THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

BRIEF OF APPELLANT ANDERSON COUNTY

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ATTORNEYS FOR APPELLANT ANDERSON COUNTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

ISSUES ON APPEAL

On November 18, 2008, the outgoing County Council of Anderson County, dominated by political allies of County Administrator Joey Preston, voted to give Preston a Severance Package worth over $1.1 million. The vote to approve the Severance Agreement included the County Council Chair, who was actively soliciting Preston for a County job at the time. This appeal presents the following questions:

1. Did the Circuit Court err in approving of the Severance Package, given that the Package was a product of fraud and abuse of power, and was unreasonable, capricious, and a violation of public policy because it was based on a phantom claim, paid Preston more than the maximum value provided for in his Employment Agreement, and was passed in a manner inconsistent with the democratic process, and that Preston knew these facts?

2. Did the Circuit Court err in approving the Severance Package despite the fact the Package was passed with votes of Council members with patent conflicts of interest?

3. Where Preston was plainly aware of the improper votes being cast in favor of his million-dollar severance, did the Circuit Court err in holding that Preston had no duty to point out the impropriety, and in holding that the Severance Agreement cannot be rescinded for breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation?

4. Where the Circuit Court's Order invalidated a total of four votes and held that the Severance Agreement passed by a 2-1 vote, and where three votes do not constitute a quorum of the Anderson County Council, did the Circuit Court err in refusing to invalidate the Severance Agreement, and in denying Anderson County's motion to amend its Complaint to seek invalidation on the basis of this absence of a quorum?

5. Did the Circuit Court err in holding that future payments due to Preston from the South Carolina Retirement System – payments made possible only because of the Severance Package – are not available in fashioning a remedy for the impropriety of the Severance Package?

6. Did the Circuit Court err in holding that the equitable remedy of rescission is unavailable to address the improprieties of the Severance Agreement?

7. Did the Circuit Court err in holding that Anderson County's lawsuit to challenge the Severance Agreement violated the terms of the Settlement Agreement, and that Preston therefore may petition for attorney's fees?

STATEMENT OF THE CASE

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

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

The parties filed cross-motions for summary judgment, which were heard on October 16-17, 2012 and denied in all respects as to both parties by Order dated October 23, 2012. (R. pp. 82-83) The matter was tried without a jury to Judge Couch from

October 29, 2012 through November 2, 2012. Judge Couch made his rulings in an Order dated May 3, 2013. (R. pp. 1-43)

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

Anderson County filed its Notice of Appeal on November 22, 2013.

STATEMENT OF FACTS

I. Introduction

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

The result was an unjustifiable $1.1 million payout to a public servant (the "Package" or "Severance Agreement"). The purported basis for the payment was settlement of a logically impossible claim that Preston's existing employment contract (the "Employment Agreement") had been "anticipatorily breached." This claim was plainly without merit, since the Employment Agreement provided that Preston could be terminated at any time, without cause, and because the purported "breach" was a prediction of future political action by persons who were not in office and so could not act for the County. In fact, Preston was in no danger of termination by the existing Council, which included a solid majority of his supporters. The Severance Package further offended rationality by

giving a public official far more than the severance to which he would have been entitled under his Employment Agreement under any scenario – including a $7,600 per month public pension for life, starting at age 45, courtesy of the taxpayers.

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

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

The Circuit Court established a potentially harmful precedent in placing the law's imprimatur on these corrupt goings-on. Under that ruling, a million-dollar severance package that was voted to a public servant by legislators with clear financial ties to him is acceptable. Under that ruling, a "severance" payment to a public servant far in excess of

any arguable legal entitlement is reasonable. Under that ruling, a public servant does nothing wrong when he sits silently by and allows tainted votes to be cast for his own severance. That ruling should be reversed.

II. Preston's Tenure and His Employment Contract

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

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

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

(R. p. 1892 at Sec. 2.A) In the event of termination without cause, the Employment Agreement included a provision for severance pay and benefits:

> B. If the Administrator is terminated for any reason other than those set out above, he shall be deemed to have been terminated without cause and shall be entitled to all pay and financial benefits remaining on his contract for the balance of the contract period in a lump sum or in incremental payments, as he, in his sole discretion, shall choose, as severance pay for such termination without cause. . . . The total severance pay under this Agreement shall not exceed thirty-six (36) months aggregate, total compensation at the rate of pay in effect upon termination. . . . .

(R. p. 1893 at Sec. 3.B) While the Employment Agreement was generous, contrary to Preston's view, it provided him no guarantee of employment for life.

III. Election of a New Council, and Preston's Claim of "Anticipatory Breach"

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

It is important to emphasize that this new Council would not be sworn in before January 2009, and that until then the old Council – a majority of which was vigorously supportive of Preston – remained in office. (R. pp. 312-313; pp. 1199-1200) Preston recognized this and acted swiftly to exit on favorable terms before the potential investigation could get underway.

Preston engaged attorney Rob Hoskins to assert a claim against the County for him. Hoskins first wrote to County Council on September 25, 2008 – that is, before the general election in November. (R. pp. 1914-1915) In that letter, Hoskins asserted on behalf of Preston that the ***intent*** of the ***incoming*** majority-elect to examine the Preston years amounted to an "anticipatory breach" of Preston's Employment Agreement: "[i]t has come to Mr. Preston's attention that certain existing Council Members have made statements that they and certain newly elected Council Members ***intend, after January 2009***, to prevent him from carrying out his duties as County Administrator." (*Id.*; emphasis added) Thus, Preston's anticipatory breach claim was based on a forecast in September 2008 that future

actions of a future Council would "render[] his ability to serve the people of Anderson County beyond January 1, 2009 impossible." (*Id.*) Despite all the discussion at trial of the "toxic" environment, the simple fact was that the ***only*** event that led to Preston's claim of "breach" was a free election; Anderson County never took any official action affecting Mr. Preston's contract or his employment status.

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

The sitting Council referred Preston's claim to its Personnel Committee, chaired by Ron Wilson. (R. p. 334, lines 10-19; p. 1189, lines 3-15; pp. 989-990) Wilson – who has since pled guilty to operating a multi-million-dollar Ponzi scheme – was a Preston supporter. (R. p. 316, lines 17-20; pp. 685-687)

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

On October 23, 2008, Preston's lawyer sent Bright a letter making a demand for $1,276,081.00: $827,222.00 for the "total value of the money and benefits due" under Preston's Employment Agreement (as calculated by Preston's lawyer); $356,087.00 to

purchase service credits to allow him to retire immediately on a full pension; and $92,772.00 to fund a health reimbursement account. (R. pp. 2026-2028)

The October 23, 2008 Hoskins letter acknowledged that Preston's demand was for more than Preston was due under his Employment Agreement, calculating the total amount due under the Employment Agreement as $827,222.00. (*Id.*) Hoskins justified this by alluding to unspecified "tort claims" that Preston would assert against current and incoming Council members – presumably those pledged to investigate his regime. (*Id.*) In fact, though, Preston's demand was not calibrated to those tort wrongs, but was ***expressly*** calculated to allow Preston to retire immediately with a full pension.

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

V. County Council's Series of Votes on the Severance Package

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

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

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

Despite prior, coordinated groundwork by certain Council members to locate funding for the Severance Package and to orchestrate its passage, consideration of the Severance Package was not placed on the agenda distributed in advance of the November 18 meeting. (R. pp. 1916-1917; pp. 344-346; pp. 546-547; p. 821; pp. 1202-1222) Instead, on Ron Wilson's motion the agenda was amended – toward the end of the meeting – to add the matter. (R. pp. 1940-1941; p. 1983) This occurred even though there remained other scheduled Council meetings in 2008 when the Severance Package could have been placed on the agenda in advance. (R. pp. 344-346, 349-354; p. 1223)

When he introduced the Severance Package, Ron Wilson said that "no one has seen this except Mr. Bright and myself." (R. p. 1965, lines 1-3; p. 1983) Despite this, there was essentially no discussion of the details of the Settlement Package, Preston's asserted claim, or the value of the Package. After truncated debate, Bill McAbee moved to end debate. (R. pp. 1963-1968; p. 1983) That motion passed, and the Severance Package was approved by a vote of 5-2, with Cindy Wilson and Waldrep voting against. (R. p. 1968; p. 1983)

This, however, did not end the matter. Councilman Greer revealed he had consulted in advance with County employees to identify "an area [of the general fund budget] in which they could locate this amount of money." (R. p. 1969, lines 1-11; p. 1983; p. 2044; pp. 2047-2048) Greer passed out a previously prepared document showing

how the Preston Settlement Package could be funded. (R. p. 1946; p. 1983; pp. 1990-1992) The motion to approve budget transfers to fund the Settlement Package passed. (R. p. 1946, line 11-p. 1948, line 45; p. 1983)

At that point – in a truly remarkable moment – Councilwoman Floyd asked "Do we need to vote to reconsider this?" (R. p. 1949, lines 2-3; p. 1983) This showed that the majority had planned a strategic series of votes for the Preston Package. In fact, Greer testified that he had a working copy of Preston's severance agreement in advance of the November 18, 2008 meeting (R. p. 1210, lines 3-9); that he never shared that copy with Council members Cindy Wilson or Waldrep (R. p. 1210, lines 14-17); and that he spoke with each of the other four members of Council who voted with him in favor of Preston's severance agreement before the November 18, 2008 Council meeting because he was interested in "knowing, in advance of the November 18th meeting, whether or not [he] had sufficient votes to approve the severance agreement for Mr. Preston." (R. p. 1210, line 22-p. 1211, line 19)

After this reminder, a motion was made to reconsider the funding transfers. (R. p. 1949; p. 1983) That passed, and after another truncated debate that was primarily squashed by Chairman Thompson on a point of order, McAbee moved to end debate. (R. p. 1950; p. 1983) The funding package was then re-approved on reconsideration. (R. p. 1951; p. 1983)

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

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

The final Council vote on the Severance Package followed. Waldrep abstained, having earlier explained an abstention with the statement that he "can't figure out what in the world" Council was doing. (R. p. 1951, lines 33-35; p. 1952, line 34-p. 1953, line 9; p. 1983) In the meeting minutes, the final recorded vote was 5 in favor, 1 against, and 1 abstention. (R. p. 1953, lines 6-9; p. 1983) Immediately after that vote, the Council took up a motion to hire a new administrator. (R. pp. 1953-1959; p. 1983). Floyd had a proposed contract for the new administrator already with her, again confirming the majority had orchestrated this series of votes in advance. (R. p. 1953, lines 12-35; p. 1983) At that point, despite several agenda items that remained undiscussed, Thompson solicited a motion to adjourn and Council adjourned without conducting any further business. (R. p. 1959, lines 15-42; p. 1983).

