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.

FINAL BRIEF OF RESPONDENT JOEY PRESTON

Lane W. Davis
Nelson Mullins Riley & Scarborough, LLP
104 South Main Street
Poinsett Plaza, Suite 900
P.O. Box 10084 (29603)
Greenville, SC 29601
(864) 250-2300

Candy M. Kern-Fuller
Upstate Law Group, LLC
SC Bar No. 011392
200 E. Main St.
Easley, S.C. 29640
(864)-855-3114

Attorneys for Respondent Joey R. Preston

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Attorneys for Respondent Joey R. Preston

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STATEMENT OF ISSUES ON APPEAL

On November 18, 2008, the Anderson County Council ("2008 Council") hoped to end a demeaning and destructive chapter in its local politics. On that date, the 2008 Council voted to execute a severance agreement ("Severance Agreement") with County Administrator Joey R. Preston ("Preston") in hopes that the divisiveness surrounding him would abate. The incoming County Council in January of 2009, however, had no intention of honoring Preston's Severance Agreement. As a result, this lawsuit ensued and now presents the following questions:

- Did the Circuit Court err when it followed the decision of Baird v. Charleston County and refused to ignore binding precedent, as urged by Appellant?
- Did the Circuit Court err when it found Appellant failed to prove by clear and convincing evidence that the 2008 Council's actions were arbitrary and capricious?
- Did the Circuit Court err when it found Appellant failed to introduce evidence that Preston breached a fiduciary duty by violating the State Ethics Act or the County Code?
- Did the Circuit Court err when it found Appellant failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation due to a host of deficiencies?
- Did the Circuit Court err when it rejected Appellant's untimely quorum argument that otherwise factually and legally fails?
- Did the Circuit Court err in rejecting Appellant's constructive trust claim when the evidence failed to support the claim by clear and convincing evidence?
- Did the Circuit Court err in rejecting Appellant's rescission claims when the parties cannot return to their prior status quo and when Appellant has unclean hands?
- Did the Circuit Court err in finding Appellant breached an unambiguous covenant not to sue that it ignored when it filed this lawsuit?

STATEMENT OF THE CASE

Anderson County ("the County" or "Appellant") filed its Complaint on November 12, 2009. (R. p. 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 its Reply on June 29, 2012. (R. pp. 229-237.)

Shortly before trial, the County settled Preston's false arrest counterclaim arising out of a DUI arrest by the Anderson County Sheriff's Department when his blood alcohol level was a 0.03. The County also settled Preston's abuse of process counterclaim arising out of Appellant's procuring a false affidavit against him. (R. pp. 247-248.) Preston's counterclaim for breach of a covenant not to sue was not settled. (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 5, 2012. (R. pp. 264-1890.) Judge Couch ruled against Appellant on May 3, 2013 on all claims. (R. pp. 1-43.)

Appellant filed a Motion to Alter or Amend the Judgment on May 13, 2013. (R. pp. 3163-3176.) Appellant also filed a post-trial motion to amend. (R. pp. 3245-3270.) Third-party, Richard Freemantle, filed a post-trial motion for intervention on June 28, 2013. (R. pp. 49-56.) Judge Couch denied all motions on November 8, 2013. (R. pp. 44-79.)

STATEMENT OF FACTS

I. Introduction

Long on rhetoric but short on facts, Appellant bandies about such terms as "fraud" and "corruption" so frequently, one might get the misimpression Anderson County proved its case below. It did not. This emperor has no clothes.

Appellant has spent five years and nearly $2.4 Million Dollars seeking the rescission of a $1.1 Million Dollar Severance Agreement. The County presses this case even though both law and fact belie its claims. That is because political payback fuels this case. As sitting Anderson County Council member, Gracie Floyd, describes this case: "It's a vendetta. It's a vendetta." (R. p. 1620, line 16.)

II. Factual Overview

An understanding of the instant dispute requires historical context.[1] Neither Party disputes the political climate in Anderson County leading up to the vote on Preston's Severance Agreement proved both toxic and sick.[2] Beginning back in 2000, a dispute arose between Joey Preston ("Preston") and now sitting Council member Cindy Wilson ("C. Wilson"). At the time, C. Wilson did not serve on Anderson County Council. The

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[1] Appellant does not challenge any of the factual findings made by the lower court. (Compare 5/3/2013 Order *with* 11/08/2013 Order (The County "simply overlooks the numerous factual findings made by the Court...") *with* App. Brief.) (R. pp. 1-43 *c.f.* R. pp. 44-79.) Preston incorporates herein all of the factual findings and citations to the record made by the lower court in its 5/3/2013 Order and its 11/08/2013 Order, including the trial court's finding that the witnesses supporting the Severance Agreement were "the more credible witnesses"...while the opposing testimony "was evasive...not credible...[and]... untrustworthy." (R. pp. 40, 68.)

[2] "[T]oxic political environment did exist in Anderson County on the 18th day of November 2008"; "Plaintiff conceded [toxic political environment existed in Anderson County] both before and at trial." (R. pp. 57; *See also* R. pp. 620, lines 14-24; 627, lines 4-13; 623, lines 16-25; 653; 1264; 2922-2926; 2933.)

dispute concerned sewer right of ways for a County infrastructure project, which C. Wilson did not want to cross her property but for which no practical alternative existed.[3]

The dispute escalated between Preston and C. Wilson and, over time, degenerated into bitter political factions pitting supporters of C. Wilson against virtually anyone who appeared to support Preston.[4] Repeated accusations and claims, concerning various matters, by C. Wilson and others surrounding her about Preston ensued.[5] Eventually C. Wilson became a member of County Council heightening the visibility of the acrimony to new levels. Over the ensuing seven (7) years, the blood-sport (as former Council member Waldrep once called it) of Anderson County politics became unrivaled in ugliness. (R. pp. 505, lines 17-25; 517, line 18-p. 518, line 18.) Preston began to receive anonymous phone calls at his home. (R. p. 843, lines 13-24 (discussing call received by Preston's son).) Increasing threats were made against Preston. Anonymous letters were sent accusing Preston of all sorts of behavior, including one sent to the pastor of his church. (R. pp. 2916-2917.) Individuals began following Preston and the harassment grew so bad he had to have Anderson County's chief security officer follow him for protection. (R. pp. 842, lines 24-25.) And, Preston endured various political stunts to

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

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

[5] R. pp. 4; 295; 844, lines 7-18; 853, lines 3-18; 1607, lines 1-20; 1609, lines 19-22 (Preston "main object" of C. Wilson's baseless allegations); Def. Ex. 21 (Listing C. Wilson's unfounded accusations against Preston); 2425-2427 (Listing C. Wilson's unfounded accusations against Preston); 2428 (C. Wilson's "[A]llegations are unfounded"); 2896-2898 (SLED interview of C. Wilson where she falsely accused Preston of serial and outrageous acts; 1112, line 13-p. 1114, line 9.)

gain political advantage over him. (See R. p. 4 (citing R. pp. 2414-2416, 2421-2422, 2640-2647 at ¶22, 2760, 2832-2836, 2841-2842, 2850-2858.)

But, Preston alone did not encounter such harassment. The harassment was similarly leveled at Council members who endeavored to work cooperatively with Preston. Former Council member Bill McAbee testified that the political climate had grown so bad "from the people that supported [C.] Wilson and her group...that he felt threatened, other council members felt threatened..." (R. pp. 652, lines 13-19; see also R. pp. 868, line 25-p. 869 line 23.) By way of example, Council members (all except C. Wilson and Waldrep) received anonymous letters at their homes threatening sodomy and prison.[6] A radio caller on WAIM radio made comments about his intentions "to take out" Michael Thompson and "spend the rest of his life in federal prison..." (R. pp. 1266, 2928.) Other verbal threats were made against Council member McAbee and his family. (R. p. 654, lines 14-16.)[7] Indeed, matters had grown so bad that SLED commenced a criminal investigation. (R. p. 653 line 16-p. 654, line 8.) By 2008, the political environment in Anderson County had grown nothing short of toxic, with a top target –

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[6] See R. pp. 650, line 12-p. 654, line 10 (McAbee testifying about letters to Preston and all council members except C. Wilson and Waldrep making threats including prison and sodomy); 653; 1265, lines 14-21; 840-841; 2922-2926; 2933.)

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

Joey Preston. (R. pp. 842 (frequent target of harassment); 1607, lines 1-20; 1609, lines 19-22.)[8]

III. Interference With Preston's Duties

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

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

- Paragraph 25: "Per the County Personnel policies, only the County Administrator can place a County employee on leave." (*Id.*)

- Paragraph 10: "Previous attempts by the County Administrator, County Attorney and County Council members to stop Defendants from ordering and instructing County employees have been unsuccessful and ignored by [C. Wilson and Bob Waldrep." (R. p. 2642.)

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[8] Appellant suggests the political atmosphere in Anderson County leading up to the Severance Agreement vote proves irrelevant. To the contrary, this Court cannot even begin to understand the behavior and decision-making process of the 2008 Council, without first understanding the extreme political atmosphere in existence during that snapshot in time. Appellant would rather the Court not recognize the November 18, 2008 Council meeting for what it was—the tearing off of a political band-aid in hopes the County could finally move forward.

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

- Paragraph 27: "The County Administrator's duty to supervise his employees is being intentionally thwarted by [C. Wilson and Bob Waldrep]." (R. p. 2644.)

- Paragraph 29: "The actions of [C. Wilson and Bob Waldrep] have interfered with the County Administrator's ability to do his job." (*Id.*)

- Paragraph 30: "The actions of [C. Wilson and Bob Waldrep] have adversely affected the morale of the County employees." (*Id.*)

- "Plaintiff has shown he is likely to prevail on the merits in this case." (R. pp. 2640-2647).[10] Importantly, after the Circuit Court made the findings against C. Wilson and Waldrep, Anderson County adopted Resolution 2009-63 ratifying their conduct as taken on behalf of Anderson County in their official capacities.[11] (R. pp. 32-33, bullet point 5; R. p. 57, FN 28; R. pp. 3300-3303; see also *infra.*)[12]

The testimony at trial unequivocally established that, after the primaries in June of 2008, and continuing through December of 2008, Councilman Waldrep, Councilwoman C. Wilson, and the three incoming Council members-elect (Eddie Moore, Tom Allen, and Tommy Dunn) began holding a series of meetings, on Sunday, at Bob Waldrep's office.

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[10] Preston filed the lawsuit against C. Wilson and Bob Waldrep and the original hearing occurred on September 24, 2008, the day before Preston gave notice to the County of his claims for constructive discharge and anticipatory breach of contract. (Compare Ex. 50, Order 12/29/08 (First page indicating hearing on 9/24/08 *with* Pl. Ex. 22). Later, after the County executed the Severance Agreement, Michael Cunningham, the new County Administrator, was substituted as the Plaintiff. However, the events referred to in the Order involved Preston, not Cunningham.

[11] The public meeting minutes, upon which they lower court relied, are found at: http://www.andersoncountysc.org/Content/Council/Minutes/OCR/cc08182009.pdf (pp. 13, lines 29-43, p. 17, line-20, line 37.)

[12] During an August 5, 2008 Audit Meeting, Waldrep publicly endorsed a plan to place: "the administrator and financial director" on paid leave and appoint "an acting administrator" in Preston's stead without the required public hearing. (R. pp. 292, 295, 1900-1913, 2633-2634.)

(R. pp. 5; 369, line 22-p. 370, line 22.) "The meeting participants excluded others on Council with whom they would be serving." (R. pp. 5; 371, line 18-p. 372, line 4.) During those meetings, the soon-to-be majority of Council laid out an intricate agenda including: firing the then County Attorney (the McNair Firm); hiring Nexsen Pruet as the new firm; hiring Bob Daniel as their investigator of sorts; designating the next Chairman (Eddie Moore); drafting resolutions for the first meeting in 2009; implementing a hiring freeze; compiling a list of employees (*i.e.*, political adversaries) they would fire; and how to get rid of Joey Preston. (R. pp. 372, line 5-p. 379, line 17; 2872-2873.)[13] What the documentary evidence lays most plain, however, is the group's intent regarding Preston.[14]

IV. Preston's Claim for Anticipatory Breach

On this backdrop, Preston's tort claims and claim for anticipatory breach of contract arose. (R. pp. 2026-2028.) Preston first notified the County of the claim on September 25, 2008, after having retained counsel. (Id.) The County referred the claim to the personnel committee, which then hired Tom Bright of Ogletree Deakins, one of the

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

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

largest employment firms in the United States. (R. pp. 803, line 17-p. 804, line 10.) Multiple witnesses testified that Bright had counseled them that if the County lost an ensuing lawsuit, it could cost the County over two million dollars ($2,000,000.00). (R. pp. 461, line 8-p. 462, line 5; 623, line 22-p. 624, line 3; 1254, lines 17-25.) Shortly following his retention on October 8, 2008, Bright's notes reflect, that at Chairman Michael Thompson's instruction (see R. p. 498, lines 15-23), he interviewed all seven Council members (including C. Wilson and Waldrep) and the County Attorney to receive their input.[15] Interestingly, Bright's notes reflect the exact sentiments—in October 2008—as were reflected by the Severance Agreement vote on November 18, 2008—five in favor, two against. (See FN. 14.)

