now we have to vote on the motion. Do I have a
25 second for the ---

26 TOMMY DUNN: Second.

27 FRANCIS CROWDER: We have a second by Mr. Dunn.
28 All those in favor of the motion, please raise your right
29 hand. Let the record show it was unanimous. Thank you.

30 All right. Item (c) is 2013-005. Mr. Pitts?

31 MIKE PITTS: Yes, sir. I'll just give a
32 quick overview before we go into the public hearing, Mr.
33 Chairman. This is second reading on an ordinance that
34 would give the county administrator the authority to file
35 debt collection lawsuits on behalf of the county, as long
36 as it was just a debt collection suit. And it was a
37 matter within the Magistrate's Court jurisdiction, which
38 is like small claims court, and that's seventy-five
39 hundred dollars.

40 FRANCIS CROWDER: All right. Do I have a motion
41 ---

42 TOMMY DUNN: Motion to move forward.

43 FRANCIS CROWDER: Motion by Mr. Dunn to move
44 forward. Do I have a second?

45 CINDY WILSON: Second.

46 TOM ALLEN: Second.

47 FRANCIS CROWDER: A second by Ms. Wilson this
48 time. She beat you, Mr. Allen.

49 TOM ALLEN: Okay.

50 FRANCIS CROWDER: Any discussion?

1 MIKE PITTS: Mr. Chairman, I believe there
2 is a public hearing on this, as well.
3 FRANCIS CROWDER: At this time, I open a public
4 hearing for any citizen to be able to comment on this
5 particular item. If you have comments, please step
6 forward and approach the Mic. Hearing no citizens step
7 forward, I declare that the public hearing is closed.
8 So at this time, do I go back and ask for the
9 second? Parliamentary Procedure.
10 MIKE PITTS: Yes, sir. Just get a second
11 and y'all can discuss it then.
12 FRANCIS CROWDER: All right. Do I have a
13 second?
14 TOM ALLEN: Second.
15 FRANCIS CROWDER: I have a second by Mr. Allen.
16 Thank you.
17 TOM ALLEN: I got it that time.
18 FRANCIS CROWDER: I know. I'm going to owe you
19 money between you and Mr. Dunn. He first and you second.
20 The floor is open for any discussion. Hearing no
21 discussion, all those in favor of this motion, please
22 raise your right hand. Let the record show it was
23 unanimous.
24 All right. The next one is 2013-006, an
25 ordinance amending Chapter 38, Article V of the Anderson
26 County Code. Mr. Rusty Burns. Oh, this is a public
27 hearing. At this time, I declare a public hearing. Are
28 there any citizens who would like to address the proposed
29 change to the storm water ordinance? If they would,
30 please step forward and address council.
31 GRACIE FLOYD: Yes. Is the public -- wait a
32 minute. Excuse me. I can speak at this time as a
33 citizen, but I won't. Are we still in public hearing?
34 Yeah, I'll wait.
35 FRANCIS CROWDER: Okay. Seeing no citizens step
36 forward, I declare the public hearing closed. At this
37 time, do I have a motion?
38 CINDY WILSON: So moved.
39 FRANCIS CROWDER: I have a motion by Ms. Wilson.
40 TOMMY DUNN: Second.
41 FRANCIS CROWDER: Second by Mr. Dunn. Now
42 discussion.
43 CINDY WILSON: Mr. Chairman.
44 GRACIE FLOYD: The young man ---
45 CINDY WILSON: May we ask that Mr. John
46 Batson ---
47 GRACIE FLOYD: I'd asked for the floor.
48 FRANCIS CROWDER: All right. Yes, ma'am, you
49 did. Go ahead, Ms. Floyd.
50 GRACIE FLOYD: Thank you. Mr. Batson, would

