THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2013-002499

Anderson County ..... Appellant,

vs.

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

REPLY BRIEF OF APPELLANT ANDERSON COUNTY

J. Theodore Gentry (No. 64038)
Troy A. Tessier (No. 13354)
Wade S. Kolb III (No. 100379)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: tgentry@wyche.com; ttessier@wyche.com; wkolb@wyche.com

Alice W. Parham Casey (No. 13459)
WYCHE, P.A.
801 Gervais Street, Suite B
Columbia, SC 29201
Telephone: 803-2254-6542
Telecopier: 803-254-6544
E-Mail: tcasey@wyche.com

ATTORNEYS FOR APPELLANT ANDERSON COUNTY

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I. The Record Is Clear, and It Leads Ineluctably to the Conclusion That the Severance Package Should Be Rescinded

In one of its final acts, the outgoing Anderson County Council introduced, purported to debate, passed, reconsidered, and passed again a $1.1 million severance agreement for Joey Preston. The debate did not touch on either the substance of the Severance Agreement or the merits of approving it. Instead, proponents of the Severance Package engaged in a highly orchestrated series of parliamentary maneuvers designed to insulate the Package from public scrutiny or later reconsideration. (R. pp. 1918-1959; p. 1983)

The Package's terms were arbitrary and unjustifiable. The Package purported to be offered in settlement of Preston's claim of "anticipatory breach" of his Employment Agreement. But the actions that constituted this supposed anticipatory breach were not actions of Anderson County at all. Instead, Preston's attorney cited to ***expected future*** actions of the incoming majority of Council – a group which had no authority to act or speak for Anderson County at the time of the vote. (R. pp. 1914-1915)

Beyond this, the Severance Package paid Preston more than he could have recovered, even if his Employment Agreement had been breached. Preston's attorney's reference to unspecified tort claims against certain individuals was not sufficient to justify paying Preston more than the severance provided in his Employment Agreement. It is also a continuation of Preston's theme – still being sounded to this Court – of trying to confuse actions and statements of individuals with actual official actions and positions of Anderson County. Preston's friends on County Council paid him what they wanted to, because they wanted to – not on the basis of an evaluation of actual legal responsibility ***of the County.***

Besides being substantively indefensible, the Severance Package was procedurally corrupt. The debate was run by a Chair who was actively courting Preston for employment. And the Severance Package was negotiated and sponsored by the Chair of the Personnel Committee, whose daughter's consulting firm had just received from Preston an inexplicable and substantial enhancement to its contract with Anderson County. It is also indisputable that Preston was aware of the facts that made those votes improper. Yet he – while still serving as County Administrator – sat silently by while those votes were cast in favor of a $1.1 million benefit for him.

All of the foregoing is established on the record. Accordingly, this case presents a clear question: May a public official retain a severance package, paid with public funds: (i) whose value substantially exceeds the severance provided by contract; (ii) when there was no breach that would justify any severance at all; (iii) where the vote was choreographed and run by officials who should not have voted or participated at all; and (iv) where the beneficiary, himself a non-elected official of the County, sat silently with the knowledge the vote was improper.

Despite finding two of the votes in favor of the Severance Package were tainted and improperly cast, the Circuit Court concluded that that there was nothing wrong with any of this, that the courts are powerless to address this circumstance, and that Anderson County breached Preston's Severance Package by even questioning its validity in Court. This was error. This Court – which is reviewing both the facts and the law *de novo* and thus is not bound by any aspect of the decision below – should rescind this improper bargain.