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

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

V. The Evidence Negating Appellant's Claims

The County now reduces all of its claims to 2 nuclei of facts. They include: (A) allegations regarding Allison Schaum ("Schaum Allegations"); (B) allegations regarding former council member Michael Thompson ("Thompson Allegations").[16] The trial evidence regarding each is treated below:

A. The Schaum Allegations:

1. Anderson County's Allegations Concerning Allison Schaum.

Anderson County's allegations concerning the Contract with Allison Schaum appear in Paragraphs 25 through 28 of the Amended Complaint. (R. pp. 131-132, ¶¶25-28.) According to Amended Complaint, Anderson County and Allison Schaum's company, Palmetto Agricultural ("PAC"), amended an existing contract on November 1, 2008 ("Services Contract"). (R. p. 132, ¶28.) The Amended Complaint fails to allege any involvement or knowledge of the amended contract on the part of then council member, Ron Wilson. (Id.) Likewise, the Amended Complaint fails to allege any correlation between the PAC contract and the Severance Agreement executed between Preston and Anderson County. (Id.) Nor did any of the evidence at trial establish any

[16] Appellant previously averred allegations involving Council member McAbee and Heather Jones. However, Anderson County has abandoned those allegations on appeal. (See App. Brief, p. 13, FN2 & p. 58, FN16.) Although the County abandons the same, it persists in citing to the record about the same presumably to provide the misimpression that the claims had merit. They did not. Both sets of allegations were proved demonstrably false at trial. The McAbee allegations were proved false. (R. pp. 7-8; 60-61; 637, line 17-p. 644, line 6; 642, lines 3-16; 1813, line 1-p. 1814, line 13; 1102, line 1-p. 1103, line 25; 654, line 22-p. 656, line 1; 1814, line 11-1816, line 25; 1817, line 18-p. 1818, line 13; 2686-2697.) The Jones allegations were likewise proved false. (See R. pp. 27-28; 73-74; 724, line 4-p. 728, line 7; 728, line 10-p. 737, line 3; 734, lines 1-5; 1802, line 1-p. 1811, line 18; 2692-2700; 2702-2712; 2933.) Nonetheless, Appellant continues to raise these issues, in sideways fashion, even though it never contested the evidence in this regard.

correlation to the same. (R. p. 9 (No evidence links Services Contract's extension and "[N]o evidence establishes R. Wilson knew of the Services Contract's extension when voted."))

2. The Actual Trial Evidence.

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

Amongst other initiatives, Schaum testified she pitched to have PAC create a farm-to-school program in Anderson County where farmers would sell fresh produce directly to school lunch programs creating a win-win scenario for both. (R. pp. 1721, line 6-p. 1724, line 22.) Schaum gave the presentation to representatives from the Farm

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

Bureau, the Farmer's Market, the Department of Agriculture, and various local farmers. (R. p. 1718, lines 6-15.) The feedback from the meeting proved "positive" and "everyone was excited about it." (R. p. 1718, lines 20-21.)[18] Throughout this process, R. Wilson had no knowledge of Schaum's proposal or presentation. (R. pp. 1718, line 22-p. 1719, line 6.)

Interested in the local agricultural initiatives, Preston and Schaum began to discuss entering a contract to create a "trial program or a pilot program" on a month to month term with a topline budget, which would be cancelled if it did not prove fruitful. (R. pp. 1728, line 5-p. 1729, line 1; 1731, lines 4-9.) At the urging of the Farmer's Market Board and the Department of Agriculture, Preston and Schaum executed the original contract in September of 2007. (R. pp. 1052, lines 1-20; 2149-2152.) Preston agreed to "revisit [the contract in] about a year and see where [they] were." (R. p. 1728, lines 10-15; 1063, lines 5-8.)[19]

PAC proved successful. Schaum's initiatives landed Anderson County an eighty thousand ($80,000.00) grant, which was double the amount of the top line number Preston had placed on the program's expenditures. (R. pp. 1730, line 6-p. 1731, line 9.) PAC spearheaded three conferences in Anderson County. (R. pp. 1731, line 10-p. 1732, line 3.) The third of these conferences, the Carolina Farm Stewardship Conference,

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[18] While Appellant attempts to spin Schaum as lacking experience in such a project, the truth is that no such pilot project had been attempted in South Carolina before. (R. p. 1719, lines 7-19.)

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

occurred during the last week in October of 2008 and hosted over 500 attendees. (R. pp. 1731, line 10-p. 1735, line 4; see also 2134.) On the heels of this conference and a little over a year after executing the pilot Services Contract, Schaum contacted Preston because she hoped the trial period would be over. (Id.; R. p. 1057, lines 19-20.)[20]

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

Contrary to Appellant's portrayal, the amended Services Contract was not a "rich" agreement. While the amended Services Contract did have a term and a liquidated damages provision, the agreement contained no minimum hour requirement, meaning the County could reduce Schaum's weekly pay to virtually nothing if it so chose. (R. pp. 1735, lines 10-15; 1104, line 24-p. 1105, line 4; 1297, lines 8-22 (Appellant's economist agreeing the County could reduce Schaum's hours to one hour per week.).)[21]

Schaum never discussed Preston's employment dispute with him. (R. pp. 1739, lines 4-7; R. pp. 1104, line 24-p. 1105, line 4.) Schaum never discussed Preston's Severance Agreement with him. (R. p. 1739, lines 8-10.) Schaum never discussed the

[20] Appellant mischaracterizes the amended PAC Services Contract as "unsolicited." (App. Brief, p. 34.) Yet, both Preston and Schaum testified that she contacted him about amending the agreement.

[21] Schaum testified the purpose of the term and liquidated damages provision was to help sustain the program and protect the businesses that had made commitments to participate. (R. pp. 1737, line 16-p. 1738, line 15; see also 1060, line 24-1062, line 25.)

amended Services Contract with R. Wilson. (R. p. 1739, lines 15-20.) R. Wilson did not benefit from the amended Services Contract. (R. pp. 1739, line 24-p. 1477.) R. Wilson did not benefit from Preston's Severance Agreement. Schaum did not benefit from Preston's Severance Agreement. (R. p. 1740, lines 2-4.) Simply no relationship existed between the amended Services Contract and Preston's Severance Agreement. (R. p. 1740, lines 5-8; 1105, lines 7-9.) Indeed, no evidence even demonstrates Schaum knew of Preston's employment dispute, which, in fact, she did not. (R. pp. 1739, line 4-1740, line 4.) And, no evidence demonstrates R. Wilson even knew about the amended Services Contract when he voted in favor of Preston's Severance Agreement.

B. <u>The Thompson Allegations</u>:

1. The Allegations in the Amended Complaint:

According to the County, while Council was considering Preston's claims for anticipatory breach of his employment contract, "Preston was engaged in conversations with" Michael Thompson ("Thompson") "about hiring him as a county employee." (R. p. 129, ¶12.) The County further contends Preston "granted Thompson special consideration" in connection with his desire "to be hired as a county employee." (<u>Id.</u> at ¶13.)[22]

[22] The County also complained—in a seemingly abandoned allegation--that Preston failed to correct a statement made by Thompson to media from June of 2008 (nearly ninety days before Preston's employment dispute even arose) wherein Thompson apparently denied interest in becoming a County employee. (R. p. 130, ¶ 17.) Thompson explained that he viewed the matter as a personnel matter, which was not appropriate for public discussion. (R. p. 792, lines 1-5.) Citing other instances where they disseminated confidential information, Thompson feared C. Wilson and Waldrep would disseminate confidential information about him had he answered otherwise. (R. p. 864, lines 3-25.) In any event, Thompson testified that he did not believe it was the job or would be appropriate for the County Administrator to go behind elected officials and correct

2. The Actual Trial Evidence:

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

Preston encouraged Thompson to pursue appraisal courses, which is confirmed by an e-mail dated March 4, 2008. (R. pp. 783, lines 12-19; 1109, line 11-p. 1110, line 13; see also 2067-2070.) Thus, by March of 2008 even before the Anderson County primaries and a full six (6) months before Preston's employment dispute even arose,

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statements to media outlets. (R. p. 864, lines 3-25.) Thompson also testified he feared the same individuals who had been sending threatening letters and making threats against him and his family might misuse the personnel information about his pursuing a job. (R.p. 857, lines 3-20.)

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

Thompson and Preston had already discussed Thompson's employment with the County and Preston had agreed to hire him even so far as encouraging him to take courses in connection with the same. (R. pp. 785, lines 4-17; 1820, line 1-1821, line 24.) Yet, given the chance, Appellant would lead this Court to believe Thompson parlayed his Severance Agreement vote in exchange for a job. Not so.

Thompson testified he contacted Preston about another opening with Anderson County in August of 2008. (R. pp. 794, line 19- p. 796, line 4; 1110, lines 23-25.) E-mail correspondence from Thompson confirms the fact. (R. p. 2076.) The position sought by Thompson was for a position as assistant purchasing manager. (R. p. 794, line 19- p. 796, line 4.) According to Thompson, he asked Preston about the position but Preston indicated another County employee was in line for the spot. (R. p. 794, line 19-p. 797, line 16; 798, line 12-p. 799, line 3.) However, Preston told Thompson the promotion of existing personnel would create an opening. (Id.) And Thompson would get the subsequent opening resulting from the internal promotion. (Id.) This conversation occurred nearly a month before Mr. Preston's employment dispute with the County ever arose. (Id.)

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

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

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

ARGUMENT

I. STANDARD OF REVIEW

While the case before the Court is equitable in nature, and while Preston agrees this Court reviews the record *de novo,* it is likewise true that, as to "questions of credibility" (see, e.g., 5/3/2013 Order, p. 40), this Court should "defer to the good judgment of the trial court who heard and observed the witnesses. Costa and Sons Const. Co., Inc. v. Long, 306 S.C. 465, 468, 412 S.E.2d 450, 452 (Ct.App. 1991). Moreover, *de novo* review does not relax Appellant's evidentiary burden of clear and convincing proof as it applies to the County's claims for fraud, constructive fraud, rescission for arbitrary and capricious decision-making, constructive trust, and rescission for negligent misrepresentation. (See, generally, R. pp. 3099-3162 (Preston Closing).)

II. APPELLANT FAILED TO PROVE RESCISSION WAS WARRANTED UNDER THE STATE ETHICS ACT, APPELLANT'S CODE, OR THE COMMON LAW

Appellant's first claim alleged the 2008 Anderson County Council ("2008 Council") violated: the State Ethics Act, the County Code, and common law by approving Preston's Severance Agreement.[24] Under this claim, Appellant challenged the entire process of passing the Severance Agreement, not just particular votes. (R. p. 6 (citing R. p. 133, ¶35 ("The Severance Agreement was adopted by Anderson County

[24] In stating its grounds for appeal, Appellant collapses various portions of the lower court's order in order to gloss the evidentiary deficiencies in its case. In other instances, Appellant takes the lower court's analysis out of order for the same purpose. While responding in full to Appellant's arguments, Preston breaks down the issues on appeal in a manner consistent with the lower court's final order and judgment. In so doing, Preston hopes this Court will have an easier time following the sequential analysis of the lower court, as it relates to the issues on appeal.