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

Moreover, the approval of the Severance Package was done by simple motion, not an ordinance. (R. p. 1983) Under the Anderson County Code, an "ordinance" requires

(among other characteristics also not present here) three separate readings on three separate days. Anderson County Code of Ordinances § 2-38.

VI. The Terms of the Severance Package

The Severance Agreement contained these key provisions (R. pp. 1985-1989):

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

VII. Facts Supporting Invalidation of the Severance Package

The core facts that require invalidation of the vote to pay Preston $1.1 million in County funds are not subject to doubt.

A. The Terms and Circumstances of the Severance Package Itself.

The terms of the Severance Package itself are sufficient to invalidate it. First, the County purported to pay Preston for "anticipatory breach" at a time when the sitting County Council was in his corner, and the majority that he expected to terminate him had not taken office. There had been no County action that constituted anticipatory breach. Moreover, Preston's Employment Agreement made it clear that he could be terminated by Council "at any time." (R. p. 1892 at Sec. 2.A) Thus even termination could never be a "breach" of the Employment Agreement. At most, it might entitle him to severance. Accordingly, the Severance Package was not a true response to an actual breach – and it

certainly was not an arm's length negotiation. Instead, it was a political bailout from political allies, to spare Preston the discomfort of dealing with a new Council not as favorably disposed toward him. While this might be understandable politics, it is an unconscionable use of County money.

This is confirmed by the fact – established in demand letters from Preston's own lawyer – that Preston was ***paid more than he was owed*** under his contract. (R. pp. 2026-2028; pp. 2037-2039) The Employment Agreement made no provision for a pension for life (or even a Yukon Denali.) (R. pp. 1891-1899) The Severance Package was a purely political payoff, dressed up in the garb of a settlement. But there was nothing to settle.

B. Council Members Had Financial Interests Intertwined with Preston and Should Not Have Voted on a Matter for His Benefit.

Anderson County presented evidence that three votes for the Severance Package should never have been cast. Indeed, the Circuit Court ***agreed*** with the County as to two of those three votes,[2] but concluded that the enactment of the Severance Package was nevertheless legal. As we discuss hereinafter, even one tainted vote requires invalidation here, and that standard was easily met.

Chairman Michael Thompson. At the time he was chairing the County Council's decision to pay Preston $1.1 million and voting repeatedly in favor of Mr. Preston's interests, Michael Thompson was ***actively seeking County employment for***

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[2] In addition to Michael Thompson and Ron Wilson, the County showed an improper financial relationship between Preston and Councilman Bill McAbee. Most starkly, the County demonstrated that Preston was signing off on "economic development" travel for McAbee and a close friend and business associate, even after McAbee had been voted out of office – at which point the travel could serve no County purpose, and could be only for McAbee's personal enjoyment and business advantage. (R. pp. 2141-2148; pp. 610-611, 614-615; pp. 1072-1073) Given the clear impropriety of the Thompson and Wilson votes, and the fact that even one bad vote is enough to invalidate the Severance Package, we focus primarily on those facts.

himself from Preston. (R. p. 778, line 25-p. 779, line 15; p. 783, line 3-p. 784, line 4; p. 785, lines 6-22; pp. 791-798; pp. 815-828; pp. 1985-1989; pp. 2072-2075; p. 2076; pp. 2079-2081; pp. 2082-2083; pp. 547-552; pp. 1015-1017; p. 1022, line 19-p. 1023, line 9; pp. 1026-1031; pp. 1036-1044) Mr. Thompson admitted as much, the Circuit Court so found, and there can be no serious dispute on this point. (R. p. 778, line 25-p.779, line 15; p. 783, line 3-p. 784, line 4; p. 785, lines 6-22; pp. 791-798; pp. 815-828; pp. 8-9) Indeed, Thompson approached Preston within a day or two of his vote on the Severance Package to obtain Preston's signature on a document to officially hire him, after being told by another County official that such a hiring would be a conflict of interest. (R. pp. 824-827; p. 548, line 21-p. 549, line 15; pp. 1037-1039) Thompson's clear conflict of interest was not disclosed to Council or to the public, by Thompson or by Preston, at the time that Thompson voted for the Severance Package. (R. p. 827, line 19-p. 828, line 4; pp. 774-775)

Councilman Ron Wilson. Councilman Wilson was chair of the Personnel Committee to which the Council referred Preston's claim of "anticipatory breach." (R. p. 334; p. 1189) Under Councilman Wilson's leadership, the Personnel Committee oversaw the negotiation of Preston's Package. Councilman Wilson made the motion that Council approve Preston's Package. (R. pp. 1940-1941; p. 1983) Wilson twice voted for approval of the agreement and voted for other motions favorable to it, including the motion to terminate debate. (R. pp. 1940-1945; p. 1983)

A year earlier, in September 2007, Preston had signed on behalf of Anderson County a contract with a consulting company (Palmetto Agricultural Consultants) owned and operated by Councilman Wilson's daughter (Allison Schaum) for consulting services related to agricultural programs. (R. pp. 2149-2152; pp. 1051-1053; pp. 1714-1715)

Schaum had no previous experience in this area, and Anderson County was her company's only client at the time. (R. pp. 1745-1754) The original contract was a month-to-month contract, with a fixed hourly rate of $65, when Schaum admitted she had never before worked for more than $15 per hour in her life. (R. pp. 2149-2152; pp. 1755-1757; p. 1761, lines 6-10; p. 1768, lines 11-19)

On November 1, 2008, while Preston's claims were before the Council and being negotiated by Councilman Wilson's Personnel Committee – and approximately one week after Preston's lawyer sent his October 23 demand for just over $1.2 million – Preston caused the County to enter into a new contract with Palmetto Agricultural Consultants that significantly improved the benefits to Schaum and her company. (R. pp. 2158-2161; pp. 1769-1774; pp. 1057-1058; pp. 1069-1071) The new contract increased the hourly rate to $75 per hour, provided yearly increases in the hourly rate thereafter until the rate reached $95 per hour, and converted the contract from month-to-month to a contract with a definite term of three years. (*Id.*) In addition, the new contract contained a truly extraordinary provision, giving Councilman Wilson's daughter the right to "liquidated damages" calculated at her hourly rate multiplied by 30 hours per week for the remainder of the three-year term if the County terminated the contract before the end of three years, this despite the fact that Schaum was not anticipated to, and never did, work more than about 20 hours per week. (*Id.*; R. p. 1758, lines 3-8; p. 1761, lines 20-24; pp. 1068-1069) The sweetening of the contract was entirely gratuitous. Preston signed the new contract – and thus obviously was aware of it – yet sat quietly by while Ron Wilson voted for Preston's $1.1 million Severance Package.

C. Preston's Knowledge of – and Silence in the Face of – the Tainted Votes.

Preston plainly was aware of these conflicts of interest. He knew Chairman Thompson was pursuing him for a job, and he knew he had upgraded the contract of Councilman Wilson's daughter. (R. pp. 1038-1039, 1057-1058, 1069-1071) Preston was also present in Council chambers while these individuals debated and voted on his Severance Package, and yet he said nothing about these improper votes. (R. pp. 1918-1959; p. 1983; p. 997) He had a duty to speak up, as an employee and as a public servant.

D. Public Integrity Is at Stake.

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

"Corruption" is the abuse of entrusted power for private gain. The key facts of this case are not subject to serious dispute, and they render the Preston Severance Package plainly and deeply corrupt. The Circuit Court's decision to let the Severance Package stand sends an unacceptable message that the courts have no power to redress this sort of public chicanery. The courts are not so powerless in the face of blatant wrong.

SUMMARY OF ARGUMENT

The 2008 County Council election marked a sea change for Preston. Faced with this popular repudiation, and before the new Council was seated, Preston asserted that his Employment Agreement had been "anticipatorily breached." While the County had taken no action concerning Preston's employment, the lame-duck Council voted to settle this claim with a Severance Package that paid Preston over $1.1 million in taxpayer money.

The Circuit Court erred in placing a legal seal of approval on that deal. Preston's Package was championed by Council members who should have been disqualified. Preston knew of the disqualifying facts, yet sat silently by. The Package was rammed through County Council in an obviously orchestrated fashion. It was premised on a cause of action that could not exist, and it paid Preston more than he could hope to recover even if he had a cause of action. The Circuit Court should have rescinded the departing Council's ill-conceived parting gift to Preston. The Package is invalid for a number of reasons, each of which is sufficient and all of which taken together are overwhelming.