II. Preston's Anticipatory Breach Claim Was a Legal Impossibility, and It Would Not Support Damages of $1.1 Million

A. The "Council-Elect" Could Not Breach Preston's Agreement

The entire premise for Preston's Severance Agreement was that Preston had a valid claim for "anticipatory breach" of his Employment Agreement that justified settlement. Without that cornerstone, the entire $1.1 million edifice crumbles. That cornerstone was at all times completely fictional. The demand letter written on Preston's behalf admits as much when it acknowledged that his claim was based on what "newly elected Council Members intend, after January 2009." (R. p. 1914) Indeed, Preston's own brief makes this same admission, revealing the core fallacy of Preston's argument. Preston's brief argues that "the issue of whether to suspend and dismiss Preston had already been made [*sic*] by ***Council-elect*** without giving Preston the right to present evidence at a fair and impartial hearing before the entire 2009 Council." (Resp. Br. pp. 31-32 and 33; emphasis added) That is, Preston relies for his anticipatory breach claim on predicted future actions of persons not yet in office. Political rhetoric is one thing; genuine acts by a political body are another. Those not yet in office cannot speak or act for the County; a "Council-elect" is not a political entity. There was no anticipatory breach of Preston's Employment Agreement, because his friends remained in control. When they undertook to pay him for what they predicted the next Council might do, they acted capriciously.

Respondent invites this Court to join the trial court in combing through all of the slights and insults directed at Preston by anonymous citizens and Councilmembers-elect. But none of this will support an anticipatory breach claim, because Preston's Employment Agreement was with Anderson County, and only Anderson County could anticipatorily breach that contract. *See* RESTATEMENT (SECOND) CONTRACTS § 250 (1981) ("a

repudiation is a statement ***by the obligor to the obligee*** indicating that the obligor will commit a breach" (emphasis added)). And Anderson County did not breach.

It may be that Preston faced – and might continue to face – political opposition. That comes with a political position, and it can be unpleasant. But avoiding unpleasantness is not a sound basis for paying a public official a settlement. (Preston's brief admits on page 1 that this was the true motivation, stating the Package was approved "in hopes that the divisiveness surrounding [Preston] would abate." Resp. Br. p. 1) It was capricious to give Preston a golden parachute to allow him to avoid the forecast unpleasantness. Preston was free to resign if he did not want to face further political scrutiny and opposition. But he was not entitled to a million-dollar payout that included a lifetime pension, on the basis of an impossible legal theory. The Severance Package was a political exit strategy, not a settlement of a valid legal claim.

B. The Total Value of the Package Is Unjustifiable

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

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[1] This Court has recently reiterated that a county council cannot enter into an employment contract that extends beyond the term of that council; under this principle, the severance agreement in Preston's Employment Agreement was invalid. *See Cunningham v. Anderson County,* 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013).

It is clear that the $1.1 million paid to Preston far exceeded the severance amount in his Employment Agreement. Again, Preston's own demand letter acknowledges this. (R. pp. 2026-2028) Clear testimony at trial reiterated this point. (E.g., R. pp. 356-357; pp. 453-456; pp. 999-1002; p. 1270; pp. 1287-1292) In particular, the Package provided for a lump sum payment to the Retirement System of over $350,000 – an amount calculated to purchase a State pension for Preston at the age of 45.

Preston's justifications for this largesse fail under scrutiny. First, he argues that the threat in the demand letter that Preston might assert other unspecified tort claims against certain individual Council members means that his potential recovery was not capped by the severance provision in his Employment Agreement. This contention is incorrect for several reasons. First and most simply, the threat was wholly unspecific. Nothing in the letter would have allowed County Council to place any value on these purported claims. Yet the County paid Preston over $350,000 to secure for him a benefit worth ***at least*** $984,131 (the excess value of the Severance Agreement over the severance amount in his Employment Agreement) for these claimed torts. (R. p. 1289) If Preston's demand letter had sought only a tort recovery, without specifying any torts, a settlement with him would have been capricious on its face. Attempting to justify paying him an enhancement to his severance for exactly the same claim – though paired with an equally meritless claim for anticipatory breach – is equally capricious.