Council in violation...").)[25] Consistent with the allegations put at issue by Appellant, the lower court analyzed all of the 2008 Council members' votes. (R. p. 6.) After doing so, the Court correctly found in favor of Preston.[26]

In analyzing the 2008 Council's actions, the trial court correctly found Anderson County's Code proves more restrictive than the State Ethics Act.[27] (R. p. 7.) Specifically, the State Ethics Act prohibits elected officials from participating in governmental decisions where an official or his family members derive a direct economic benefit. See, e.g., S.C. CODE ANN. § 8-13-700. By contrast, Anderson County Code (hereinafter "ACC") § 2-37(g)(4)(e), titled when "members may not vote," more broadly disallows Council members from participating in decisions where their involvement creates: "a substantial appearance of impropriety." ACC § 2-37(g)(4)(e).

A. After Analyzing All of the Votes Cast, the Trial Court Disqualified the Votes of: Thompson, R. Wilson, C. Wilson, and Waldrep

With these principles in mind, the trial court analyzed the 2008 Council's votes in relation to Preston's Severance Agreement, as follows:

Larry Greer & Gracie Floyd

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

[26] All seven members of Anderson County Council attended the November 18, 2008 meeting of County Council. (R. p. 7.) All voted on Preston's Severance Agreement. (Id.) The Council members in attendance included: Larry Greer ("Greer"), Gracie Floyd ("Floyd"), Bill McAbee ("McAbee"), Michael Thompson ("Thompson"), Ron Wilson ("R. Wilson"), Cindy Wilson ("C. Wilson"), and Bob Waldrep ("Waldrep"). (Id.)

[27] Preston notes that the State Ethics Act does not create a private right of action. (See R. pp. 3133-3134.) Preston incorporates the analysis from the same herein by reference.

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

Bill McAbee

Appellant initially questioned the propriety of McAbee's vote on the Severance Agreement but has since dropped the issue on appeal. (See App. Brief, p. 13, FN2.) Nonetheless, after considering all evidence of record, the Court found McAbee did not possess a financial interest in Preston's Severance Agreement or the vote approving the same. (R. pp. 7-8.) The trial court likewise found neither the allegations nor the record evidence concerning McAbee's vote gave rise to a substantial appearance of impropriety. (Id.) Accordingly, the lower court found McAbee's vote was proper. (Id.) And, Appellant no longer substantively challenges the same.

Michael Thompson

The lower court found Thompson derived no financial benefit from Preston's Severance Agreement. But, because at the time he cast his vote Thompson continued to seek employment from Appellant, the lower court found, Thompson's vote ran afoul of ACC §2-37(g)(4)(e). (R. pp. 8-9.) The trial judge reasoned: "To a casual observer of the Severance Agreement vote...such facts and circumstances created a substantial appearance of impropriety." (Id.) Thus, "Thompson should have refrained from voting on Preston's Severance Agreement." (Id.)

Ronald Wilson

"R. Wilson similarly derived no financial benefit from the Severance Agreement vote." (R. p. 9.) Nor does Appellant argue to the contrary. (See App. Brief, pp. 14-15.)

But, like Thompson's, the lower court found R. Wilson's vote ran afoul of ACC §2-37(g)(4)(e)'s substantial appearance of impropriety prohibition because, "In the weeks before the Severance Agreement vote, R. Wilson's adult, emancipated daughter received an extension to her personal services contract ("Services Contract") with Anderson County." (R. p. 9.) "To a casual observer," the lower court concluded such facts and circumstances created a substantial appearance of impropriety. (Id.) Therefore, R. Wilson should have refrained from participating in the vote.[28] (Id.)

Wilson & Waldrep

The circumstances surrounding the respective votes of C. Wilson and Waldrep mirror each other and, as such, the Court treated them collectively. The trial court found both C. Wilson and Waldrep possessed direct financial interests in the Severance Agreement vote and their respective votes carried a substantial appearance of impropriety. As such, neither C. Wilson nor Waldrep should have participated in the Severance Agreement vote.

At the time of the Severance Agreement's adoption, C. Wilson and Waldrep were named, in their individual capacities, in a lawsuit brought by Preston. The complaint in that case sought costs and attorney's fees as well as injunctive relief. (R. p. 10.)[29] Preston alleged C. Wilson and Waldrep interfered with the execution of his job as County

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[28] In so holding, the lower court found Appellant failed to introduce any evidence directly linking the Services Contract's extension to R. Wilson's Severance Agreement vote *and* R. Wilson received no direct benefit from the Services Contract's extension. Moreover, "no evidence establishe[d] R. Wilson knew of the Services Contract's extension when he voted." (R. p. 9.) Indeed, as the lower court found the evidence of record proved otherwise. (Id.; see, e.g., R. pp. 1473, lines 1-8; 1739, line 4-1740, lines 4-8.)

[29] Throughout the trial, the lower court heard evidence regarding the lawsuit brought by Preston against Waldrep and C. Wilson. (See, e.g., R. pp. 2640-2647; see also *infra*.)

Administrator. (Id.) After the lawsuit commenced and well in advance of the Severance Agreement vote, Preston, by and through his personal attorney, also gave notice to County Council of both his claim for anticipatory breach of contract and tort claims he intended to pursue against C. Wilson and Waldrep personally, which both Council members acknowledged. (See FN29.)[30]

Since Preston agreed not to pursue any further claims against any County Council member (see R. p. 1986, ¶6), the lower court found: "Waldrep and C. Wilson had a direct economic interest in the outcome of the vote regardless of the vote's outcome." (R. p. 12.)[31] Applying the same standard as it applied to R. Wilson and Thompson, the trial court concluded: "[D]ue to a potential appearance of substantial impropriety, Waldrep and C. Wilson should not have participated in a vote on Preston's Severance Agreement while Preston maintained a lawsuit against them individually." (Id. (citing ACC §2-

[30] Appellant argues the release contained in the Severance Agreement conferred identical benefits upon all Council members. (App. Brief, p. 48, FN13.) According to Appellant, to the extent the release conferred benefits on all Council members, all votes were improper for the same reason. (App. Brief, p. 48, FN13.) The lower court correctly rejected this analysis since Anderson County Code §2-37(g) (4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." (R. p. 11, FN6.) The evidence at trial established: Preston had filed a lawsuit against C. Wilson and Waldrep individually, which remained pending at the time of the Severance Agreement vote (R. pp. 402, lines 16-24; 1679, lines 20-21; 1685, lines 10-23; 970, line 16-p. 972, line 3); and Preston had supplied notice of an intent to pursue tort claims against two Council members, which C. Wilson and Waldrep acknowledged referred to them (R. pp. 420, lines 13-21; R. p. 1679, line 11-p. 1680, p. 22). By contrast, at the time of the Severance Agreement vote, Preston had not filed a lawsuit nor given notice of his intent to pursue tort claims against any other member of the 2008 Council. Thus, the Severance Agreement conferred personal and financial benefits on C. Wilson and Waldrep greater than that of the general Anderson County public.

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

37(g)(4.).) The lower court continued: "Waldrep and C. Wilson [also] had personal and financial interests 'greater than that of the general Anderson County public' thereby prohibiting their participation and vote." (R. p. 12 (citing ACC §2-37(g)(4).)[32] Accordingly, the lower court held Waldrep and C. Wilson should not have voted on the Severance Agreement or any related issues." (Id.)

B. The Trial Court Correctly Followed the Decision of Baird v. Charleston County

Having found the votes of Thompson, R. Wilson, C. Wilson, and Waldrep as improperly cast, the lower court next analyzed what impact flowed from such findings. (R. pp. 12-16.) In that regard, the trial court held the Supreme Court's holding in Baird v. Charleston County, 333 S.C. 519, 535, 511 S.E.2d 69, 79 (1999) controlled. Adopting the majority view, the Baird Court held:

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

Id. at 535, 511 S.E.2d at 77-78 (citing W.J. Dunn, *What Constitutes Requisite Majority of Members of Municipal Council Voting on Issue*, 43 A.L.R.2d 698, 748 (1955) ("[T]he

[32] According to Appellant, the votes of Waldrep and C. Wilson should nonetheless be counted because they voted against Preston's Severance Agreement. (App. Brief, p.48, FN13.) In such instances, ACC §2-37(g)(4) provides: "No member shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public." ACC §2-37(g)(4) The Ordinance contains no exception exists based upon how a Council member votes. (Id.; R. p. 12.)

Council action will be upheld if the majority was not dependent on the votes of disqualified members and rejected if there would be no majority without such votes.")[33]

Relying upon a patchwork quilt of authority from other jurisdictions (see App. Brief, pp. 37-45), Appellant tries to side-step the plain holding of Baird arguing only one tainted vote sufficed to rescind the Severance Agreement.[34] (See App. Brief, pp. 36-45.) However, the lower court correctly relied upon the Baird decision in concluding the one tainted vote rule does not control in South Carolina.[35] Moreover, Baird does not indicate that South Carolina's courts should consider the political position or relative strength of

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[33] In following Baird, the lower court cited eighteen different opinions from around the country which accord with the Baird Court's analysis and reject that of Appellant. (5/3/2013 Order, p. 13; FN 10 (citing cases from all over the United States).) Yet, Appellant simply ignores the authority cited by the lower court and fails to identify any error in the trial judge's reliance upon the same.

[34] Had it not elected to follow the Baird holding, the trial court would "have had to consider what impact other tainted votes of Waldrep and C. Wilson had on the County's ability to bring the instant lawsuit and the Court's jurisdiction to hear Plaintiff's claims." (R. p. 14, FN.11.) "For example, votes approving the investigation of the Severance Agreement and to commence and maintain the instant lawsuit could prove void if, as [Appellant] urges, one tainted vote (such as those cast by C. Wilson and Waldrep) invalidated Council action." (See, e.g., R. p. 2933; Anderson County Meeting Minutes, Nov. 12, 2009 (publicly available at: http://www.andersoncountysc.org/web/Council_Minutes01.asp.) Due to the lower court's findings, however, "further factual development and legal analysis, in this regard, prove[d] unnecessary to the...analysis." (R. p. 14, FN11.)

[35] Wholly ignored by Appellant, the lower court also noted: "[T]he superiority of the analytical framework established by the Baird Court." (R. p. 14, FN12.) Under Appellant's urged approach, the "validity and finality of an otherwise valid action of a legislative body could be rendered uncertain by virtue of a judicial challenge arising out of an alleged appearance of impropriety, regardless of whether the challenged vote proved outcome determinative." Id. Like the lower court, this Court should reject "such [an] approach as inconsistent with the holding of Baird and the other authority discussed herein." (Id. citing Eways v. Reading Parking Authority, 385 Pa. 592, 604, 124 A.2d 92, 98 (1956).

elected officials advocating for one side or another when determining which votes to allow.[36] Indeed, such an enterprise would prove unworkable.

No South Carolina authority supports Appellant's premise wherein it argues South Carolina's courts should weigh the potential sway of individual officials when reviewing governmental decisions. (App. Brief, pp. 40-41.) The lower court correctly treated "each public official equally and [found] their respective votes warrant[ed] equal weight and independence."[37] (R. p. 14.) To hold otherwise would elevate one elected official's vote over another and cast South Carolina Courts into an unending pursuit of trying to appraise the respective political sway of various public officials.[38]

The trial court's reasoning, in this regard, accords with substantial South Carolina precedent. As discussed below, South Carolina law disfavors substituting judicial

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[36] Appellant continues to rely upon the decision of Thompson v. City of Atlantic City, 921 F.2d 427, 190 N.J. 359 (2007). The Thompson case proves wholly inapposite. Thompson arose under a peculiar set of facts under New Jersey's Faulkner Act. Indeed, Thompson nowhere discusses the treatment of votes of a legislative body when allegations of an interested transaction exists. (See R. pp. 3150-3151 (providing detailed analysis distinguishing Thompson.)

[37] Appellant mischaracterizes the Severance Agreement as conferring solely an "individual benefit." (See App. Brief, p. 38.) The lower court rejected this mischaracterization finding the evidence at trial confirmed those Council members who appropriately voted in favor of the Severance Agreement did so in hopes of promoting the public good. (R. pp. 15, FN13; 65-66; see also *infra* at FN 50.)