I. The Severance Package Is Void Because it Was a Product of Fraud and Abuse of Power, it Was Unreasonable and Capricious, and it Violated Public Policy.

Courts have authority to review arbitrary enactments like this Package. First, Preston's claim for "anticipatory breach" was premised on the prediction that the ***incoming*** County Council was likely to take some unspecified improper action toward him. The Circuit Court erred in confusing a hodgepodge of political postures and rhetoric with actual official conduct. Because the persons Preston said were "anticipatorily" breaching his contract were not in office, had no authority, and could not take and had not taken any official action, his claim was baseless. Anderson County, his employer, had done nothing.

Second, Preston's employment contract clearly provided that he served at the pleasure of County Council and could be terminated at any time and for any reason; the question was only whether he would be owed severance upon such termination. Preston's termination, in and of itself, simply could not have been a breach of contract.

Moreover, even if Preston could have claimed breach of his contract, Preston's own attorney admitted the "settlement" paid to Preston exceeded the maximum amount he could have claimed for breach. This was arbitrary.

Finally, the "debate" on the Severance Package was a sham. The Package was added to the agenda by an amendment offered toward the end of the meeting and with no advance notice. The proposed Severance Package was then swiftly distributed, "debated," passed, "reconsidered," and voted on again – in addition to being funded in a separate action – all in a choreographed dance, with virtually no substantive debate.

II. The Tainted Votes Cast in Favor of the Severance Package Require its Rescission. Even the Circuit Court's Order – which upheld the Severance Package – could not escape the conclusion that the votes of Councilmen Michael Thompson and Ron Wilson were clearly improper. The Circuit Court said this did not matter. It did.

First, Courts around the country have held – correctly and persuasively – that a single tainted vote is sufficient to invalidate an action in cases like this one. Specifically, (i) where the enactment at issue confers a specific benefit for one individual rather than establishing a law of general applicability; (ii) where the action was not part of a County ordinance but instead was passed by a simple motion; (iii) where consideration was marked by procedural irregularities; (iv) where tainted votes were cast by the chair or other key proponents of the action; ***or*** (v) where the matter was passed without notice or any opportunity for public comment or political redress, a single improper vote is sufficient to void the infected outcome. Here, not just one of these factors is present; they all are.

Second, even if the County were required to invalidate a number of votes equal to the margin of passage of the Package, a single tainted vote would suffice. The passage of the Severance Package included a motion to reconsider – a parliamentary maneuver designed to prevent later reconsideration. The vote to end debate on the reconsidered motion was only 4-3. (R. p. 1974, line 10-p. 1976, line 9; p. 1983) Because this one-vote margin was a necessary step in final approval, invalidation of a single vote is enough.

III. Preston Breached His Fiduciary Duty, and Engaged in Fraud, Constructive Fraud, and Negligent Misrepresentation When He Did Not Disclose the Facts That Required Disqualification of Thompson and Ron Wilson. Preston was aware that Michael Thompson was soliciting a County job from him, and that he had just upgraded Ron Wilson's daughter's county contract for no good reason, and yet he stood silently by and let them cast votes, thus implicitly and fraudulently representing to all present that their votes were proper, and breaching his duties to the County and its taxpayers. The Circuit Court erred in holding that Preston – who was still County Administrator – had no duty to speak in the face of this knowledge.

IV. The Circuit Court Erred by Invalidating Two Votes *Against* the Package, and then Failing to Recognize That This Holding Destroyed the Quorum Needed for Passage. In a bizarre procedural twist, the Circuit Court followed Preston's unpled suggestion – prompted by concern over the one-vote margin of passage of the motion to end debate mentioned above – and held that the votes cast by Waldrep and Cindy Wilson were improper because of the general release contained in the Package. (R. pp. 10-12) The Circuit Court thus invalidated a total of four votes, out of the seven members of County Council. When the Circuit Court issued its Order, the parties were for the first time faced with the conclusion that – if the Circuit Court was correct – no quorum was present for the vote on the Package. While Anderson County does not agree with the invalidation of those two votes against the Package, if the Circuit Court was correct then the Package must be invalidated for lack of a quorum.

V. The Circuit Court Erred in Holding That the Courts Are Powerless to Provide a Remedy. The remedy for a void enactment like the Severance Package is rescission. Particularly where the public interest is so deeply implicated, the Courts are not

powerless to fashion a remedy. This is particularly true here, where one plainly improper element of the Package is a lifetime State pension. That flow of funds – secured with Anderson County funds – can be tapped as part of an equitable remedy.

VI. The County Did Not Breach the Severance Agreement by Seeking a Judicial Determination of the Package's Validity. The Circuit Court held that this lawsuit violated the covenant not to sue contained in the Package. That claim obviously fails if the Package is voided, as the covenant would go away as well. Even if the Package were allowed to stand, Preston's counterclaim for breach should be rejected. First, courts have recognized that an action challenging the validity of a contract containing a covenant not to sue is not a violation of that covenant. Such a covenant is not an "incontestability clause." Second, the scope of the covenant is limited to claims "relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the County...." (R. p. 1987 at ¶ 8) Because the purpose of this suit was not to litigate over Preston's employment, but to test the validity of the Package, the covenant is not implicated.

ARGUMENT

I. Standard of Review

In this equitable matter, this Court reviews the record *de novo*. *Independence Nat'l Bank v. Buncombe Prof'l Park, LLC*, 402 S.C. 514, 520, 741 S.E.2d 572, 575 (Ct. App. 2013) ("The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence.")

II. The Severance Package Was a Product of Fraud and Abuse of Power, It Was Unreasonable and Capricious, and It Violated Public Policy

Courts have the authority to invalidate an enactment, even in the absence of tainted votes, "in cases of fraud or clear abuse of power, or where [the action was] unreasonable or

capricious." *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (quoting *SCE&G v. South Carolina Pub. Serv. Auth.*, 215 S.C. 193, 212, 54 S.E.2d 777, 785 (1949)).[3] A court may also invalidate a county council action that violates the public policy of the state. *Piedmont Public Serv. Dist. v. Cowart*, 319 S.C. 124, 136, 459 S.E.2d 876, 882-83 (Ct. App. 1995) (invalidating employment contract as *ultra vires* and contrary to public policy), *aff'd on other grounds*, 324 S.C. 239, 478 S.E.2d 836 (1996); *Thompson v. Atlantic City*, 921 A.2d 427 (N.J. 2007) (invalidating settlement and release agreement with city procured for mayor of that city by political allies because conflicts of interest inherent in negotiation violated public policy); *see also Berkeley Elec. Coop. v. Town of Mt. Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (invalidating franchise not created by ordinance); *Business Lic. Opposition Comm. v. Sumter Cnty.*, 311 S.C. 24, 426 S.E.2d 745 (1992) (invalidating ordinance adopted in violation of Freedom of Information Act). *See generally Dep't of Transp. v. Brooks*, 328 S.E. 2d 705, 717 n.14 (Ga. 1985) ("Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly. . . . Ordinances are examined for reasonableness; acts of the General Assembly are reviewed for constitutionality." (citations omitted)). Anderson County's second and seventh causes of action seek rescission on the basis of these authorities. (R. pp. 133-134, 138)

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

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

Contrary to the Circuit Court's apparent conclusion that the Package was a reasoned exercise in the public interest, the outgoing Council's casual generosity with

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[3] The Circuit Court apparently applied a "fairly debatable" standard. (R. pp. 18-22) Anderson County believes that *Moody* sets forth the governing formulation. However, the Severance Package is arbitrary and unjustifiable under either standard.

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

> Q. Well, while you were in control, or chair of the county council, did you sense that there was any danger to Mr. Preston that he was going to be terminated by your county council?
>
> A. No.
>
> Q. His concern, it sounds like as it was relayed to you, was a concern that the incoming county council might do something to get rid of him?
>
> A. Yes.

(R. p. 802, lines 8-16)[4] Preston's own demand letter – which based its claim on what "newly elected Council Members intend, after January 2009" – confirms this. (R. pp. 1914-1915)

The claim of anticipatory breach was a pretense. Regardless of what intention the incoming Council members might have harbored, they could not act until they were in office, so their intentions were irrelevant and could not constitute anticipatory breach. A repudiation or anticipatory breach requires a statement or action ***by a party to the contract***

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

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

It is also noteworthy that the claim of "breach" is utterly unspecific. Nowhere does the Hoskins letter set forth the specific threatened acts that constitute the alleged breach. The letter sticks to terms like "prevent him from carrying out his duties," "efforts will now escalate," "obstructionist scheme," and "the new assault he faces . . . is more than he can endure." (R. pp. 1914-1915) Besides coming from people not in office and without power to act, the alleged "scheme" had no content. *See Hodgkiss v. Pierce Cnty.*, 100 Wash. App. 1066, at *9 (Wash. Ct. App. May 26, 2000; unpublished) (in overturning settlement by county, court noted municipal corporation "cannot make a gift of public monies nor grant releases from obligations under the guise of compromising an entirely unfounded claim against it" (citing *Edelstein v. City of Asbury Park,* 143 A.2d 860, 871-72 (1958))).

Preston felt threatened by a political event, not a contractual one. His friends on Council had lost primary races, but remained in office. It is hard to imagine public action

more "unreasonable and capricious" than lavishing a seven-figure settlement on a public servant on the basis of a logically impossible legal claim.

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

Preston's own lawyer acknowledged in negotiations that the total severance benefit in the Employment Agreement was worth no more than $827,222.00. (R. pp. 2026-2028; p. 453) (The County showed the amount was even less. (R. pp. 2651-2670; pp. 1283-1286)) When it voted to give Preston over $1.1 million, County Council exceeded the maximum amount he could have obtained even if he had been terminated without cause.