The second reason Preston's purported tort claims would not support an enhancement of his severance was that he had already sued the two Council members in question – Bob Waldrep and Cindy Wilson – for every purported wrong they had done to him, in a lawsuit hereinafter referred to as "*Preston v. Waldrep*". (R. pp. 968-978 (Preston asserted all claims he knew of in that lawsuit); pp. 2170-2226) Preston, and the Circuit

Court, reasoned that *Preston v. Waldrep* meant that Waldrep and Cindy Wilson should not have voted on the Severance Package because it contained a release of particular benefit to them, because of that pending lawsuit. Without conceding that argument, the filing of *Preston v. Waldrep* also meant that Preston had ***already*** sued on the facts underlying his tort claims, and so could not assert them a second time.

Finally, it is noteworthy that *Preston v. Waldrep* did not seek damages – and it certainly did not seek damages against Anderson County. Preston sued only the two individual Council members, and Preston admitted that he filed the lawsuit with the County Council's blessing and approval. (R. pp. 968, 973; pp. 2162-2169) Here again, the unspecific nature of the claim and the facts surrounding the initiation of the lawsuit of *Preston v. Waldrep* – all well known to County Council, which approved that very lawsuit – made it impossible for the County Council to conclude that ***the County*** had six-figure liability for the alleged acts of two individual Council members.

Preston also points to the testimony that Tom Bright, legal counsel retained by the County to deal with Preston, stated that the "worst-case scenario" was that the cost of litigation could exceed the settlement amount. (R. pp. 462-463) This one statement cannot be yanked from the entire context of the legal advice provided by Tom Bright, and used to justify an otherwise arbitrary settlement. Mr. Bright also testified that he advised that Preston's claim did not have substantial merit. (R. pp. 458-460, 462-463, 471-472, 477-479) He also testified that it was clear to him that Ron Wilson and others directing Mr. Bright had decided to settle with Preston regardless of the merits, and to "try and get the best deal you can." (R. pp. 464-465) This direction is consistent with a decision to give Preston a political gift, and not with reasoned stewardship of County funds. Thus, if Mr.

Bright's opinion is to be invoked to measure the reasonableness of the Severance Package, then the Severance Package falls short.

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

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

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

The capricious nature of the vote to give Preston a $1.1 million severance is cemented by the nature of the Council proceeding. Only by viewing the videotape of the debate can the Court gain a full appreciation for the absence of actual deliberation, and the clear evidence of choreography. Anderson County described in its opening brief how every step of the process was plainly planned in advance. Chair Michael Thompson knew whom to recognize to keep the process moving. Council member Bill McAbee was visibly

proud of his maneuvers to end debate and to reconsider the just-passed approval, so that it could not be brought up again later. (R. pp. 1940-1945, 1950-1953; p. 1983) Almost comically, Council member Gracie Floyd at one point reminded her colleagues to make a motion for reconsideration. (R. p. 1949, lines 2-3; p. 1983) Similarly, Council member Larry Greer had already determined what budget line items could be shifted to pay the Severance Package. (R. p. 1946; p. 1983; pp. 1990-1992; p. 2044; pp. 2047-2048) And Council member Floyd somehow, conveniently, had with her a proposed employment agreement for Preston's successor as County Administrator. (R. p. 1953, lines 12-35; p. 1983)

It is also important, though, to point out what is missing from this debate. There was no discussion of the propriety of the settlement amount. There was no discussion of the merits of Preston's legal claim. There was no discussion of the value of Preston's contractual severance. The only justification offered on the floor was Ron Wilson's statement that the County was in a "detrimental situation" and he would like to "get beyond this and move on." (R. pp. 1941-1942) But as we have already pointed out, buying political peace for or from Preston, by paying him to take a full retirement, was neither an appropriate nor a reasonable use of public money. Preston's brief offers no defense of this parliamentary travesty, nor could it.