[38] Specifically, the lower court rejected Appellant's premise (which it repeats on appeal (see App. Brief, p. 40) that "because Thompson (as Chairman of Council) and R. Wilson (as Chairman of the Personnel Committee) supported the Severance Agreement, their influence somehow overwhelmed the independent judgment of County Council's remaining elected officials." (R. p. 15.) As discussed below, each of the Council members whose votes the lower court "found as properly cast in favor of the Severance Agreement, articulated independent and lucid grounds supporting their respective votes." (See R. pp. 1254, lines 17-25; 1266, line 12-p. 1267, line 4; 616, line 17-p. 627, line 13; 660, line 7-663, line 19; 1614, line 16-1622, line 25.)

determinations for the decision-making of officials elected to make such judgments. (See R. p. 15 (discussing same).) Appellant simply ignores the lower court's citation to the decisions of Segars-Andrews v. Judicial Merit Selection Commission et al. and Bear Enterprises v. The County of Greenville et al., wherein South Carolina's appellate courts afforded "great deference to legislative bodies and their decision-making, both legislatively and judicially." (Id. citing Segars-Andrews, 387 S.C. 109, 130, 691 S.E. 2d 453, 469 (2010) (declining judicial intervention into political determinations conferred to a legislative body due to Separation of Powers constraints); Bear Enterprises, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("If the propriety of the Council's decision is even "fairly debatable," we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed."); S.C. CODE ANN. § 4-9-620 (conferring upon County Council the discretion to hire and remove County Administrators in Council-Administrator form of government).)[39]

The Court next examined how many votes were necessary to approve the Severance Agreement. Pursuant to ACC § 2-37(g)(3), approval of the Severance Agreement required a simple majority of those members present and voting. (R. p. 16)

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[39] Likewise ignored by Appellant, the lower court also relied upon the following cases: Griggs v. Hodge, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956) ("As a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate governmental agency."); Schroeder v. O'Neill, 179 S.C. 310, 184 S.E.2d 679 (1936) ("The Court will not interfere with discretionary powers of a municipal body, except in cases of fraud or clear abuse of power, or where unreasonable or capricious"); Plunkett v. Aiken, 159 S.C. 97, 108-09, 156 S.E. 245 (1931) ("The exercise of that discretion so long as it is not unreasonable or capricious, is a matter of policy with which the Courts are not concerned. There was not sufficient evidence to show any exercise of arbitrary power or caprice upon the part of the City Council, and we cannot sustain the decree of the Circuit Judge on this additional ground, as urged by the respondents."). (R. p. 16, FN14.)

(citing ACC § 2-37(g)(3) ("[A] majority vote of those members present and voting shall decide all questions, motions, and other votes."). Upon applying the Baird holding and ACC § 2-37(g)(3) to the facts at bar, the trial court found a majority of votes of those present and properly voting approved Preston's Severance Agreement.

The trial court then painstakingly analyzed each and every vote taken by the 2008 Council when approving Preston's Severance Agreement. (R. pp. 16-18.)[40] After doing so, the lower court correctly found: "After discounting the improper votes, the Court finds a majority of members present and voting duly passed Preston's Severance Agreement." (R. p . 18.)[41]

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[40] With respect to such analysis, Preston does not go through each and every vote analyzed by the lower court but instead incorporates the analysis from pages 16 through 18 of the lower court's order herein by reference. (R. pp. 16-18.)

[41] Of all the votes leading up to the approval of the Severance Agreement, only the parliamentary vote to call for the question on the motion to reconsider was close. (See R. p. 17.) However, the lower court found, and Appellant does not contest, "that even if Waldrep and C. Wilson could have voted, no change in outcome would have manifested." (Id. at 17, FN15.) First, under Robert's Rules of Order Article 1, §7, debate would have eventually expired regardless of the outcome on the subject vote to call for the question. Consistent with their votes throughout, the trial testimony from voting Council members reflected that additional debate on the Motion to Reconsider would not have changed their ultimate vote. (See, e.g., R. pp. 450, line 21-p. 451, line 8; 632, line 25-633, line 8; 1243, lines 16-20; 1268, lines 20-23; R. p. 1351, line 16-p. 1622, line 25.) Appellant failed to introduce "any evidence to the contrary," nor does it cite any on appeal. (R. p. 17, FN15.) Moreover, as the lower court found, "[H]ad such members felt that additional debate could materially change their ultimate vote, they could have voted against the final vote adopting the Severance Agreement." (Id.) This did not occur, as the Second Vote on the Severance Agreement passed with a vote of 5-1-1. (See R. pp. 17, FN15; 18.) "Third, adverse parliamentary rulings can be appealed under the Anderson County Code." (R. p. 17, FN15 citing ACC § 2-37(g).) Here, as the lower court held, no appeal occurred. (See R. pp. 1918-1959.) Finally, South Carolina Courts do not review the parliamentary processes of legislative bodies. See State v. Lewis, 181 S.C. 10, 186 S.E. 625, 631 (1936) ("That is merely a matter of parliamentary procedure, which each body, by special rule, may, and usually does, regulate for itself."); Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 822-23 (1903) (Same); see also MASON'S MANUAL OF LEGISLATIVE PROCEDURES § 71, at 72 (1975) ("[C]ourts will not disturb a ruling on a

III. THE 2008 COUNCIL'S APPROVAL OF THE SEVERANCE AGREEMENT DID NOT CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION

As noted by the trial court, "[i]t is not the prerogative of the courts to pass upon the wisdom of [a] County Council's decision."[42] (R. p. 19 (citing Bear Enterprises v. County of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995).) "If the propriety of the Council's decision is even 'fairly debatable,' [South Carolina courts] cannot inject [their] judgment into a review of [County Council's decision], but must leave that decision undisturbed." Bear Enters., 319 S.C. at 141, 459 S.E.2d at 885. "The party challenging a governmental body's decision bears the burden of proving the decision [was] arbitrary."[43] Pressley v. Lancaster Cnty., 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). (R. p. 19.) Thus, Appellant was required, but as the lower court ruled, did not prove the arbitrariness of County Council's action "by clear and

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parliamentary question made by a legislative . . . body having authority necessary to make rules for its government . . . ."). Importantly, Appellant does not challenge any of the lower court's findings in this regard.

[42] Appellant's seventh cause of action sought rescission based upon arbitrary and capricious decision-making as discussed herein.

[43] As to Appellant's second cause of action seeking rescission due to a violation of public policy, the lower court found: "[P]aragraphs 37 through 39 of the Amended Complaint never specif[ied] how the Severance Agreement's approval violated public policy..." (R. pp. 18-19.) But, in any event, the lower court found "greater harm would exist by virtue of South Carolina's courts disturbing the decision of a legislative body" since a "strong public policy [exists] in this state [whereby] South Carolina courts accord deference to the discretionary decision-making conferred upon legislative bodies by statute." (Id. citation omitted.) Appellant fails to address this finding altogether.

convincing evidence." (R. pp. 19-22 (citing Bear Enters., 319 S.C. at 141, 459 S.E.2d at 886.)[44]

The lower court correctly found: "The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious."[45] (R. p. 20.) According to Appellant, the financial value of the Severance Agreement rendered Council's vote approving the same arbitrary and capricious because the amount paid under the Severance Agreement exceeded amounts owed under the strict operation of Preston's Master Employment Agreement. (See App. Brief, p. 24.) But the lower court expressly rejected this contention and made numerous factual findings, none

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[44] Importantly, Appellant does not challenge any of the lower court's legal findings regarding the correct legal standards and burden of proof. In fact, Appellant simply ignores the same. (See App. Brief, pp. 20-32; R. p. 67 ("The [5/3/2013] Order analyzed the trial evidence through the correct legal standards for evaluating whether the 2008 County Council's decision-making was arbitrary and capricious, which the County does not contest or cite any authority to the contrary.) & FN45 (outlining factual findings uncontested by Anderson County).) R. pp. 2686-2697.) Moreover, until this appeal, Appellant never once challenged the legal standards employed in the lower court's decision and cannot do so for the first time now. (See R. p. 67 ("[T]he County does not contest or cite any authority to the contrary.)

[45] Appellant complains about the process under which the Severance Agreement was approved. However, what the Appellant really complains about is that a majority of the 2008 Council had sufficient votes to approve the Severance Agreement notwithstanding the vocal dissents of C. Wilson and Waldrep. What Appellant omits is that Anderson County had, as of November 18, 2008, passed almost all important decisions by a vote of 5 to 2, including the one before the Court. (R. pp. 632, line 25-p. 633, line 8.) Indeed, when Tom Bright first interviewed all 2008 Council members, his notes reflect that 5 members of the 2008 Council desired to end the blood feud between Waldrep, C. Wilson, and Preston and two (C. Wilson and Waldrep) opposed any mention of negotiating a severance. (R. p. 486, line 15-p. 487, line 25; 507 line 23-p. 508, line 13; 2413; 2424.) Moreover, Bright's notes further reflect that Waldrep and C. Wilson both knew about a potential severance over a month before the November 18, 2008 meeting. (Id.; R. pp. 509, line 13-p 511, line 3; 2425-2427.) In fact, C. Wilson and Waldrep attended at least one of the personnel committee meetings in advance of November 18, 2008 where settlement with Preston was discussed. (R. p. 515, lines 1-21.)

of which Appellant challenged below or here. (C.f. R. pp. 20 *with* R. p. 24 & FN45 *with* R. pp. 3163-3176 *with* App. Brief, pp. 21-32.)[46]

The 2008 Council's decision-making, as found by the lower court, proved reasonable in light of the steps the Council-elect had repeatedly leaked to the public as their intended course.[47] "Based on what the members of County Council knew at the time, such actions could very well have violated Preston's legal and contractual rights," as Preston's Master Employment Contract and South Carolina statute provided for a hearing before dismissal or suspension without cause. (R. pp. 20-21 (citing R. p. 1897, ¶13 & S.C. Code §4-9-620.) The evidence at trial clearly demonstrated that, by November of 2008, the issue of whether to suspend and dismiss Preston had already been made by

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[46] First, the lower court found the approval of the Severance Agreement fell within the advice of counsel, Tom Bright, who conceded one of the options he gave the personnel committee was to settle with Preston (see R. pp. 525, line 18-p. 526, line 9) and also who opined a potential downside risk of two million dollars or more. (R. pp. 462, line 8-p. 463, line 12, Bright ("[T]his could certainly clear two million-dollars in exposure...,"; 495, lines 19-21.) The lower court found: "Preston's claims, as articulated in correspondence from his attorney dated October 23, 2008, included potential tort claims and exceeded severance claims arising strictly from the four corners of his Master Employment Agreement. " (R. pp. 20, FN16 citing 2026-2028; 454, lines 9-13; 490, lines 1-25 ("[Preston's attorney] specifically was identifying tort claims against individual council members...").) In addition, the Court found the release contained in the Severance Agreement exceeded the scope of the release contemplated by Preston's Master Employment Agreement. (Id. comparing R. pp. 1894, ¶E *with* 1986 ¶6; 527, line 11-p. 529, line 20.) And, Preston's Master Employment Agreement also contained an indemnity provision, which survived the Agreement, but was terminated under the Severance Agreement. (Id. comparing R. pp. 8 §14 *with* 1986 ¶6.) The lower court concluded: "Thus, contrary to Plaintiff's suggestions, county Council's mere approval of a Severance Agreement providing for severance amounts exceeding the strict operation of Preston's Master Employment Agreement does not render the Severance Agreement arbitrary and capricious. (Id.) Yet, Appellant ignores all of the lower court's findings in this regard.

[47] See R. p. 20; see also R. pp. 647, line 15-p. 648, line 11; 1788, lines 12-25; 2429-2434, 2635, 2825, 2826, 2831.)

Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. (R. p. 21 ("It is clear to this Court that the matter had been prejudged...").)[48] "To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer...who: "[E]stimated potential exposure, including attorneys's fees and costs, of up to two million dollars ($2,000,000.00)."[49] (R. p. 21.)

The evidence at trial established Anderson County Council's approval of the Severance Agreement proved neither arbitrary nor capricious. In light of the information

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[48] See also R. pp. 520, lines 8-19; 1260, line 10-p. 1261, line 1; 1788, lines 12-25; 1260, line 10-p. 1261, line 1; 2429-2434; 2635; 2825; 2827-2828; 2831.) While it is incorrect that the County did not have immediate exposure to Preston's potential claims, Appellant never explains why it is arbitrary or capricious for a sitting Council "to safeguard against imminent litigation, for which they had received notice and for which their employment attorney opined would expose the County of "estimated potential exposure, including attorney's fees and costs, of up to two million dollars ($2,000,000.00.) (R. pp. 68-69 ("No authority exists to support the notion that elected officials must standby and idly watch as the County becomes entrenched in litigation. Legislative bodies routinely address issues in prospective fashion."); see also R. p. 484, lines 5-20 (concerned about claims particularly when new council arrived.) And, while Appellant downplays the validity of Preston's claims, Anderson County ignores the fact that a lawsuit was—at that very time—already pending against C. Wilson and Waldrep for interfering with his job functions. Moreover, as the lower court found, "If potential liability proved as speculative as [Appellant] suggests (see, e.g., App. Brief, pp. 21-23), the "County's employment attorney would not have identified a potential downside risk of up to two million dollars ($2,000,000.00)." (R. pp. 22, FN19; 69, FN47.)