The major component forming the difference between "full severance" and the amount Preston received was the payment of over $350,000 to the Retirement System to purchase over seven and a half years of extra service credit to qualify Preston for immediate full retirement. (R. pp. 1985-1989; p. 456, line 2-p. 457, line 16; pp. 1287-1292; p. 251 at ¶ 6; pp. 2671-2681) Plainly, Preston's Employment Agreement did not promise him employment all the way to retirement, nor did its severance provision provide for a pension for life. This payment – a gift by the County of a life pension starting at age 45 – is emblematic of the utter disconnect between the Severance Package and reality. Preston had no claim for such a pension. Yet his friends on County Council did not even blink in spending County money to confer that benefit. *Page v. MiraCosta Cmty. Coll. Dist.*, 102 Cal. Rptr. 3d 902, 922 (Cal. Ct. App. 2009) (payment by state agency of more than its maximum legal exposure improper, as "akin to payment of a wholly invalid claim").

Thus, the Severance Package was indefensible even if one assumes the validity of Preston's Employment Agreement. In fact, the Employment Agreement was not valid.

Preston signed his Employment Agreement – which purported to be a three-year contract with an evergreen renewal feature, and severance benefits tied to that term – in 1998. When it was considering Preston's claims in 2008, County Council was advised by its employment counsel that Preston's Employment Agreement was probably subject to the rule that a contract with a political appointee may not extend beyond the term of the County Council in which the contract was entered. (R. pp. 458-459, 471-472, 477-479)[5] This would mean Preston's Employment Agreement should have expired when a new Council took office in 1999 – and certainly would have expired when the incoming Council took office in 2009. The capriciousness of paying Preston more than his maximum severance is magnified by the Council's disregard for the likely invalidity of Preston's Employment Agreement. (R. pp. 458-459, 464-465, 477-479)

3. The Severance Package Was Obtained Through Fraud.

Under *Moody*, the grounds for judicial invalidation of an enactment include "fraud or clear abuse of power." 319 S.C. at 186, 460 S.E.2d at 375. We discuss below the County's independent causes of action for rescission based on fraud, fraudulent concealment, and negligent misrepresentation, but the same core facts also call for invalidation under *Moody*. As we detail in this brief – and the Circuit Court found – Council members with financial ties to Preston voted to give him a severance package. But what is critical here is not that corrupt participation, but Preston's presence ***and silence*** in the face of that participation. Preston was present at the vote on his Severance Package.

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

He plainly knew that Chairman Thompson was courting him for a job, and just as he plainly knew he had given a sweetheart contract to Councilman Ron Wilson's daughter.

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

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

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

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

to have the matter reconsidered, but that it was a "parliamentary tactic" to ensure the matter could not be reconsidered at a later date. (R. pp. 628-629)

The arbitrariness of the settlement itself, coupled with this theatrical process, leaves no doubt that consideration and adoption of the Package was the very opposite of an open process, designed to discern and serve the interests of Anderson County. It was an exercise in raw political power, and it is subject to judicial correction. *See Peterson Outdoor Adver. v. Myrtle Beach*, 327 S.C. 230, 235-36, 489 S.E.2d 630, 633 (1997) ("When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary." (internal citations omitted)).

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

Faced with the implausibility of his claim of anticipatory breach, and the unreasonableness of the amount he was paid, Preston seeks to justify the Severance Package on the basis of the "toxic political environment" in Anderson County. Again, though, political posturing and rhetoric is not the same as an adverse employment action, and Preston had endured years of the "toxicity," until the 2008 primary faced him with the prospect of a new political landscape.

Preston and the Circuit Court placed great weight on a series of meetings – which took place before the new Council was seated – involving Bob Waldrep, Cindy Wilson, the three Councilmembers-elect, and other interested citizens. (R. pp. 924-925, 933-934, 948, 950-955; pp. 5, 32-34) There is simply nothing impermissible about these meetings. Even assuming that these meetings included plans for possible future action that might involve Preston, this would not constitute anticipatory breach. When the meetings occurred, those present were not empowered to act for the County. Preston's argument still reduces to a

claim that he ***expected*** some actionable conduct by a new County Council in the future. It is as if he had written a demand letter claiming payment because "I expect to be hit by a County dump truck next year." However earnest the belief, that speculative claim of what might happen in the future would not justify a payment.

Preston's reliance on a statement prepared by Councilmember-elect Eddie Moore and presented by Bob Waldrep, calling for an audit of County finances coupled with a paid leave of absence for Preston, is similar. (R. pp. 1900-1913; pp. 323-328, 383-385; pp. 942-947) The proposal is just that – a proposal. The gathering was not a formal Council meeting, and the proposal was never acted on.

As further proof of "toxicity," Preston relies on a 2008 lawsuit he filed against Cindy Wilson and Bob Waldrep, in which he sought injunctive relief to prevent them from allegedly interfering with his job. In support of his request for a temporary injunction in that case, Preston set forth a laundry list of conduct that he ascribed to them in an affidavit. (R. pp. 2170-2226) Preston testified that this list of examples of interference was complete at the time the affidavit was prepared, that he would have included "everything [he] was aware of," and that all of the incidents of interference pre-dated September 25, 2008 – the date of his demand letter to the County. (R. pp. 1914-1915; pp. 974-977) This collection of stored-up grievances will not support the decision in late 2008 to pay Preston $1.1 million. First, the list itself collects every grievance back to 2002; Preston cannot rely on stale complaints to claim anticipatory breach in 2008. Second, many of the items on the list are either trivial, or reflect genuine political questions, or both.[6] The mere fact Council

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

members clashed with a County Administrator does not entitle the Administrator to a lifetime retirement benefit. Preston testified that none of the "interference" that he cited as examples in his lawsuit against Wilson and Waldrep was so bad that it caused him to quit his job. (R. pp. 968-970) Indeed, Preston's September 25, 2008 demand letter stated that, while "[c]ertain Council Members have hindered Mr. Preston's ability to perform his duties as County Administrator for at least seven years," Preston "has overcome the efforts [to] stymie him in the performance of his duties." (R. p. 1914) The letter was clear that the anticipatory breach would arise from predicted events starting in January 2009, not past events. Thus, all of the prior conduct to which Preston now points could not offer a justification for paying him a severance.

Preston also suggests it was economically rational to pay him over a million dollars, because the County's lawyer had given a worst case estimate of what litigation might cost that exceeded that amount, and because the County wanted an "amicable divorce." Neither of these justifies the arbitrary act of settling a nonexistent claim. Attorney Tom Bright's testimony was clear and credible that any number in this range that he might have mentioned was a "worst-case scenario," not a valuation or a recommended settlement value. (R. pp. 462-463) Any lawyer, when asked about the worst thing that might happen, will provide a big number. However, it is not reasonable to use that nuclear scenario as a basis for settlement – especially when the only legal advice provided is that the claim itself does not have merit, and where the client has already decided to settle the case anyway. (R. pp. 458-460, 464-465, 471-472) Nor is "buying peace" a valid public purpose when the payments exceed the maximum possible recovery by six figures. While Preston has repeatedly suggested that the Severance Package is somehow justified because the County has spent a substantial amount of money investigating Preston and litigating

various issues concerning the Severance Agreement, that has no bearing on the propriety of the Package. If the Package was improperly approved by the use of tainted votes and if it represents arbitrary and capricious government action, then the County cannot be criticized for mounting a legal challenge to it. Indeed, it is equally plausible to argue that the 2008 majority caused these expenditures, by the cavalier way they handled the consideration of the Package.

Finally, Preston relies on the statement in the October 23, 2008 letter from his lawyer that "there also exist a number of causes of action which Mr. Preston will assert against two current Council Members as well as maybe one or more incoming Council Members. His additional causes of action will, obviously, include tort claims given the extreme malice and intentional nature of the actions of the subject Council Members over the past several years." (R. p. 2026) This unspecific claim of "additional" claims against individual Council members – not the County – does not justify paying Mr. Preston a severance from ***County*** funds. A straightforward way to see this is to imagine a demand letter to the County with this simple language: "I have tort claims against two council members and several yet to take office. Please pay me." Without a doubt, it would be arbitrary to spend County funds to resolve such unspecified and ambiguous claims. Preston's supposed tort claims are not backed by any greater specificity.

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

6. Rescission Is the Appropriate Remedy for Such an Arbitrary and Capricious Act.

These facts paint a picture of gross disregard for the public welfare and the public purse. Rescission is appropriate in such a case. *See Moody*, 319 S.C. 184, 460 S.E.2d 374; *Piedmont Public Serv. Dist.*, 319 S.C. 124, 459 S.E.2d 876; *Berkeley Elec. Coop.*, 308 S.C. 205, 417 S.E.2d 579; *Business Lic. Opposition Comm.*, 311 S.C. 24, 426 S.E.2d 745.

A remarkably similar case was decided by the Supreme Court of New Jersey. That thoughtful opinion deserves careful consideration in this case. In *Thompson v. City of Atlantic City*, 921 A.2d 427 (N.J. 2007), the court concluded that rescission of a tainted agreement and restitution of its proceeds was the only appropriate remedy. *Atlantic City* involved a court challenge to a settlement of a lawsuit filed by the Mayor (before his election), because friends of the Mayor had negotiated and voted for the settlement. Lorenzo Langford had sued Atlantic City, alleging his city job had been eliminated in retaliation for his protected political activities. While that lawsuit was pending, Langford was elected Mayor of Atlantic City. After he assumed office, Langford allowed his political appointees to recommend a substantial settlement in his favor to the city council. At the time of the city council vote, moreover, one member of council had been promised a job by Langford, but still voted for the package.[7] 921 A.2d at 438. The agreement was approved and signed, the proceeds were paid to Langford, and his lawsuit was dismissed.