EXHIBIT C

1 TOMMY DUNN: Yes, sir.
2 FRANCIS CROWDER: Okay. I'm just looking at
3 who's name is down ---
4 TOMMY DUNN: Yes, sir, they do that. But
5 this is in District 5. It's off of Centerville Road.
6 We've had two readings on this already. This is -- the
7 citizens over there went through, followed the proper
8 procedures for our county ordinance to get their roads
9 brought up to standards where the county can take them
10 in. So I put this in the form of a motion to move it
11 forward.
12 TOM ALLEN: Second.
13 FRANCIS CROWDER: A motion by Mr. Dunn. A
14 second by Mr. Moore. Any discussion? Hearing no
15 discussion, all those in favor? Let the record show it
16 was unanimous.
17 Item 10(b), Number 2013-004, an Ordinance
18 amending Chapter 2, Article V, of the Anderson County
19 Code pertaining to purchasing in order to provide for
20 an increased level of competition including competition
21 by local vendors, and matters related thereto. I
22 understand that you want to make a ---
23 TOM ALLEN: Mr. Chairman?
24 FRANCIS CROWDER: Yes, sir.
25 TOM ALLEN: Yes, I would. I would like
26 to make a motion at this time to table this because
27 we've come up with some -- there are relatively minor,
28 but changes to this. And I'd like for all of the
29 council members to have a chance to look at it and they
30 were just handed out earlier today. So I'd like to
31 table this until the next meeting. And I put that in
32 the form of a motion.
33 KEN WATERS: Second. I'll make a second.
34 FRANCIS CROWDER: All right. All those in
35 favor? All right. Let the record show that those in
36 favor were Ms. Wilson, Mr. Allen, Mr. Moore, Ms. Floyd,
37 Mr. Dunn and Mr. Waters. Opposed, Francis Crowder.
38 All right. Moving on to Item 10(c), 2013-005,
39 an Ordinance to allow the county administrator limited
40 authority to approve filing of legal actions for the
41 collection of certain debt on behalf of the county, and
42 matters related thereto. Mr. Pitts?
43 MIKE PITTS: Mr. Chairman, this is third
44 reading of an ordinance that would allow the
45 administrator to authorize the filing of a debt
46 collection action as long as the amount is under
47 seventy-five hundred dollars.
48 TOMMY DUNN: Mr. Chairman?
49 FRANCIS CROWDER: All right. Do I have a
50 motion?

1 TOMMY DUNN: I make a motion to move this
2 forward.
3 TOM ALLEN: I second.
4 FRANCIS CROWDER: We have a motion by Mr.
5 Dunn. Do we have a second?
6 TOM ALLEN: Second.
7 FRANCIS CROWDER: We have a second by Mr.
8 Allen. Discussion? Hearing no discussion, all those
9 in favor raise your right hand. Let the record show
10 that it was unanimous.
11 All right. Item (d), 10(d), 2013-006, an
12 ordinance amending Chapter 38 Article V of the Anderson
13 County ---
14 CINDY WILSON: Mr. Chairman?
15 TOM ALLEN: That was pulled.
16 FRANCIS CROWDER: We've set that aside.
17 TOMMY DUNN: This is the time we talked
18 with the representatives.
19 FRANCIS CROWDER: I'm sorry. Yeah. We did.
20 I apologize. I should have marked it. Set aside.
21 All right. Moving on to Item Number 11,
22 Ordinance 2nd reading. I declare this a public
23 hearing. It's an ordinance for the adoption of the
24 Royal American Overlay District Regulation and matters
25 related thereto. If any citizen would like to speak,
26 either for or against this item, please come forward to
27 the stand and express your views. The floor is open
28 for the public hearing. Seeing -- oh, come right
29 ahead, Mr. Brissey.
30 BILL BRISSEY: Ladies and Gentlemen of the
31 Council, I'm Bill Brissey. I'm hungry because all
32 we've had here tonight is some kind of food
33 proclamation or serving food or reading from the
34 newspaper. I'm about to starve to death.
35 FRANCIS CROWDER: I understand that, brother.
36 BILL BRISSEY: I'm here tonight to talk a
37 little bit about this overlay district that's up in the
38 -- it's the property that's behind the Royal American
39 Inn on Clemson Boulevard. We've had property up there
40 now for about fifteen years. And, of course, we bought
41 this property, it was developed in the commercial
42 tract. And, of course, now we seem to be getting some
43 opposition about being able to develop it without
44 putting a lot of restrictions on this commercial
45 property. Different restrictions, over and above what
46 we already have to do.
47 In order to develop something into a
48 commercial tract, we go through an enormous amount of
49 work with engineers trying to get it ready to develop.
50 With all the new state regulations now it seems that

County leaders give final nod to Tri-County land lease at airport

Council takes less than five minutes to approve Tri-County plan

By Nikie Mayo

Tuesday, February 5, 2013

ANDERSON — County council members took less than five minutes Tuesday night to give final approval to a long-in-the-works lease that allows Tri-County Technical College to use some land at the Anderson Regional Airport for a highway-construction training program.