[49] See R. p. 462, lines 8-25 ("[T]his could certainly clear two million dollars in exposure..."); R, pp. 623, line 22-p. 624, line 3; see also 1254, lines 17-25; 1614, line 16-p. 1622, line 25. Of course, in hindsight, the 2008 Council's decision-making and analysis proved prescient even by the time of trial, since Anderson County had already spent more than two million dollars ($2,000,000.00) in pursing Joey Preston. (R. p. 1410, lines 2-21; 661, line 17-p. 662, line 6.) To date, that amount now approximates two million three hundred eighty-nine thousand two hundred and two dollars and twenty cents ($2,389,202.20). (See R. p. 3244.) Ironically, the decision to spend nearly double the value of the Severance Agreement to rescind the Agreement in and of itself raises the specter of the arbitrary and capricious expenditure of public funds.

available to County Council when it approved the Severance Agreement, and in light of events occurring since, the lower court found Anderson County Council's approval of the Severance Package fell within the advice of counsel and has proven a reasonable choice. (See R. p. 525, line 18-p. 526, line 9) (Conceding advice to Personnel Committee included several potential options including settling with Preston; conceding he informed Personnel Committee of potential downside of litigation); see also R. p. 2440, ¶F.)

By November of 2008, the evidence at trial demonstrated that the issue of whether to suspend and dismiss Preston had already been made by Council-elect without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council. It was clear to the trial court that the matter had been prejudged by the majority of Council-elect. (See *supra.*) To follow such course could very well have resulted in the costly litigation feared by the County's employment lawyer. The County's employment lawyer estimated potential exposure, including attorney's fees and costs, of up to two million ($2,000,000.00) dollars. (See R. p. 616, line 17-p. 617, line 22; 623, line 22-624, line 3; 1254, lines 17-25, Greer; 462, lines 8-25.)[50]

During trial, each of the 2008 Council members, who the Court found properly voted for the Severance Agreement, provided independent and lucid reasons supporting their votes.[51] Certainly their decisions were unpopular with segments of the community

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[50] Appellant tries to downplay the potential risks to the County as opined by Tom Bright as a "worst case scenario." (See App. Brief, p. 29.) Yet, the evidence at trial showed Bright never supplied potential percentages as to likely outcomes. (See, e.g., R. p. 617, lines 15-22.)

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

and with Council-elect. However, as the lower court found, Courts should not weigh the decisions of legislative bodies based upon the popularity of their decisions. (R. p. 22.) South Carolina's courts must instead judge whether a reasonable basis existed for making the decision in question. (Id.) Reasonable decisions can often be unpopular when they are made. (Id.)

As was stated in the Bear Enterprises case, if the decision made by the 2008 Council was "fairly debatable" the decision must remain undisturbed. 319 S.C. at 140, 459 S.E.2d at 885. Here, the lower court found the decision to approve the Severance Agreement was "fairly debatable." (Id.) Moreover, upon taking office, Council-elect tellingly initiated this lawsuit presenting substantially the same issues facing the 2008 Council in the litigation averted by the Severance Agreement. The resulting costs to Anderson County for this litigation and the underlying investigation have exceeded the County employment attorney's 2008 estimate of two million ($2,000,000.00) dollars. (See e.g., *supra* at FN48; R. p. 1410, lines 2-21, Allen (Testifying the instant litigation was already nearing two million dollars ($2,000,000.00) in January of 2012); R. pp. 661, line 17-p. 662, line 6.) Therefore, this Court should affirm the lower court, as the 2008 Council's decision to enter into Preston's Severance Agreement was neither arbitrary nor capricious.[52]

[52] The County raised subsequent precedent to the trial court regarding the potential unenforceability of Preston's Master Employment Agreement. Such precedent, however, did not change the lower court's decision. At the time of the Severance Agreement's approval, no such precedent existed. Legislative bodies do not have to foresee what an appellate court may decide five (5) years later. The question before the lower court was whether, based upon the information then available, County Council's decision-making was fairly debatable. The lower court found that it was. Again, if the issue was so clear,

IV. PRESTON DID NOT BREACH HIS FIDUCIARY DUTY TO ANDERSON COUNTY

Appellant's third cause of action sought rescission of the Severance Agreement due to Preston's alleged breach of fiduciary duty resulting from violations of the State Ethics Act and Anderson County Code. (R. pp. 134-135, ¶¶40-46.) As an initial matter, the lower court found no evidence supported Appellant's contention that Preston breached a fiduciary duty by violating the State Ethics Act or Anderson County Code.[53] (See *infra* (discussing County Council members as those individuals who owed disclosure duties, to the extent applicable). As discussed above, the lower court discounted the favorable votes of Thompson and R. Wilson as contrary to the Anderson County Code inasmuch as such votes carried a substantial "appearance of impropriety." (See *supra.*) After doing so, the lower court found in favor of Preston in relation to the County's third cause of action.

The analysis applied by the lower court followed the Supreme Court's holding in Baird, 333 S.C. at 519, 511 S.E.2d at 69. In Baird, the State Ethics Commission advised the tainted voter not to vote on a Bond Ordinance. When the tainted voter ignored the State Ethics Commission and nonetheless voted, the remedy, as determined by the Baird Court, was to invalidate the tainted vote "in determining the necessary majority for valid action." Id. at 535, 511 S.E.2d at 77. The remedy was not to overturn the entire vote. Id.

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the County's employment attorney would not have identified a potential downside risk of up to two million ($2,000,000.00) dollars. (R. pp. 22, FN19; 69, FN47.)

[53] As to the specific nuclei of remaining allegations (*i.e.,* Thompson and R. Wilson), the lower court set out additional analysis discussed below.

Thus, the lower court found the correct remedy in this case "should be no greater than in Baird." (R. p. 23.)

Pursuant to the Supreme Court's holding in Baird, then, the lower court discounted the tainted votes and then determined "whether County Council would have still adopted the Severance Agreement." Baird, 511 S.E.2d at 78 (The court has jurisdiction to undo legislative action if the requisite number of votes "would not [have] exist[ed] but for the improper vote[s].") Unlike in Baird, however, when the trial court discounted the tainted votes in this case, the resulting vote remained unchanged.[54] Accordingly, Anderson County Council still approved Preston's Severance Agreement. The lower court, therefore, found in favor of Preston as to Plaintiff's third cause of action.

V. APPELLANT FAILED TO PROVE ITS CLAIMS FOR FRAUD, CONSTRUCTIVE FRAUD, AND NEGLIGENT MISREPRESENTATION

As to the fourth, fifth, and sixth causes of action, Appellant respectively alleged Preston committed fraud, constructive fraud, and negligent misrepresentation warranting the Severance Agreement's rescission. (R. pp. 134-138, ¶¶40-70.) The lower court found Appellant failed to prove the necessary elements of such claims.[55] Accordingly,

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[54] Unchallenged by Appellant, the lower court similarly found: "No evidence of record establishe[d] any of the remaining votes of County Council would have changed had such Council members known the information about which Plaintiff complains." (R. p. 24, FN20.) In fact, the lower court found the opposite was true. Id. Moreover, as noted above, Anderson County failed to prove any connection linking the Thompson Allegations and R. Wilson Allegations to the Severance Agreement. Id. The Court instead discounted Thompson's vote and R. Wilson's vote due to the appearance of impropriety. Id.

[55] R. pp. 24-27 (citations omitted.)

the lower court found in favor of Preston as to Appellant's fourth, fifth, and sixth causes of action.

Appellant now reduces the factual bases for its fourth, fifth, and sixth claims to the Thompson and R. Wilson allegations. As discussed above, regarding Thompson and R. Wilson, Appellant "failed to introduce any evidence linking the alleged improprieties to Preston's Severance Agreement." (R. p. 25.) "Moreover, to the extent duties of disclosure existed, the impacted *elected officials* possessed positive legal duties to disclose any issues implicating ethical matters." (Id.)[56] But, in any event, Appellant "failed to prove such disclosures were material to the outcome, as Plaintiff has not shown such disclosures, even if made, would have changed the votes of McAbee, Greer, and Floyd." (Id.) Indeed, as found by the lower court, "the evidence of record supports an opposite conclusion." (Id.) Appellant fails to address any of the lower court's findings in this regard.

Moreover, by November 18, 2008, the Court found "Preston did not possess a duty to disclose information about his employment claims to County Council." (R. p. 25.) "It [was] clear to [the lower court] that by October and November of 2008, Preston and County Council had assumed positions adverse to each other." (Id.) By that time, Preston

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[56] The lower court also found: "[T]he County's [argument] improperly attempts to convert factual knowledge into knowledge of a 'legal conclusion.'" (R. p. 19.) "Misrepresentations as to matters of law cannot support claims for constructive fraud or fraud." (Id. at FN39 (citation omitted.) Moreover, "the County presented no evidence showing Preston knew Thompson's and Wilson's votes warranted disqualification due to legal constraints." (Id.) With respect to such matters, the Anderson County Code "expressly confers such duty, first on the individual Council member, and then if doubts persist, on the County Attorney." (Id.) "Simultaneously, the County seeks to transfer a duty conferred to the County Attorney on Preston under factual circumstances where Preston was represented by counsel and openly adverse to the County." (Id.)

had already sued two Council members individually, asserting claims for injunctive relief, payment of costs, and attorney's fees. (See, e.g., R. pp. 2640-2647.)

Preston had further employed personal counsel to advance a claim of anticipatory breach of his employment contract by Council and the Council-elect. (See, e.g., R. pp. 2029-2032.) Preston had likewise given notice of tort claims he intended to bring against individual Council members and Council-elect. (Id.) By this time, the County and the individual Council members each had retained their own attorneys to protect their interests.[57] "It [was, therefore," clear to [the lower Court], that at that time, the Parties were in adversarial positions...concerning the continued employment of Joey Preston." (Id.)

As to the Schaum issues, the Court found "the Services Contract was a public file and Preston had no duty to inform Council of public information." (R. pp. 1-43, see, e.g., S.C. CODE ANN. § 30-4-40(a)(5)(A).) "It had been widely known that Schaum had a Services Contract with the County long before Preston asserted any claims against the County." (Id.) "Schaum's relationship with R. Wilson was likewise known." (Id.) "No evidence proved the Services Contract's renewal was in any way material or related to County Council's decision to approve Preston's Severance Agreement." (Id.) "The evidence further failed to prove [the 2008 County Council] would not have approved the Severance Agreement, regardless. (Id.) Indeed, the lower court found the evidence of

[57] The lower court further explained that—during the material time period—"Preston was a claimant against certain Council members and Council itself." (R. pp. 25-26.) As a result, the lower court found: "Preston did not owe County Council a duty to furnish information adverse to his claim: when both parties had employed attorneys, when both parties were preparing for litigation, and when the affected Council members themselves possessed positive legal duties to disclose the ethics issues cited by Plaintiff."(R. pp. 25-26.)

record proved otherwise. (Id.; see also R. pp. 1243, lines 16-20; 1268, lines 20-23.) Appellant has not challenged any of the lower court's findings in this regard.

As a result, the lower court correctly found in favor of Preston on Appellant's fourth, fifth, and sixth causes of action because: "no fraud, constructive fraud, or negligent misrepresentation arose by virtue of Preston's remaining quiet during the Severance Agreement vote...[and] the Severance Agreement was not the product of fraud nor was it an abuse of power." (R. p. 27.) Accordingly, this Court should affirm the lower court.