The court rescinded the agreement. The court held that the "conflict-ridden actions" of the Mayor's appointees could "hardly be viewed as disinterested or inspiring confidence in government," and so the settlement agreement was "void as a matter of state

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

law." 921 A.2d at 430. The court noted with approval the criticism one council member leveled at another who voted for the agreement: "you got a job from the Mayor and you're voting to give him a million dollars." 921 A.2d at 432. (Substituting "administrator" for "Mayor," those words could easily have been uttered in this case.)

The court observed that "it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself." 921 A.2d at 436. The "appearance of self-dealing . . . had the clear capacity to undermine public confidence in the integrity" of government, and thus violated public policy. 921 A.2d at 438. These "egregious" conflicts of interest rendered "the settlement itself void *ab initio,*" and justified the "equitable remedy [of] rescission of the settlement agreement and restitution of the ill-gotten settlement proceeds." 921 A.2d at 441-42.

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

This action is a virtual definition of caprice, fraud, unreason, and disregard for public policy. This Court is the only means of redress for these clear wrongs. Like the *Atlantic City* court, this Court should rescind the Settlement Package.

III. Tainted Votes Cast for the Severance Package Require Its Rescission

A. Michael Thompson and Ron Wilson Should Not Have Voted for the Severance Package.

It is indisputable that two critical proponents of the Severance Package had actual and apparent conflicts of interest that rendered their votes improper. Anderson County's first cause of action seeks rescission on the basis of these tainted votes. (R. pp. 129-133)

Both Chairman Thompson and Ron Wilson had disqualifying direct or indirect financial ties to Preston while they were leading the response to Preston's claims against the County, chairing both the Council (Thompson) and Personnel Committee (Wilson) in considering the matter, and voting for his $1.1 million payout. Ron Wilson was characterized as the primary person giving guidance about the proposed agreement with Preston. (R. p. 471, lines 14-17) As noted earlier, Chairman Thompson was actively seeking County employment from Preston at the time and received significant personal benefits in the form of County-funded training approved by Preston. Councilman Wilson's daughter was given substantial – and inexplicable – enhancements from Preston in the terms of her consulting company's contract with the County just before the vote. As a matter of law, these financial ties nullify the Council's approval of the Package. *See Atlantic City*, 921 A.2d at 432, 437 (court quoting one councilman observing conflict: "you got a job from the Mayor and you're voting to give him a million dollars"; rescission was appropriate because "[t]he public had good reason to suspect that [those with financial ties to mayor] might not be able to exercise complete objectivity and independence in assessing the merits of the lawsuit" they were settling on behalf of city).

1. The Votes by Thompson and Wilson Were Prohibited by the Anderson County Code.

The Anderson County Code directly addresses, and expressly prohibits, votes like the ones cast by Thompson and Ron Wilson. It provides:

> ***No member [of county council] shall vote*** on any matter in which he/she has a personal or financial interest . . . . 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 descendent***) has such an interest. . . . He/she has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter . . . . 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***.

Anderson County Code of Ordinances § 2-37(g) (emphases added). This language shows Anderson County's clear public policy of prohibiting votes by those with a financial interest or where there is a substantial appearance of impropriety.

It is clear to anyone with any understanding of human nature that neither Thompson nor Wilson should ever have voted on the Package. Thompson was actively courting Preston for employment. Wilson's daughter – during precisely the period that Wilson was spearheading the effort to pay Preston severance – was given an unsolicited new contract by Preston.[8] Both had financial dealings that depended on Preston, and their votes lacked "unbiased and impartial judgment" and created the "substantial appearance of impropriety." Anderson County Code of Ordinances § 2-37(g).

Preston argued below that the County must prove an express *quid pro quo* arrangement in order to invalidate votes. This is not a correct reading of the Code provision. First, Section 2-37(g) forbids a vote if a Council member cannot for any reason

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[8] Wilson's daughter's financial interest is relevant here because she is a "member of his/her immediate family" – *i.e.*, his "direct descendant," as provided by § 2-37(g).

render a fair judgment on a matter, or if there is a substantial ***appearance of impropriety***. Plainly, either of these standards can be met without an express agreement of the type Preston insists must be present. *See Atlantic City*, 921 A.2d at 436 ("it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself"). Second, the existence of a financial interest is clear here, even in the absence of an express deal. It simply ignores common human experience to assert that a Council member's judgment would not be influenced in voting on a severance package for someone from whom he was seeking employment, or who had just given his daughter a substantial financial benefit. Such circumstances are laden with conflicts of interest, and these Council members plainly should never have voted on or debated Preston's severance agreement.

With respect to the Ron Wilson vote, the fact that both he and his daughter deny that Mr. Wilson was aware of the new contract at the time of the vote on the Severance Package is not relevant (in addition to lacking credibility). ***Preston*** indisputably knew; he signed the contract. Despite this, he stood silently by while Wilson advocated and voted for the Package. The County is not making a claim against Ron Wilson, but against Preston. The appearance of impropriety existed, and Preston allowed it to exist. The Wilson vote should not have been cast.

2. *The Vote for the Package Also Violated the State Ethics Act.*

The South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991, S.C. Code Ann. §§ 8-13-100 *et seq.* (the "Ethics Act") provides: "No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is

associated." S.C. Code Ann. § 8-13-700(A). Preston and Thompson violated the Ethics Act by negotiating for post-election employment for Thompson at the same time that Preston was seeking Thompson's vote in favor of Preston's severance agreement. The approval of the Package thus violated the Act, and the appropriate remedy is rescission. *See Baird v. Charleston Cnty.*, 333 S.C. 519, 535, 511 S.E.2d 69, 77-78 (1999) (Ethics Act challenge to vote for ordinance states a claim to have the ordinance declared invalid).[9]

B. Even One Tainted Vote Mandates Rescission of the Severance Agreement.

The Circuit Court held that Preston could retain his $1.1 million windfall, despite the impropriety of the Thompson and Ron Wilson votes, because not enough bad votes were cast to wipe out the margin of passage of the Package. This ruling should be reversed for several reasons.

1. The Series of Votes Leading to Enactment Included a 4-3 Vote.

Preston's severance agreement was not subjected to just one up-or-down vote. Instead, it was the product of a planned series of votes, each of which was necessary to its ultimate passage. One of those votes passed by a single-vote margin. Thus – while we disagree (for reasons discussed in the next section) that the County is required to invalidate

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[9] *Baird* also undercuts Preston's argument below that the Ethics Act does not give rise to a private right of action, at least without exhaustion of certain administrative remedies. In *Baird*, the Supreme Court allowed a suit by a group of doctors to enjoin issuance of county bonds to go forward on the theory that the vote in favor of the bond ordinance violated the Ethics Act, and therefore that the ordinance was invalid. It does not appear that the plaintiffs in *Baird* filed an ethics complaint before bringing suit. *Baird* stands squarely for the proposition that the Ethics Act provides a cause of action to invalidate actions taken in violation of that Act. Further, the Court in *Baird* underscored the provision in the Ethics Act which states that "[t]he provisions of this section are ***in addition to*** all other civil and administrative remedies against public officials, public members, or public employees which are provided by law." S.C. Code Ann. § 8-13-780(A) (emphasis added). The Supreme Court explained, "[t]hus, the remedies outlined in section 8-13-780 are not exclusive." 333 S.C. at 535 n.12, 511 S.E.2d at 77 n.12.

enough votes to wipe out the margin of passage – even if that were the applicable law the Package should be rescinded, as even one tainted vote is enough to undo the action.

At first, the Council approved the severance agreement by a vote of 5-2. (R. p. 1916; p. 1983) However, thereafter the Council invalidated that vote by voting to reconsider the matter. (R. p. 1974; p. 1983) After the Council voted to reconsider, Councilman McAbee was almost immediately given the floor by Thompson, and McAbee moved to cut off debate and proceed to a second vote. (R. p. 1974, line 10-p. 1976, line 9; p. 1983) That motion to end debate passed by a vote of only 4-3, with both Thompson and Wilson in the one-vote majority. (*Id.*) Thus, without the vote of either Thompson or Wilson, the Council would not have proceeded to the final vote on the Severance Agreement and its ultimate approval.

It cannot be assumed that the Council would have approved the Package – or that the margin of approval would have been the same – if debate and discussion had been allowed to continue; the purpose of debate is to attempt to change minds, and votes. The ultimate approval of the Package was dependent upon the prior 4-3 vote to terminate debate and proceed to the vote. Thus, each of the votes of Thompson and Ron Wilson – which were fatally tainted – was essential to the approval of the Package, and the invalidation of either one alone requires rescission.[10]

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[10] The Circuit Court's apparent concern over this issue led to that Court's extraordinary *sua sponte* holding that the votes of Cindy Wilson and Bob Waldrep should also be invalidated for unpled conflicts. (R. pp. 10-12) As we discuss hereinafter, that ruling introduces an additional complexity to this case, as it led the Circuit Court to uphold the Package on the basis of a 2-1 vote – a vote that is void on its face for lack of a quorum.

2. *Numerous Courts Have Recognized That, in the Particular Circumstances Presented Here, a Single Tainted Vote Is Fatal.*

The margin-of-passage rule applied by the Circuit Court is an appropriate standard where the enactment at issue is legislation of general application, and where there are no procedural irregularities. However, that rule cannot be slavishly applied where circumstances are dramatically different. The vote for the Package has numerous characteristics that make the margin-of-passage rule inapplicable. Because of those special circumstances, this Court should join numerous other courts that have considered the issue, and have concluded that one tainted vote is sufficient to overturn an outcome like this one.