The land will be used by students who are learning to operate heavy equipment used in roadwork. One of the skills students will learn is how to lay asphalt.

The lease allows the college to lease five acres at the airport for five years. It also gives Anderson County the option to tell Tri-County to leave the work site if a business is interested in using the same acreage for an economic-development project.

If that were to happen, interim administrator Rusty Burns has said, the county would make provisions for the college to move its work site "a little farther down the road," but still on the same property.

Council members hope for a "light business and industrial park" near the airport. When the college first asked for land out there more than a year ago, county leaders hesitated — and studied — before they answered.

The county commissioned a \$4,000 study then to determine if leasing land to the college was a good idea.

William McCoy of F&S Surveyors, Engineers and Planners prepared the study.

"As development proceeds on the total tract, the instructional buildings for this facility — which would be of an attractive modular construction — could be easily relocated with grading," McCoy said in the study.

"Utilization of experience-oriented training from this alliance," McCoy said, "would be a strong benefit to the county and Tri-County Tech."

College officials have a long-term goal of asking for about 70 more acres at the

airport. The land would be used for research facilities. The college did not have a representative speak about the lease Tuesday night.

The lease requires the county and the college to give each other sufficient notice if one of the parties wants to terminate the agreement.

In other business, the Anderson County Council gave Burns the authority to "approve the filing of legal actions" on behalf of the county — as long as those actions are related to collecting debts of \$7,500 or less.

County attorney Mike Pitts said the council's resolution gives Burns "limited authority" to approve filings made on behalf of the county in Magistrate Court.

Pitts said the need for that authority arose because the county is trying to collect money from a person who has used services at the airport but has thus far refused to pay.

The resolution approved by the county council does not give Burns the authority to approve any high-dollar lawsuits, Pitts said.

Still, council member Eddie Moore said he wants to know about any small-claims cases that Burns approves going forward.

"Being the recipient of numerous lawsuits," Moore said, "I'm a little touchy about it."



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002499

Anderson County, ... Appellant,
v.
Joey Preston and the South Carolina Retirement System, Respondents.

PROOF OF SERVICE

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

Pleadings:

Respondent Joey Preston's Reply

Counsel Served:

J. Theodore Gentry

Troy A. Tessier
Alice W.W. Parham
Wade S. Kolb II

RECEIVED

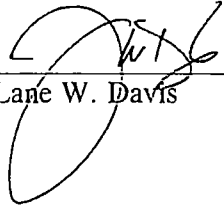
JUN 20 2014

SC Court of Appeals

WYCHE, PA
44 East Camperdown Way
Greenville, SC 29601

David K. Avant
South Carolina Budget and Control Board,
South Carolina Retirement Systems
202 Arbor Lake Drive
Columbia, SC 29223

June 17, 2014



Lane W. Davis

The South Carolina Court of Appeals

Anderson County, Appellant,

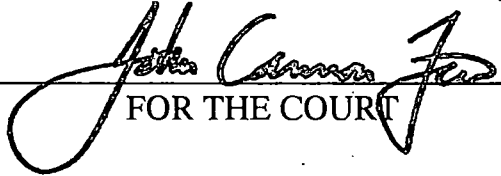
v.

Joey Preston and the South Carolina Retirement System,
Respondents.

Appellate Case No. 2013-002499

ORDER

Respondent Joey Preston's motion to dismiss is denied. Preston shall serve and file his initial brief and designation of matter within twenty days.

 C.J.
FOR THE COURT

Columbia, South Carolina

cc:

James Theodore Gentry, Esquire

Troy A. Tessier, Esquire

Alice Witherspoon Wilson Parham, Esquire

Candy M. Kern-Fuller, Esquire

Lane Whittaker Davis, Esquire

David Keith Avant, Esquire

Justin Richard Werner, Esquire

FILED
11-8-14