VI. APPELLANT FAILED TO TIMELY RAISE ITS OTHERWISE LEGALLY AND FACTUALLY INCORRECT QUORUM ARGUMENT

According to Appellant, the lower court erred because the disqualification of Waldrep's and C. Wilson's votes deprived the County of a quorum ("Quorum Argument"). (See App. Brief, pp. 47-50.)[58] Appellant's Quorum Argument fails due to the following reasons:

[58] Appellant errantly states: "Anderson County challenged only three votes cast for the Severance Package. No other votes were challenged in the pleadings." (App. Brief, p. 47.) Not so. Ignored by Appellant, the lower court found both the County's Complaint and Preston's Answer required the trial court to analyze the votes of all Council members. (R. pp. 6 & FN4; 133, ¶35; 59-60 & FN29-35.) As the lower court also found, "The disqualification of Waldrep's and C. Wilson's votes do not even implicate a true affirmative defense, but rather form part of Plaintiff's *prima facie* proof of the claims Appellant alleged in seeking to invalidate Council's action." (R. p. 59.) Finally, Appellant never interposed a challenge to the lower court's finding where it held: "The Parties otherwise tried the issue of disqualifying Waldrep's and C. Wilson's votes pursuant to Rule 15(b), SCRCP...The court allowed the evidence at trial and addressed the same on page 6 of its Order.") (Id.) Thus, the County errs by suggesting the issue was not adequately raised at trial because it clearly was.

A. **Having Never Raised the Issue at Trial, Appellant Waived the Quorum Issue**

First, as the lower court correctly found, the County failed to preserve the quorum issue "as the issue was never presented to the Court" during trial. (R. pp. 44-49; 58.)[59] Instead, Appellant impermissibly raised the issue—for the first time in its Motion to Reconsider—*after* evidence closed and *after* the lower court spent nearly five (5) months authoring its final order. (R. p. 58 & FN30-32.)

It is axiomatic: "A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial." MailSource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct.App. 2003). Here, during the trial phase, the disqualification of Waldrep's and C. Wilson's votes arose *inter alia*: during Waldrep's cross-examination (see R. pp. 419, line 422, line 4), during Preston's directed verdict motion (see R. p. 1351, lines 13-21 ("[T]he Court should discount both the votes of Cindy Wilson and Bob Waldrep"), and in both Parties' closings (see R. pp. 3068-3069 *with* Preston's Closing, 3125-3126 & 3152.)[60] Moreover, as the trial court

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[59] The lower court also noted, "At trial, Plaintiff actually argued the exact opposite position concerning the votes of Waldrep and C. Wilson instead contending such votes were properly cast." (R. p. 44.)

[60] The lower court correctly distinguished between the issue concerning the disqualification of C. Wilson's and Waldrep's votes under ethics provisions with the issue of whether a quorum existed. While related, the issues are legally and factually distinct involving different provisions of Anderson County's Code and different factual inquiries. (R. pp. 48-49 & FN8.) Thus, the two issues are not the same. If Appellant desired to raise the latter, it had ample opportunity to do so but for tactical reasons it did not. (See *infra*.)

found, "the evidence of record reflects the issue had arisen and was factually developed during the discovery phase." (R. p. 60, FN35.)[61]

Appellant implausibly suggests it lacked an opportunity to raise the quorum issue –until after the lower court entered judgment and it filed its Reconsideration Motion. Not so. During trial, what the County *did* was to pursue a discrepant legal and factual theory than what it advances on appeal. (R. p. 45.) As discussed above, the issue of

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[61] The County also off-handedly implies the general release contained in the Severance Agreement did not disqualify C. Wilson and Waldrep because: the release generally released *all* Council members (see App. Brief p. 47), C. Wilson and Waldrep voted against the Severance Agreement (see App. Brief p. 48, FN13), and the pending claims against C. Wilson and Waldrep were in their *official capacities*, not their individual capacities (Id.). The County both misstates and omits material facts supporting the lower court's ruling. First, the lower court specifically addressed all the issues now rehashed by Appellant without addressing the trial court's actual findings. The Court explained that the pending lawsuit and specific claims asserted against C. Wilson and Waldrep conferred upon them a greater benefit than that of the general Anderson County public in violation of Anderson County Code §2-37(g)(4). (R. p. 11, FN6.) The County just pretends as if the lower court never ruled upon the issue. Second, contrary to the County's brief (see App. Brief, p. 47), C. Wilson and Waldrep *were* named in their individual capacities, not their official capacities in the lawsuit of Preston v. Waldrep & C. Wilson, 2008-CP-04-2776. (See R. p. 10 ("C. Wilson and Waldrep were named, in their individual capacities.); 2640-2647 (caption identifying suit brought against C. Wilson and Waldrep in their "individual capacities"); 1679, lines 20-22 (C. Wilson testifying: Q. "And what capacity did Mr. Preston sue you? A. In our individual capacities.")) Appellant also ignores that the lower court found Preston, at the time of the Severance Agreement vote, had furnished formal notice of an intention to pursue "tort claims...against...C. Wilson and Waldrep." (R. pp. 10; 2026-2028 ("[T]here also exist a number of causes of action which Mr. Preston will assert against two current Council members..."); 1679, line 11-p. 1680, line 22, C. Wilson (It was clear Pl. Ex. 22 – R. pp. 2026-2028 - referred to C. Wilson and Waldrep.); 419, line 12-21 (Waldrep confirming Pl. Ex. 22 – R. pp. 2026-2028 - refers to him and C. Wilson.) Contrary to the County's statements, the Severance Agreement did release Waldrep and C. Wilson of personal liability and the pending lawsuit was dropped shortly thereafter. Finally, the County also failed to reference the lower court's rejection of its arguments concerning Waldrep's and C. Wilson's voting against their interests. (Compare R. p. 12 (Finding Waldrep's and C. Wilson's votes violated County Code and noting "No exception exists based upon how a Council member votes.") *with* App. Brief, p. 48 (FN 13: C. Wilson and Waldrep voted against the Severance Agreement.)

disqualifying Waldrep's and C. Wilson's votes clearly arose at trial. Appellant made a tactical decision not to raise the quorum issue but instead argued Waldrep and C. Wilson had no conflict of interest. (See, e.g., R. pp. 3068-3069.)

After having litigated and lost, the County sought a legal mulligan by way of a Rule 59(e) Motion—or alternatively—through a contemporaneous, post-trial Motion to Amend.[62] (R. pp. 44-49; 58-59.) However, as the trial court found and as Appellant does not challenge, allowing Appellant to interject the quorum argument after judgment would highly prejudice Preston.[63]

A. Appellant's Quorum Argument Fails Under the Anderson County Code, the County's Own Prior Usage, and State Law

Altogether ignored by Appellant and thus conceded, the lower court made detailed findings why Appellant's quorum argument otherwise fails. (Compare App. Brief *with* 11/08/2013 Order, R. pp. 46-49 & 58, FN29 *with* App. Brief, pp. 47-50.) The trial court first quoted language from the decision of Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998), which Appellant had omitted in its filing below and *again* tellingly omits in its brief to this Court. (R. p. 47, FN2 ("The County's Motion omitted the following operative language

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[62] Appellant's filing of the post-judgment motion to amend tacitly underscores that the County knows its choice in legal strategy waived the quorum issue foreclosing the ability to raise it in a Reconsideration Order.

[63] Unchallenged by Appellant, Preston incorporates herein by reference all of the factual findings of prejudice made by the lower court, which Appellant does not challenge. (R. pp. 45-46, 58 & FN29.)

from Garris...) *with* App. Brief, p. 49.)[64] The omitted language from the Garris decision stated:

> **In the absence of any statutory or other controlling provision**, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum.

Garris, 333 S.C. at 453 (emphasis added). In turn, as is common with local government bodies, the lower court noted a series of "statutory" and "controlling provisions" modifying application of the common law rule as pertaining to boards in general. Thus, applying the twice omitted language from Garris to facts at bar sinks Appellant's quorum argument, as it well knows.

First, as the trial court found, the Anderson County Code itself establishes what constitutes a quorum based upon presence at the meeting site, not voting eligibility. (R. pp. 46-47.) For example, Anderson County Code §2-37(d) states: "Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum." ACC § 2-37(d).[65] Thus, the trial court correctly concluded

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[64] The County's Brief cites a series of cases to support the common law proposition that "an interested director or committeeman cannot be counted in order to make up a quorum." (See App. Brief, pp. 48-51. The County simply ignores the lower court's actual ruling wherein it examined various statutory or other controlling provisions altering the common law default, as referenced by the omitted language from Garris. (R. pp. 46-49.) Importantly, re-tooling common law quorum formulations is the norm, not the exception, at the local government level due to council sizes and the necessity to make public decisions. As explained *infra*, the trial court found positive law, controlling provisions (*i.e.*, the Anderson County Code, FOIA, and the State Ethics Act) existed with respect to defining a quorum of Anderson County Council rendering the decisions cited by Plaintiff inapposite.

[65] The provision also states: "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." (Id.) Thus, it is clear the provision uses physical presence at the voting site as the touchstone for determining a quorum.

that consistent with the other provisions cited below, the only instances wherein the Anderson County Code contemplates the loss of a quorum relate to the physical absence of members, not their voting qualification or recusal issues.[66]

Second, as to Preston's Severance Agreement, the County Code did not require a majority of Council to vote on the issue for the vote to be valid, but rather simply a majority of those present and voting to carry the question. (R. p. 47 & FN4.) Anderson County Code §2-37(g) states: "[A] majority vote of those members present and voting shall decide all questions, motions, and other votes." ACC §2-37(g)(3). As the trial court correctly found, the inclusion of this less onerous voting formula evidences an intent to permit governmental action on a vote less than a *majority of a quorum*, a formulation the Anderson County Code elsewhere uses for other types of Council action. See, e.g., ACC §2-36 ("All elections shall be by majority vote of the quorum present.").

Third, Appellant's *own* prior interpretation and usage of the Anderson County Code mirrors the lower court's findings. For example, during a meeting on August 19, 2009, substantially the same facts as those *sub judice* arose. After analyzing the Anderson County Code, the County Attorney opined--on the record--that the Anderson County Code required *only* the *physical* presence of a majority of Council to establish a quorum. (R. p. 47 & FN5; http://www.andersoncountysc.org/Content/Council/Minutes /OCR/cc08182009.pdf (pp. 13, lines 29-43, p. 17, line-20, line 37 (Council "ratifying" conduct); R. pp. 32-33, bullet point 5; R. p. 57, FN 28; 3296, lines 33-40; Id. at lines 33-

[66] See also Rainey v. Haley, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (Discussing the canon of construction *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius*).

36) (County Attorney: "Under the County Code it...requires a majority of the council members to be present for there to be a quorum.")

The County Attorney specifically concluded that two members, who had already recused themselves, could physically return to Council Chambers so as to re-establish a quorum but refrain from voting. (Id. at lines 38-40) ("Mr. Waldrep and Mr. Moore could certainly still be present and...we would have quorum of council at that point...") Notwithstanding those members' disqualification from voting, then, their *physical presence* permitted them, under the Anderson County Code, to be counted for purposes of a quorum. (*Id.* at lines 40-41.)[67] Indeed, this was Appellant's prior interpretation and usage of its own Code—at least until the case at bar prompted Appellant to about-face and argue the exact opposite.

However, Appellant's interpretation and usage of its Code cannot just blow hot and cold, depending on the most convenient legal position at any given time. This is because Anderson County Code §2-37(g)(12) mandates the interpretation of the County's Code "**shall** be guided by the previous usage of county council..." ACC §2-37(g)(12) (emphasis added).[68] As a result, the lower court correctly rejected Appellant's newly minted quorum argument for yet another reason—it violated the prior usage mandate of the Anderson County Code.

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[67] Although Appellant spent four pages of its brief discussing its Quorum Argument, it never disclosed that its urged position contradicts the County's prior usage under its own Code. (App. Brief, pp. 47-51.) Appellant made the same omission below. (R. pp. 3177-3244.)

[68] See also ACC § 1-2 (Defining the term shall: "The word "shall" is mandatory.")