We would emphasize that Anderson County is not advocating for a general rule that duly enacted legislation can be overturned by a single tainted vote. Cases with as many egregious circumstances as this one are going to be exceedingly rare. Accordingly, we urge the Court to follow courts that have recognized that cases like this one, which involve extreme irregularities, appropriately apply a one-tainted-vote rule. Courts have struck down enactments because of one tainted vote in the presence of only one or two of these factors; the Preston Severance Agreement is extraordinary in the sheer number of irregularities it presents.

Benefit to a Single Individual. First, the Package conferred a special benefit on one individual; it was not a law of general application. It thus did not have the dignity of generally applicable legislation that affects all, and that can be addressed in subsequent political cycles. *See Atlantic City*, 921 A.2d at 438 (invalidating settlement with mayor approved by 5-1-1 vote of city council, given conflict of single councilman who had been offered job by mayor, even though that councilman did not vote on reconsideration); *Appeal of City of Keene*, 693 A.2d 412, 415 (N.H. 1997) (one-tainted-vote rule is

appropriate where action does not have a "widely felt impact"); *Stevens ex rel. Kuberski v. Haussermann*, 172 A. 738, 741-42 (N.J. Super. 1934) (act of council in voting to accept or reject resignation of councilman is a "judicial act," as distinguished from a "legislative act," and necessitates lack of personal interest on part of each councilmember voting on such matter); *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 298 (Neb. 2003) (type of case where one-tainted-vote rule is not appropriate includes "making a law" of general applicability).

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

Procedural Irregularity. Courts apply the one-tainted-vote rule where the matter was not announced in advance or extensively debated, or the procedure surrounding enactment was otherwise suspect. That happened here. *See Dowling Realty v. City of Shawnee*, 85 P.3d 716, 719 (Kan. Ct. App. 2004) (court applying one-tainted-vote rule noted that tainted voter had "strategy to put [the interested vote] on at the end of the meeting" to ensure that fellow members would "be tired and sail right through" and a fellow member noted that the proceedings were "not exactly kosher" and that "the process

seemed hurried up."); *Piggott v. Borough of Hopewell*, 91 A.2d 667, 670 (N. J. Super. Ct. Ch. Div. 1952) ("[a]s a result of this ***special meeting***, the borough council adopted [the tainted resolution]" and "it is to be noted, too, that despite the solicitor's recommendation made at the council meeting that action be deferred to a later period ... [tainted voter's] counter-proposal paved the way for action forthwith" (emphasis added)). Preston's proponents similarly hid the vote from the public, added it to the agenda at the last minute, and used procedural mechanisms to hurry consideration and to stifle dissent.

Hidden Conflicts of Interest. The one-tainted-vote rule has been applied where the conflicts of interest were kept hidden by the interested party. The most interested party on November 18, 2008 was Preston, and he was aware of the problems with the votes being cast. *See Griswold v. City of Homer,* 925 P.2d 1015, 1029 (Alaska 1996) (where a decision could have passed even without the support of a tainted voter, but "the interest is undisclosed, the ordinance will generally be invalid."); *Dowling Realty* 85 P.3d at 721 (holding council would have to "redo the entire process since it was tainted from the very beginning" because a tainted voter "never filed a disclosure of interest form"); *Hanig v. City of Winner*, 692 N.W.2d 202, 210 (S.D. 2005) ("The basis of granting a new hearing is first and foremost that one of the council members had an indirect pecuniary interest" especially since tainted voter "did not disclose the conflict"; "the necessity to disclose a conflict cannot be over emphasized"). Preston's promise of employment to Thompson, and his upgrade of the contract with Ron Wilson's daughter, should have been disclosed during the debate. Preston is not entitled to an inference that full disclosure would not have affected the course of the debate.

Corrupt Leadership. One bad vote is enough where that bad vote comes from a key leader. In this case, two bad votes came from the Chair of County Council and the

chair of the Personnel Committee. *Buell v. City of Bremerton*, 495 P.2d 1358, 1362 (Wash. 1972) (tainted voter "in his role as chairman... could not be expected to hear the weak voices as well as the strong, and most certainly could not appear to the public to be able to do so"; accordingly the chairman's self-interest "infected the action of the other members of the commission regardless of their disinterestedness."); *Brooks*, 328 S.E.2d at 716 (fact that council member with conflict of interest chaired first planning commission hearing on the application was sufficient to support finding of fraud and to invalidate the action). Because of the behind-the-scenes maneuvering before the Package was brought to a vote, it is impossible to estimate what influence was exercised by these leaders outside of meetings. Further, it is obvious from the way that Chairman Thompson presided over the sham process to ramrod approval of the Severance Package that a tainted vote from a leader in the process infects the entire action beyond the impact of that single vote.

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

The Package is a perfect storm of the factors on which courts have relied to allow a single bad vote to invalidate an action. Its substance was an arbitrary and unreasonable benefit to a single individual; it was not a full-blown ordinance subject to multiple readings; the debate was hurried and irregular; the Package was not placed on the agenda; the leaders of that debate should never have participated in it; Preston himself knew of those facts and said nothing; and parliamentary and other maneuvers ensured there was never a prospect of political redress. The one-tainted-vote rule applies here. *See generally Winslow v. Town of Holderness Planning Bd.*, 480 A.2d 114, 117 (N.H. 1984) ("mere participation by one disqualified member was sufficient to invalidate the tribunal's decision because it was impossible to estimate the influence one member might have on his associates"); *Wilson v. Iowa City*, 165 N.W.2d 813, 820 (Iowa 1969) ("We hold a vote by a [conflicted] member of the council is void and that the result reached by the council in such a matter is also void, ***whether such vote determined the issue before the council or not.***" (emphasis added)); *Griggs v. Borough of Princeton*, 162 A.2d 862, 869 (N.J. 1960) ("Nevertheless, it is the ***existence of such interests which is decisive, not whether they were actually influential.***" (emphasis added)); *Keene*, 693 A.2d at 416 (action conferring specific benefit on one individual "is voidable if the disqualified member participates therein, ***without reference to the fact whether the result is produced by his vote.***" (emphasis added); *Piggott*, 91 A.2d at 669 (actions "which impose[] burdens or confer[] privileges in specific cases" are more closely scrutinized for conflicts of interest).[11]

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[11] As the *Piggott* court explained:

> [T]he concurrence of an interested member in the action taken by the body taints it with illegality. The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable. This is the general rule. It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have

3. The Supreme Court's Decision in Baird Is Not to the Contrary.

No decided South Carolina case has rejected this one-tainted-vote rule in a case like this one. The Circuit Court relied on a passage from *Baird v. Charleston County*, 333 S.C. at 535, 511 S.E.2d at 77-78, in holding to the contrary, but *Baird* is not dispositive here.

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

Baird is distinguishable from this case for several reasons. First and foremost, the question of whether one tainted vote could support invalidation when the margin is larger was not even presented in *Baird*. To the contrary, *Baird* involved a one-vote majority, so the issue could not have arisen. *See* 333 S.C. at 77, 511 S.E.2d at 534 (challenged voter cast the "tie-breaking vote"). Nor did *Baird* involve any of the special circumstances

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> influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. ***It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product.***

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

involved here, where one vote is enough. *Baird* involved a law of general application – a bond ordinance – not a special benefit for a single individual. At issue, therefore, was true legislation – passed after multiple readings. 333 S.C. at 72, 511 S.E.2d at 524-25. Because of the multiple readings, the ordinance at issue in *Baird* was not protected from prior public scrutiny, and it does not appear the conflict of interest at issue was kept secret. 333 S.C. at 77, 511 S.E.2d at 533-34 (council member obtained, but ignored, an informal ethics commission opinion on whether he should vote). Finally, unlike Thompson (council chair) and Ron Wilson (chair of Personnel Committee), it does not appear that the challenged voter in *Baird* had a place of special influence in the debate. In short, the precise factors that mean that Preston's Severance Package should be reviewed under the one-tainted-vote rule were absent from *Baird*. *Baird* does not address a situation like this one, and the one-tainted-vote rule was not presented or ruled on in *Baird*.

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

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

Preston, and Floyd, who plainly knew the motions to reconsider were planned and who had the contract for the new administrator with her) were in some fashion "in on" the planned vote. It is impossible to estimate the full scope of the impact of Ron Wilson's and Thompson's participation in that planning.

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

IV. Preston's Conduct Constituted Breach of Fiduciary Duty, Fraud, Constructive Fraud, and Negligent Misrepresentation

The County's third through sixth causes of action all arise out of the inescapable fact that Preston knew the facts that made the votes for his Severance Package improper, yet sat silently by while those improper votes were cast. (R. pp. 134-138; pp. 1918-1959; p. 1983; pp. 997-998) Preston, as the highest ranking non-elected officer of Anderson County, owed the County the highest duty of loyalty. When he knowingly allowed Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes concerning his Severance Package, he breached that duty.

The Circuit Court erred in holding that Preston "did not possess a duty to disclose information about his employment claims to County Council." (R. p. 25) In so holding, the Circuit Court confused Preston's private and public roles. Certainly, Preston could negotiate with the County at arm's length concerning his claims. But he remained employed by the County, and as County Administrator present at a vote affecting his own interest, Preston had a duty to make those conflicts known. This was not "information about his employment claims." It was part of his job and his duty of loyalty as County Administrator.