Finally, the Anderson County Code expressly incorporated the Freedom of Information Act ("FOIA") and the State Ethics Act into its meeting procedures. Both FOIA and the State Ethics Act define quorum without reference to voting disqualification. (Compare ACC §2-37(d) ("A quorum shall consist of a majority of the council"), ACC § 2-37(a) ("County council will conduct its meetings in accordance with the South Carolina Freedom of Information Act, as amended, and the state ethics laws, as amended, and the requirements of those acts and laws, as amended, shall apply to all notices, agenda, minutes, and other aspects of such meetings."); ACC § 2-676 (Mandating compliance with FOIA); ACC §2-352 ("[S]hall comply with the provisions of the South Carolina Freedom of Information Act") *with* S.C. CODE ANN. § 30-4-20(e) ("'Quorum' unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body."); see also South Carolina Ethics Opinion, SEC AO98-002 (Nov. 19, 1997) (Analyzing substantially similar facts and concluding: "[D]isqualification under the Ethics Reform Act **does not affect the existence of a quorum**.")(emphasis added); Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 500, 685 S.E.2d 600 (2009) (South Carolina courts accord substantial deference to the State Ethics Commission's interpretation of its own enabling legislation.) For the foregoing reasons, the lower court correctly rejected Appellant's Quorum Argument.[69]

[69] The County argues in a footnote that the Circuit Court erred in denying Appellant's Motion to Amend. (App. Brief, p. 50, FN15.) Having never raised this issue to the trial court in a Motion to Reconsider the Order denying its Motion to Amend, Appellant failed to preserve the issue for appeal. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 780–81 (2004). Second, Appellant fails to challenge any of the analysis contained in the lower court's order denying its Motion to Amend. Preston incorporates all such unanswered analysis herein by reference. (R. pp. 44-49.) Third, the lower court

VII. APPELLANT SEEKS A REMEDY FOR CONSTRUCTIVE TRUST WHEN THE EVIDENCE FAILED TO SUPPORT THE CLAIM

Appellant next argues the Circuit Court erred by foreclosing a remedy for a claim the County never proved. (App. Brief, pp. 51-52.) According to Appellant, the trial court erred by finding the County could not seize Preston's retirement benefits through a constructive trust theory.[70] Appellant's analysis lacks merit.

First, and as noted by the South Carolina Retirement System's ("SCRS") Brief (see SCRS Brief, pp. 8-9), the SCRS anti-alienation provision broadly exempts a member's retirements benefits from garnishment, attachment, or other legal process, with extremely limited exceptions. (See S.C. CODE ANN. § 9-1-1680.) Here, as the County concedes, the only possible exception applicable to the case *sub judice* arises under "the doctrine of constructive trust *ex maleficio*," which mirrors Appellant's tenth cause of action. (See App. Brief, pp. 51-52.)

As to Appellant's constructive trust claim, the lower court found Appellant failed to establish a constructive trust by "clear, definite, and unequivocal" evidence. (5/3/2013 Order, p. 30; 11/08/2013 Order, pp. 31-32) (citing Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559 (1987).) The trial court correctly found that fraud constituted an "essential element" to establish a constructive trust. (Id.) With respect to the same, the trial court

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also denied Appellant's Motion to Amend under Rule 15(b), SCRCP, which also are not challenged by Appellant and cannot be upset on appeal.

[70]Preston incorporates by reference his prior discussion regarding Appellant's failure to prove its case and the lower court's findings pertaining to the same. (See *supra*.)

wrote, "The County failed to introduce any evidence establishing fraud let alone by "clear, definite, unequivocal, and satisfactory evidence." (Id.)[71]

Appellant's Brief never challenges and, therefore, concedes the lower court's ruling regarding Appellant's failure to prove its constructive trust claim. Instead, Appellant argues: "The Circuit Court erred in holding that [SCRS] funds are not available to a court fashioning a remedy in equity." (App. Brief, p. 51.) Appellant's argument fails in internal logic because it leap-frogs the trial court's actual findings concerning the County's failure to prove its constructive trust claim in order to challenge the general legal availability of a remedy for a claim Appellant failed to prove. (App. Brief, pp. 51-52.) If allowed, Appellant's analysis would wag the dog by the argument's tail.

Second, Appellant simply misstates the lower court's ruling about imposing a constructive trust over SCRS-held retirement monies. The Court did not address if and when an equitable court had the power to re-direct SCRS retirement funds. (R. pp. 30; 74-75.) The issue proved moot because Appellant never proved the claim. (Id.)

Third, even if Appellant had proved its constructive trust claim, which it did not, the remedy advanced by the County still fails. Appellant ignores a crucial fact: the vast majority of Preston's retirement benefits have nothing to do with the instant dispute and do not even arguably fall within the exceptions to the anti-alienation statute. (R. p. 251, ¶¶4 & 5.) Yet, the County would have this court illegally redirect Preston's retirement funds. (App. Brief, p. 52.) Moreover, as SCRS points out, the funds "the County

[71] The lower court cited Singleton v. Mullins Lumber Co., 234 S.C. 330, 350-351, 108 S.E.2d 414, 424 (1959); see also Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979)(Evidence must leave "no reasonable doubt as to the existence of the trust."); McNair v. Rainsford, 330 S.C. 332, 357, 499 S.E.2d 488, 501 (Ct. App. 1998)

initially sought to recover from SCRS in its complaint have now been entirely" paid to Preston as "retirement benefits." (SCRS Brief, p. 6.) Finally, as SCRS correctly notes, the relief the County now urges—on appeal--was never even pled by the County. (See SCRS Brief, pp. 5-6; R. p. 139, ¶¶82-83.) Accordingly, this Court should affirm the trial court's ruling in favor of Preston.

VIII. THE LOWER COURT CORRECTLY FOUND RESCISSION UNAVAILABLE AS A REMEDY.

The lower court correctly ruled the County could not invoke rescission as a remedy for two reasons: (A) the Court could not restore the Parties to their prior subject positions (see R. pp. 29-31; 75-77) and (B) due to the County's unclean hands, Appellant could not invoke the lower court's equitable powers (see R. pp. 31-35; 57-58.). [72] Both findings prove correct.

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

Appellant once again claims "error" but ignores the lower court's actual rulings. In its final judgment, the lower court correctly found: "In order to invoke its equitable powers to rescind a contract, and in the absence of fraud, the Court must be able to return the parties to their *status quo* before the contract's formation." (R. p. 30 (citing King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct.App. 1984); Rice and Santos, Inc. v. Jones, 279 S.C. 201, 305 S.E.2d 74 (1983). The lower court further found the County

[72] *Nothing* required Appellant to assert only equitable claims. Appellant chose to do so in order to deprive Preston of an insurance defense and coverage.

failed to prove any species of fraud whether actual, constructive, or otherwise. (R. pp. 24-27.)[73]

Never explaining why the lower court erred, the County simply rehashes the errant analysis from its Reconsideration Motion wherein Appellant contended the lower court failed to address the availability of rescission due to "Preston's own culpability." (R. p. 3174.) Yet, the trial court expressly held: "[T]he Court rejects the County's premise, as it failed to prove any of its claims and, thus, failed to prove the 'culpability' it directs at Preston. The Court, therefore, rejects the County's twelfth ground as it again errantly assumes a conclusion it failed to prove." (R. p. 75.) Appellant nonetheless seeks reversal of the lower court arguing the Oxford Court did not really mean "fraud" when it said "fraud" and further urging this Court to disregard controlling precedent by allowing rescission—despite an irreversible change of circumstances—so long as one party utters the word "fraud" despite altogether lacking any proof.[74]

Appellant misstates South Carolina precedent only to misdirect the Appellate Court to the law of other jurisdictions, which it then misstates.[75] Appellant argues the

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[73] Preston notes that the lower court also found that, "[A]n adequate remedy at law...exist[ed]. Generally, in South Carolina, 'equitable relief is unnecessary when an adequate remedy...is available at law." (R. p. 35 (citations omitted).) Appellant never challenged this finding and it is now the law of the case.

[74] Appellant recycles (now for a third time) the same argument never bothering to explain how or why the lower court's factual findings prove incorrect. (App. Brief, pp. 52-55.) Appellant improperly asks the Court to substitute its own weighing of the evidence over the that of an experienced trial judge who presided over the instant case for years.

[75] Appellant misstates the authority cited in its brief. (App. Brief, pp. 53-54.) First, Appellant cites Admiral Ins. Co. v. Am. Nat'l Sav. Bank, F.S.B., 918 F.Supp. 150, 156 (D. Md. 1996). The Admiral decision analyzes a restitution claim for funds mistakenly paid under an insurance contract where the parties agreed no coverage actually existed. The Court examined whether under Maryland law the Bank had established change of

Circuit Court "misplaced" its reliance on King v. Oxford. (App. Brief, p. 53.) Specifically, according to Appellant, the Oxford Court did not really mean what it held when it wrote: "In the absence of fraud which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the *status quo* prior to the contract." Id. Apparently, when citing the King decision in 2009, the South Carolina Supreme Court likewise did not mean to restate the identical holding in Brazell v. Windsor, 384 S.C. 512, 517 (2009)("In the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract.") Appellant conspicuously omitted the Brazell decision when attributing error to the lower court's holding.[76]

Appellant again cites the decision of Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 452 (4th Cir. 2004) but again ignores the lower court's analysis regarding Griggs. As the lower court explained, Griggs was an ERISA case and had no "bearing on

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circumstances, not for purposes of rescinding a contract, but for purposes of whether repayment was required. The Court found the defense had not been properly pled and that the Bank had not actually changed its circumstances so as to support the defense. Id. Appellant then cites Sokolow, Dunaud, Mercadier & Carrerras LLP v. Lacher, 747 N.Y.S.2d 441, 447 (N.Y. App. Div. 2002). Unlike the Admiral decision, Sokolow *did* involve a rescission claim. The Sokolow Court found summary judgment should not have been granted because the case involved a fraudulent inducement, which if proven at trial, might justify rescission of the Agreement notwithstanding SDMC's change of position. Id. In addition, also omitted by Appellant, the Sokolow opinion relied upon the decision of Butler v. Prentiss, 158 N.Y. 49, 64 (N.Y. 1899) which held: "When, without fault on the part of the one defrauded, seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied." (Id.) Thus, the opinions cited by Appellant accord with the lower court's ruling and not Appellant's arguments.

[76] The fraud, misrepresentation, concealment and imposition reference different species of fraud. Appellant's argument makes a distinction without a difference.

South Carolina law." (Id. at 33.) Moreover, Griggs actually supports the trial court's ruling as it confirms rescission is generally disallowed unless the parties can be restored to their prior positions. (Id.) *(citing* DAN B. DOBBS, HANDBOOK ON REMEDIES § 9.4 at 622 (West 1973) ("The general rule . . . is that the adult plaintiff must make restoration of what he got under the contract in order to get rescission, and his inability to do so will not excuse such restoration. In such a case, he may be permitted to recover damages, but rescission will be barred by his inability to make restoration to the defendant.")).[77]

Third, the Griggs decision states: "rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief." Id. Yet, precisely for the reasons stated in the May 3, 2013 Order on pages 30 and 31, rescission (even if Plaintiff had proved its non-fraud based claims) cannot be granted in this case in a manner that does equity to both parties.[78]

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[77] Appellant cannot reconcile its argument with the South Carolina precedent requiring parties seeking to invalidate a settlement agreement or release to tender the consideration of whatever has been received under such compromise. See, e.g., Taylor v. Palmetto State Life Ins. Co., 196 S.C. 195, 12 S.E.2d 708, 710 (1940); Dunaway v. United Ins. Co. of Am., 293 S.C. 407, 410, 123 S.E.2d 353, 354 (1962) (same); Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 749 (D.S.C. 2001); Adams v. Moore Bus. Forms, Inc., 224 F.3d 324, 331 (4th Cir. 2000). Furthermore, Appellant is required to affirm the entire settlement agreement or rescind it in its entirety. 28 S.C. JUR. *Fraud* § 17; First Equity Inv. Corp. v. United Serv. Corp. of Anderson, 299 S.C. 491, 497, 386 S.E.2d 245, 249 (1989) ("A defrauded party is not allowed to rescind in part and affirm in part – he must do one or the other."). Here, Appellant never tendered Preston his position back to him. Indeed, Appellant admits it cannot. (App. Brief, p. 54.) Yet, the County seeks to undo the Severance Agreement--in part--while retaining all of the benefits inuring to its favor. By contrast, South Carolina law firmly supports the lower court's ruling.

[78] Appellant does not contest any of the lower court's factual findings as to why the Parties cannot be returned to their prior positions, which Preston incorporates herein by reference. (R. pp. 30-31.)