As a high-ranking employee, Preston had a duty to disclose the facts that made the Thompson and Ron Wilson votes improper. *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) ("Nondisclosure is fraudulent when there is a duty to speak."); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud."). Preston's silence in the face of that duty satisfies the elements of each of the County's Third through Sixth Causes of Action, by breaching his fiduciary duty of loyalty, and by misleading the County concerning a material element of the Package vote. The elements of fraud are (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Ardis*, 314 S.C. at 515, 431 S.E.2d at 269. For constructive fraud, proof of fraudulent intent is not required. *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 102-03, 249 S.E.2d 734, 737-38 (1978) (granting rescission on basis of constructive fraud). The

elements of negligent misrepresentation are: (1) false representation; (2) a pecuniary interest in making representation; (3) duty of care to communicate truthful information; (4) failure to exercise due care; (5) justifiable reliance; and (6) pecuniary loss as proximate result. *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011).

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

The Circuit Court's untroubled acceptance of Preston's silence in the face of blatantly improper votes should not be the law. Under the Circuit Court's view, an employee with a claim against his employer would no longer owe that employer any duties; that plainly is not the law. Preston was free to negotiate at arm's length, but his failure to speak when he had a duty to do so breached his duty of loyalty, and constituted fraud, constructive fraud, and negligent misrepresentation.

V. The Circuit Court's Invalidation of Four Votes Means There Was No Quorum, Rendering the Vote Void

In its Complaint and presentation of evidence, Anderson County challenged only three votes cast for the Severance Package. No other votes were challenged in the pleadings. Despite this – and in an apparent effort to deal with the 4-3 vote to end debate discussed hereinbefore – the Circuit Court found that a total of four Council members should not have voted on Preston's Severance Agreement. In addition to the votes of Thompson and Ron Wilson, the Circuit Court also held that the votes of Waldrep and

Cindy Wilson (both of whom opposed the Package) were improper because the Severance Agreement contained a general release in favor of ***all*** members of Council. The Order then finds the remaining three members of Council cast each of the series of votes required for passage of the Severance Package and related funding; the Order thus upheld the Severance Agreement on the strength of a series of 3-0 votes. (R. pp. 16-18)[12]

While Anderson County believes it was error to disqualify the votes of Cindy Wilson and Waldrep,[13] if that ruling was correct then the Severance Package is void for an additional reason beyond those originally set forth by Anderson County. The County Council was powerless to act with only three members able to vote.

The Anderson County Code requires that four members be present to constitute a quorum. Anderson County Code of Ordinances § 2-37(d).[14] Moreover, South Carolina law is clear that a member of the body who cannot participate because of a conflict of interest ***is not counted toward the quorum***. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238,

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[12] At one point the Circuit Court referred to a 3-0-1 vote, but this is incorrect on the Circuit Court's theory, as the one abstention was Mr. Waldrep who, according to the Circuit Court, should not be counted. (R. p. 18; pp. 1975-1976)

[13] Because the release in the Severance Agreement benefited all Council members, its presence either disqualified all, or none. The fact that Preston had sued Waldrep and Cindy Wilson (in his official capacity) did not change this. That lawsuit was not ended by the release in the Settlement Agreement. Instead, it was passed along to Preston's successor as County Administrator, who was instructed by County Council to dismiss the action. (R. pp. 2640-2647; pp. 432-437) Moreover, Cindy Wilson and Waldrep voted ***against*** their purported interest in opposing the Package.

[14] The provision provides in full:

> *Quorums.* A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

153 S.E. 141 (1930), is on point here. In *Harby*, the South Carolina Supreme Court voided an action of the Sumter Cemetery Association, a state-created entity, upon determining that the authorizing vote of the committee was taken without the necessary quorum because committeemen later determined to be disqualified could not be counted toward the quorum. The Court held: "A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted. And likewise an interested director or committeeman cannot be counted in order to make up a quorum to pass upon any matter in which such director or committeeman is interested." 156 S.C. at 247, 153 S.E. at 144 (internal quotation marks omitted). *See also Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (corporate director disqualified for interest "may not even be counted to make a quorum at a meeting where the matter is acted upon"); *Garris v. Governing Bd. of South Carolina Reinsurance Facility,* 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter"). If, as the Order holds, four members of Council had disqualifying interests, there was no quorum present and the matter could not have been acted upon.

Preston argued below that the quorum issue was not raised in a timely manner. This is incorrect, because the issue did not ***exist*** until the Circuit Court issued its Order invalidating four votes. Anderson County argued for the invalidation of only three votes, and Preston's pleadings cannot reasonably be construed to have sought invalidation of ***any*** votes. Accordingly, the conclusion in the Order that four votes should not have been cast constitutes new matter in this case, an internal inconsistency, and relief that was not sought in the pleadings. In addition, the conclusion that a matter could be validly enacted by a 3-0

vote is a clear error of law. This ruling was therefore appropriately addressed in Anderson County's motion to alter or amend the Order. (R. pp. 3165-3168) *See* J. TOAL, S. VAFAI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA at 60 (2d ed. 2002) (post-trial motion is appropriate vehicle to address relief not requested or inconsistencies in final order). Where a court rules on a matter not previously before it and to which the parties had not been given an adequate opportunity to address, any error in the ruling may be corrected on a Rule 59(e) motion. *See Moreau v. Allied Van Lines, Inc.*, Civil Action No. 1:07–3257–RBH, 2010 WL 2044663 (D.S.C. May 20, 2010) (vacating the court's *sua sponte* granting of summary judgment in favor of the plaintiff, where the only motion pending before the court concerned the defendant's request for summary judgment).[15]

The Circuit Court's conclusion that members disqualified for bias count toward a quorum – despite the rule of *Harby* – is incorrect. The Anderson County Code does not address this issue, and the Circuit Court's reliance on other statutes such as FOIA is misplaced. (R. pp. 47-48) FOIA governs only when a gathering of public officials must be open to the public. It does not concern when they have authority to act; if FOIA did sweep that broadly, all other rules concerning quorums would be preempted, and that plainly is not the purpose of FOIA.

The Circuit Court upheld the Severance Package on the basis of a 3-0 vote. Because such a vote is clearly illegal, this result is improper and must be reversed. If this Court agrees that four votes were improperly cast, the Severance Package must be voided.

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[15] Alternatively, the Circuit Court erred in denying Anderson County's motion to amend its Complaint post-trial to address the quorum issue. (R. pp. 44-49; pp. 3245-3270) That motion was timely because the issue did not exist until the Court itself disqualified four votes. Moreover, no prejudice would result from an amendment to address the purely legal effect of the disqualification of four votes. Preston cannot claim prejudice from the impact of his own urging that Waldrep and Cindy Wilson be disqualified. (R. pp. 1350-1353; pp. 1377-1383; pp. 1391-1394)

VI. Future Retirement System Benefits "Owed" to Preston Under the Severance Package Can Be Used to Fashion a Remedy

The Severance Package included a lump-sum payment of over $350,000 to the South Carolina Retirement System ("SCRS"). This money was used to purchase additional service credit for Preston, allowing him to retire on a full pension – $7,600 per month at the time of trial – at age 45. (R. pp. 1985-1989; p. 252 at ¶ 10)

The Circuit Court erred in holding that these funds are not available to a court fashioning a remedy in equity. In seeking to impose a constructive trust on these funds in its Tenth Cause of Action (R. p. 139 at ¶¶ 81-84), the County is not seeking any relief in this case that would harm SCRS. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay. Instead, the unrebutted testimony of SCRS itself makes it clear that the retirement benefits currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement. (R. pp. 251-252 at ¶¶ 5-11; pp. 253-255 at ¶¶ 5-7, 11-14) In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase. (*Id.*) The Court has readily available revenue from which to fashion an equitable remedy.

The relevant statue provides for precisely this relief. S.C. Code Ann. § 9-1-1680 provides in relevant part, "***[S]ubject to the doctrine of constructive trust ex maleficio*** . . ., the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process . . . ." (Emphasis added.) Thus, the statute allows a constructive trust on retirement fund proceeds in the face of wrongdoing. This makes sense, as it would be remarkable if a court of equity were

powerless to undo an inappropriate purchase of service credit like the one at issue here. *See Matter of Loomer*, 198 B.R. 755, 762 (Bankr. D. Neb. 1996) ("[v]oid [ERISA] contributions are not protected by the alienation restraint and may be disgorged from the Plan"; "funds in the account may be recovered under the federal common law theory that fraud in the inducement allows rescission of the contract.").

In its Tenth Cause of Action, consistent with the statutory language, the County seeks the imposition of a constructive trust with respect to the SCRS assets. The purpose of this constructive trust is to ensure the Court can fashion a remedy that does justice. Because Preston was complicit in securing retirement benefits to which he was not entitled, such a remedy is appropriate. At the time of trial, Preston was 49 years of age, and he will turn 60 on April 29, 2023. Between January 2009 and the day he turns 60, Preston will receive monthly payments that will total approximately $1,333,000 from SCRS, payments that would not have been available to him without the Severance Package. (R. pp. 2671-2681; p. 1290, lines 15-18) The statute and equitable principles allow the Court to fashion a remedy that includes the redirection of these funds to the County.

VII. Rescission Is the Appropriate Remedy Here

The Circuit Court held that rescission is unavailable because Preston does not have the ability to repay everything he received, and because he cannot be returned to the position of County Administrator of Anderson County. (R. pp. 29-31) This holding is incorrect for several reasons: first, where – as here – the party opposing rescission is himself at fault, he cannot rely on the "changed circumstances" rule to block rescission; second, equity is simply not so limited in fashioning remedies; and third, the Circuit Court ignored the public aspects of this case, and the fact that rescission is the remedy that must

be invoked when a governmental action like this one is determined to be improper; the considerations here are different from those that might apply in a purely private contractual setting.

It is long established that a defendant may not assert a change-of-circumstances defense to rescission where the defendant is at fault for inducing the initial wrongful payment. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011) ("The defense [of change of position] is therefore unavailable to a conscious wrongdoer or to a recipient who is primarily responsible for his own unjust enrichment."); *Admiral Ins. Co. v. American Nat'l Sav. Bank, F.S.B.*, 918 F. Supp. 150, 156 (D. Md. 1996) (the change of circumstances defense is only available "if the recipient was no more at fault for its receipt of the payment than was the payor"); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002) (change of circumstances defense "will not be strictly enforced where the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing"). That is precisely the case here. It is Preston who provided benefits to those voting on his Severance Package, and Preston who sought far more than even his generous Employment Agreement provided. He cannot invoke changed circumstances.

In particular, the Circuit Court's reliance on *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984), was misplaced. Reading the entire opinion reveals that the *King* court drew a distinction between rescission because of innocent mistake, and "fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission." 282 S.C. at 313, 318 S.E.2d at 128. The court then repeats that list in holding that the party seeking rescission did not establish "fraud, misrepresentation, concealment, or imposition" before using the word "fraud" alone as shorthand (rather than repeating the

list yet again) in holding that the absence of such wrongdoing does require return to the status quo. The holding that this requires establishment of all the technical elements of fraud is incorrect. As makes sense with respect to equity, the holding of *King* is that if the party opposing rescission is not innocent – *i.e.*, what is at issue is not mere mistake – that party cannot prevent fashioning of an equitable remedy by complaining about a change in circumstances brought about by the contract obtained by that party's conduct.

Even under the "technical fraud" standard applied by the Circuit Court – and still more under the proper equitable standard – Mr. Preston's own culpability prevents him from relying on the fact the County did not hold his post open since 2009 to avoid any remedy. *See* 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault").

It also cannot be ignored here that Preston is able to return his ill-gotten gains. He is receiving a pension that is the direct result of the excessive payments that he received. Anderson County's expert Charles Alford testified that the value of those payments was very close to the amount of Preston's Severance Package. (R. pp. 2671-2681; p. 1290)

The fact that Preston cannot be returned to the position of County Administrator is also irrelevant. Courts have recognized that equity is flexible enough to allow rescission in a situation like this, even where a former position has been filled. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) ("in the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief"; court also recited unappealed ruling by district court that reinstatement would not be ordered because prior position was already filled); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007)

(where severance agreement was obtained by misrepresentation (and at a meeting with one commissioner absent), rescission appropriate even though fire chief argued he was not returned to status quo because he lost benefits when out of office). *See generally* 17B C.J.S. *Contracts* § 652 ("The parties, upon rescission of a contract, generally must be placed only in substantially the same condition or position as they were when the contract was executed, or as near to it as possible. The exact, absolute, or literal return of the parties to the status quo is not required, and such restoration as is practicable and demanded by the equities of the case is sufficient. The status quo rule requires practicality in adjusting the rights of the party."). Simply, equity is not as strait-jacketed as the Circuit Court suggests. Especially given that it is now clear as a matter of law that Preston's Employment Agreement was invalid, *see Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013), it makes little sense to say that the inability to return Preston to that post should be a barrier to relief.

The Circuit Court's conclusion that rescission is unavailable because the County has unclean hands is erroneous. (R. pp. 31-35) The law in South Carolina is that "a party will have unclean hands where ***the party*** behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Anderson v. Buonfonte*, 365 S.C. 482, 492, 617 S.E.2d 750, 756 (Ct. App. 2005) (emphasis added); *see also Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.,* 202 F.3d 223, 228 (4th Cir. 2000) ("Unclean hands bars a party from receiving equitable relief ***because of that party's own inequitable conduct***." (emphasis added)). As we have emphasized, the County took no action at all concerning Preston's employment. Preston's complaint was over a political change that he predicted would result in future employment action. The Circuit Court confused the political rhetoric of primary winners with actual County conduct. The former will not support a

finding of unclean hands. *See Wedgewood Comm. Ass'n, Inc. v. Nash*, 789 N.E.2d 495, 496 (Ind. Ct. App. 2003) (rejecting attempt to impute unclean hands to plaintiff community association on the basis of alleged actions of the association's directors); 30A C.J.S. *Equity* § 118 ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible.").

The Circuit Court's holding that rescission was unavailable because the County could have brought a declaratory judgment action is equally incorrect. (R. pp. 34-35) Such an action would not have provided any concrete relief against Preston.

The ruling below ignores a key aspect of this case. What is sought here is not merely rescission of a private contract. Instead, this lawsuit invokes cases that recognize that rescission is required when a public act is improper. When a governmental body acts on the basis of tainted votes, and in an arbitrary and unreasonable manner, it is imperative that an appropriate remedy be fashioned. The public interest in avoiding such improper acts must be given substantial weight in such a circumstance. Again, the decision in *Atlantic City* is noteworthy. The beneficiary of the tainted settlement in that case argued, as does Preston, that his ill-gotten settlement money was gone and thus that rescission was unavailable. The *Atlantic City* court gave this argument short shrift:

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

921 A.2d at 442. Given this Court's power to balance equities and fashion an appropriate remedy, and the important public concerns at issue here, we submit that a rigid and mechanical insistence on return to the exact, literal status quo should not bar a remedy.

VIII. Anderson County's Challenge to the Validity of the Severance Agreement Did Not Breach the Severance Agreement

The first and most obvious point to make about Preston's claim that this lawsuit itself violated the Severance Agreement is that if the Court invalidates the Severance Agreement, Preston cannot prevail on a claim for breach of that Agreement.

Beyond this, the covenant not to sue plainly was not intended to be some sort of "incontestability clause," and absent very clear intent in the language to create that kind of a barrier, one should not be inferred. Tom Bright, who drafted the language, testified that there was no discussion or contemplation of creating such an incontestability clause. (R. p. 472, lines 16-25) Nor does the language reflect such an intent. Courts have declined to treat covenants not to sue as preventing a challenge to the validity of the document itself. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966) ("[W]hen the very existence of a covenant is disputed in good faith that dispute must be resolved before the covenant can be recognized and allowance must be made for such resolution. . . . It cannot rationally be argued that the covenant, retroactively, denied the right to the very litigation which was necessary to establish its existence."); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985) (covenant not to sue "would go only to the merits of the controversy settled – not to the existence or terms of the Settlement Agreement itself"). Given the important public policy issues at stake here, a provision that would prevent the County from seeking a determination of whether approval of the Severance Package violated its conflict of interest rules or public policy generally would itself be a violation of public policy.

More generally, the covenant by its own terms is limited to claims "relating to Mr. Preston's employment with the County or his actions as an employee on behalf of the

County." (R. p. 1987 at ¶ 8) This lawsuit is not about Preston's "employment" or his actions taken "on behalf of the County," but instead about the terms of his Severance Package and the manner in which it was adopted.[16] (R. pp. 133-140 at ¶¶ 34-87) To the extent the suit involves Preston's actions, it involves the actions he took as the County's ***adversary*** after he asserted a claim against the County, not his actions taken "on behalf of the County." This lawsuit is about whether the Package as approved by Preston's allies was arbitrary, in violation of public policy, and/or supported by tainted votes. These claims are outside the scope of the covenant.

Even if this Court were to conclude that the Severance Agreement should not be rescinded, the Circuit Court's holding that the County's challenge violated that Agreement should be reversed. It is undeniable that the circumstances of the Severance Agreement's passage were extraordinary, and the County's decision to challenge the validity of the Package was reasonable and appropriate. Indeed, the Circuit Court denied Preston's motion for summary judgment. (R. pp. 82-83) For the same reasons, the Circuit Court should also be instructed that a fee award is not available in this case. The Circuit Court has indicated a willingness to entertain a fee petition, and a fee award against Anderson County would be unjust. (R. pp. 39-40) *See* S.C. Code Ann. § 15-77-300 (fee award

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

against state not available where lawsuit is "substantially justified" or in the presence of "special circumstances" making a fee award unjust).

CONCLUSION

In 2008, the voters of Anderson County sent a clear message that they wanted closer scrutiny of County government. It was not unreasonable for Preston, faced with the loss of a pliable majority, to conclude life would be simpler if he left office. It was, however, unreasonable and improper for Preston to line his pockets on the way out the door. The "anticipatory breach" claim was a sheer and indefensible pretext to allow his allies to hand him unearned taxpayer funds.

The pertinent facts of this case are not disputable. No official action that could constitute "anticipatory breach" had been taken. Preston's friends on Council had financial ties to Preston that made it utterly improper for them to vote for the Severance Package. The Package itself paid Preston far more than his claim was worth – including allowing him to retire with a full public pension at the age of 45. Preston knew of these improprieties and allowed the matter to proceed without pointing them out.

The Circuit Court erred when it said this was an acceptable transaction, and that the courts are powerless to remedy these clear wrongs. Anderson County asks this Court to reverse the holding below, including the finding that this lawsuit breached the Severance Agreement, and remand with instructions to the Circuit Court to direct Preston to make restitution to the County equal to the amounts paid to him or on his behalf pursuant to the Severance Agreement, plus interest, and to direct that that those pension benefits made possible by the Package and held by the South Carolina Retirement System for Preston be placed in a constructive trust for the benefit of Anderson County, as part of this remedy.

Respectfully submitted,

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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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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