Nor has Appellant ever explained how rescission could occur and do equity to both parties.[79]

Finally, Appellant repeats rescission as appropriate due to the public nature of the contract. The County cites no South Carolina authority supporting its assertion that a Court in equity should place a County's contracts on unequal footing with those of private citizens. In its brief and below, the County cited the inapposite decision of Thompson v. City of Atlantic City, 921 A.2d 427 (N.J. 2007), bottomed on unique aspects of New Jersey law, for the proposition that rescission is the proper remedy when "a public act has been taken improperly." [80] (App. Brief, p. 56.) As noted *supra* and incorporated herein, however, the lower court found—for a wide number of reasons (yet again ignored by Appellant)—the Baird decision controlled. (See R. pp. 12-14; see also *supra.*) As a result, this Court should affirm the lower court.[81]

B. Appellant's Unclean Hands Barred Anderson County From Invoking the Equitable Remedy of Rescission

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[79] Appellant also challenges the lower court's observation that Appellant could have filed a declaratory judgment action, which would have avoided the problematic approach of solely seeking rescission in a case where the pursuit of such relief would prove improper. (R. pp. 34-35; see also App. Brief, p. 56.) As the lower court held, S.C. CODE ANN. §15-53-20 authorizes South Carolina courts to grant "further relief" based upon a judicial declaration "whenever necessary or proper." (R. p. 77.) Yet, Appellant elected to pursue rescission as a remedy only to complain about the constraints accompanying the sole remedy it chose.

[80] The Thompson decision involved unique issues under New Jersey's Faulkner Act, which have no application to the case at bar or under South Carolina law. Id. at 42.

[81] The County disingenuously suggests that Preston's retirement funds can be taken so as to support rescission as a remedy. (See App. Brief, p. 54.) As discussed above, such a result would violate South Carolina law. See *supra.*

Without ever addressing the lower court's findings, Appellant questions whether the lower court's unclean hands analysis properly distinguished Anderson County from its Council members. (See, e.g., R. p. 3165.) But, as the lower court found, pages 32-34 of its May 3, 2013 Order contained eight bullet points setting forth the factual basis supporting the unclean hands finding. (R. p. 57.) By contrast, bullet point nine listed actions the lower court did not find as properly attributable to Appellant. Id. Appellant never contests the accuracy of any of the factual findings made by the lower court.[82] Nor does Anderson County explain how the lower court erred in attributing the conduct outlined in bullet points one through eight to Appellant.

Moreover, in relation to Bullet Point 5 in the lower court's May 3, 2013 Order, Appellant expressly ratified the improper conduct in Anderson County Council Resolution 2009-63. (See R. pp. 3180; 57 FN. 28 (Finding: "Notably, Bullet Point 5 discusses improper conduct expressly ratified by Anderson County in ACC Resolution 2009-63.") The lower court found sitting County Council members, C. Wilson and Bob Waldrep, "intentionally thwarted [and]...interfered with [Preston's] ability to do his job..." (R. p. 33 (citing R. pp. 2460-2647, ¶¶27 & 29 and 1686, line 5-1687, line 8 (C. Wilson suggesting Ex. 50 constituted judicial misconduct.).) And, the lower court correctly found Anderson County expressly ratified the conduct.[83]

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[82] Preston incorporates herein by reference all of the factual findings made by the lower court in support of the unclean hands findings—none of which Appellant challenges on appeal. (R. pp. 32-34.)

[83] See R. pp. 32-33, bullet point 5; R. p. 57, FN 28; 3296, lines 33-40; Id. at lines 33-36) (County Attorney: "Under the County Code it...requires a majority of the council members to be present for there to be a quorum."); http://www.andersoncountysc.org/Content/Council/Minutes/OCR/cc08182009.pdf (pp. 13, lines 29-43, p. 17, line-20, line 37 (Council "ratifying" conduct); see also R. pp. 3300-

The County's brief advances no effort to deny the stark underhandedness of certain of its Council members, all while acting in concert with Council-elect. As noted by the Florida Supreme Court, governmental entities, like Anderson County, must abide by the same equitable contours as private citizens: "If we say with Mr. Justice Holmes, 'men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens.'" Daniell v. Sherrill, 48 So.2d 736, 739 (Fla. 1950). In this instance, the lower court correctly held Anderson County to a like standard of rectangular rectitude. This Court should affirm.

IX. APPELLANT BREACHED PRESTON'S SEVERANCE AGREEMENT

The lower court correctly found the lawsuit brought against Preston violated the unambiguous terms of Paragraph Eight of the Severance Agreement. (R. pp. 35; 1987, ¶8.) Appellant now improperly challenges this finding for the first time on appeal, as it appears nowhere in Anderson County's Motion for Reconsideration. (R. pp. 3163-3176.) As a result, the lower court's finding in this regard cannot be challenged by the County. See I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716 (2000).

3303 publishing Resolution 2009-63: "This is a resolution authorizing and ratifying payment of legal expenses incurred by Bob Waldrep..." and "Waldrep incurred those legal fees in defending" a lawsuit challenging the "actions taken by Mr. Waldrep and Ms. Wilson as member of council." (emphasis added.) To clarify, Preston sued Wilson and Waldrep individually for intentional acts of misconduct which Judge Nicholson found to interfere with his job duties in violation of Home Rule. In an effort to justify paying Waldrep's legal fees on the 'public dime,' the County passed Resolution 2009-63, *after* public monies had already been expended to pay Waldrep's legal expenses. Nonetheless, the County is simply being disingenuous if it means to suggest that it did not formally ratify C. Wilson and Waldrep's misconduct from the fall of 2008.

The lower court nonetheless did not err in finding the County breached the Severance Agreement. According to the County, the instant lawsuit merely attacks the Severance Agreement, not Preston's actions while County Administrator.[84] Not so. The lower court expressly rejected this contention. (R. p. 36.)[85] The lower court found: "It is clear the County based the instant lawsuit upon actions taken by Preston while performing his job as Administrator."[86] (Id.) The lower court also ruled that: "[S]everal of [Appellant's] causes of action attempt, albeit unsuccessfully, to invoke Preston's employment as a predicate to stating a claim."[87] (Id.) Appellant never challenged any of these factual findings below and indeed does not challenge them on appeal.[88]

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[84] While the County generally raised issues concerning Preston's breach of contract counterclaim in its closing, see R. p. 3142, Appellant never challenged the lower court's factual findings and legal analysis from the May 3, 2013 Order. (See R. pp. 3163-3176.) The lower court's legal analysis and factual findings were detailed and thorough. Yet, Appellant has never before suggested such findings erred.

[85] It is plain that Anderson County never had any intention of simply challenging the Severance Agreement's validity. For three (3) years, the County conducted unending discovery into and introduced evidence at trial that had nothing to do with the Severance Agreement. The entire objective of the lawsuit was to publicly embarrass Preston and his family including his children.

[86] See R. p. 36 (citing R. pp. 129-130, ¶¶12, 13, & 17 (Preston's attempted hiring of Thompson); Id. at 131-132, ¶¶25-28 (renewing Services Contract with R. Wilson's daughter); Id. at 132-133, ¶¶30-33 (challenging temporally remote travel reimbursements of McAbee); Id. at 129, ¶¶11(a)-(c) (Preston's supposed "back-dating" of Jones' employment memos, which were shown as not back-dating at all.)

[87] See R. p. 36 (citing Am. Compl., Fifth Cause of Action (Constructive Fraud); Sixth Cause of Action (Negligent Misrepresentation); Seventh Cause of Action (Breach of Fiduciary Duty); Ninth Cause of Action (Breach of Fiduciary Duty on other grounds.)

[88] Appellant attempts to cite the testimony of Attorney Tom Bright to establish the intent of the provision. (See App. Brief, p. 57 (citing R. p. 472).) First, such testimony constitutes improper parol evidence since the County never challenged the Court's finding that the covenant to sue was unambiguous. Second, the County omits Bright's

Moreover, the lower court cited numerous decisions holding "that obvious breaches of covenants not to sue support the award of damages in the amount of attorney's fees incurred as a result of the breach." (R. p. 37.)[89] The County never challenged any of the authority cited by the lower court below, nor does it do so now.[90] Appellant further ignores the lower court's analysis of this Court's decision in Benedict College v. National Credit Systems, Inc. v. Ford, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012), which stands for the proposition that attorney's fees "can form an element of recoverable damages—if—as in this case, they flow from the complained of wrong." (R.

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testimony where he testified the intent of the provision was "a no fault divorce" and the Parties were not "gonna have anything to do with each other." (R. p. 473, lines 1-4.)

[89] Specifically, the lower court cited cases from eight other jurisdictions which Appellant simply ignores and Preston incorporates herein by reference. (R. p. 37 (for case citations). Appellant never moved to reconsider the lower court's reliance on any of the authority cited in its May 3, 2013 Order. Nor does the County presently provide any analysis why the cases cited by the lower court prove inapplicable.

[90] Appellant does cite two inapposite cases. First, Appellant cites the decision of Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp, 358 F.2d 1007, 1016 (D.C. Cir. 1985). Unlike here, Winchester involved an oral covenant not to sue and its validity was challenged under the California Statute of Frauds. Moreover, in Winchester, the parties disputed whether construction of the oral covenant not to sue extended to one or two disputes. Contrary to Appellant's arguments, the Winchester Court noted: "[A]ttorney fees necessarily incurred in defense of suit are a proper item of damages." Id. at 436. Thus, in Winchester, the Parties had a *bona fide* dispute over the breadth of the covenant not to sue and whether it embraced the specific lawsuit before the Court. Here, the covenant not to sue unambiguously embraces all conduct during Preston's employment, which the County clearly integrated into its claims for rescission. Second, Appellant cites the decision of Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1016 (D.C. Cir. 1985). Anderson County misstates the holding of Schneider, a decision that actually supports the lower court's ruling. Id. at 1016 ("A settlement agreement is, of course, a contract... and litigation in defiance of a promise not to sue could constitute a breach. But no such situation presents itself here. The August 4 Settlement Agreement contains no explicit covenant not to sue.")

p. 38.) Appellant likewise never challenged this analysis and continues to ignore the same on appeal.

As with all of the County's arguments, Appellant assumes the conclusion—a conclusion it never proved. Appellant argues: "Even if this Court were to conclude the Severance Agreement should not be rescinded, the Circuit Court's holding that the County's challenge violated that Agreement should be reversed...[because] the circumstances of the Severance Agreement's passage were extraordinary..." (App. Brief, p. 58.) Yet, Appellant failed to prove any of its eleven causes of action supporting rescission of the Severance Agreement. No legitimate basis existed to pursue the instant lawsuit and—after hearing all of the evidence and weighing the credibility of all the witnesses—the lower court correctly found Appellant's lawsuit breached the covenant not to sue in the Severance Agreement.[91]

Appellant also improperly asks this Court to issue an advisory opinion on whether attorney's fees prove available pursuant to S.C. CODE ANN. § 15-77-300. Anderson County never raised this issue in its Motion to Reconsider. (R. pp. 3163-3176.) Moreover, the lower court has not yet ruled on the availability of attorney's fees under the statute. (R. p. 40.) Advisory opinions are disallowed and the Court should refuse such a request. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975).

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[91] The lower court also correctly found: "The covenant not to sue does not...contain an exception to challenge the actions taken by Preston while County Administrator, so long as those challenges are raised in contesting the Severance Agreement's validity... To hold otherwise would render the provision meaningless." (R. p. 37.)

CONCLUSION

For the reasons set forth above, this Court should affirm the lower court's final judgment.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

Lane W. Davis
SC Bar No. 68796
E-Mail: lane.davis@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Candy M. Kern-Fuller
Upstate Law Group, LLC
SC Bar No. 011392
200 E. Main St.
Easley, S.C. 29640
(864)-855-3114

Attorney for Joey R. Preston

Greenville, South Carolina

October 7, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

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Anderson County, ... Appellant,

v.

Joey Preston and the South Carolina Retirement System, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

Lane W. Davis
SC Bar No. 68796
E-Mail: lane.davis@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Candy M. Kern-Fuller
Upstate Law Group, LLC
SC Bar No. 011392
200 E. Main St.
Easley, S.C. 29640
(864)-855-3114

Attorneys for Joey R. Preston

Greenville, South Carolina

October 7, 2014

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PROOF OF SERVICE

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

Pleadings:

Final Brief of Respondent Joey Preston

Counsel Served:

J. Theodore Gentry
Troy A. Tessier
Alice W.W. Parham
Wade S. Kolb II
WYCHE, PA
44 East Camperdown Way
Greenville, SC 29601

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

Lane W. Davis

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