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

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[2] The Circuit Court applied, and Preston's Brief argues for, a "fairly debatable" standard that they find in *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1995). *Bear Enterprises* involved a challenge to a zoning decision. Observing that zoning was inherently a "legislative matter" and that courts have "no power" to zone

III. The Improper Participation and Votes of the Severance Package's Primary Proponents Render It Void

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

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

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

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

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property, the *Bear Enterprises* court looked only to other zoning cases for the "fairly debatable" standard. *See id.* at 140-41, 459 S.E.2d at 885-86. Accordingly, Anderson County believes that *Moody* provides the applicable standard. However, use of the "fairly debatable" standard would not yield a different result. Whether or not Anderson County could justifiably pay $1.1 million for a nonexistent claim, and one that would in any event be capped at a considerably lower figure, is not "fairly debatable." And, as a purely factual matter, the videotape reveals that there was no "fair debate."

before the vote, and about a week after Preston's October 23 demand letter – Preston signed a consulting contract with Ron Wilson's daughter's consulting company. (R. pp. 2158-2161) That company was already under contract with the County (R. pp. 2149-2152), and the revised agreement was on its face indefensibly favorable to the company. It raised the hourly rate, provided for an annual increase in rates, created a definite term, and gave the right to "liquidated damages" if the contract were terminated. All of these increases were given to a company with no other consulting jobs at the time.[3] (R. p. 1750) The conclusion that Preston acted to curry favor with Ron Wilson is inescapable.

Preston's primary response to this clear skullduggery is to insist that it is inconsequential because both Ron Wilson and his daughter testified that she never mentioned the contract upgrade to Councilman Wilson. This argument does not save Ron Wilson's vote on the Severance Package, for several reasons. First, Preston's own brief to this Court argues strenuously that Wilson's daughter's contract was a matter of public record and thus that knowledge of it was imputable to County Council. (Resp. Br. p. 39) If this is so, then knowledge of the contract was imputable to Ron Wilson as well, and the idea that his improper vote was "innocent" evaporates. Ron Wilson lacked innocence in another respect as well. When subpoenaed to testify in this case, he invoked his Fifth Amendment right to avoid incriminating himself, and he declined to testify.[4] (R. pp. 685-687) This only strengthens the conclusion that Ron Wilson and his daughter were not credible when they claimed he was unaware of the windfall brought her by Joey Preston.

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[3] Preston's attempts to defend the Schaum contract are meritless. How she performed under her initial contract is irrelevant, as her contract was in no way on a trial basis, but to the extent her performance is considered at all, it is dramatically overstated by Preston. (*See, e.g.*, R. pp. 1731, 1733, 1763-1769, 1774-1780)

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

In addition, Preston admits that he invested around $200,000 in Ron Wilson's Atlantic Bullion Ponzi scheme in 2009, using money he received from the Severance Package. (R. pp. 1861-1862) Preston also admits he sent other investors to Wilson's business and was compensated for such referrals. (R. p. 1862) From his $200,000 investment, Preston admits he received at least $600,000 from Atlantic Bullion. (R. pp. 1862-1863) Such investments and referrals benefited Ron Wilson. It is rational to infer that Preston was close enough to Wilson and had communicated with him about such investments at or around the time of the Severance Package. Further, the point here is that Preston himself was aware of the facts that made Ron Wilson's vote improper, and that is the knowledge that mattered.

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

B. On the Particular Facts of This Case, One Bad Vote Is One Too Many

While the Circuit Court agreed with Anderson County that the Thompson and Ron Wilson votes were improper, that court held that this did not matter. This was error. This case falls within a substantial body of law, applied by numerous courts, recognizing that in certain circumstances a single tainted vote is enough to justify rescission of a political act, even where the margin of passage was more than a single vote. The Circuit Court held this line of cases is inconsistent with *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69

(1999). This line of cases was not presented or considered in *Baird*, and *Baird* does not prevent applying this line of cases where, as here, it plainly applies.

Courts have applied the one-tainted-vote rule where a vote is on a benefit for a single individual, rather than a law of general application; where there is less procedural rigor and formality (a simple motion rather than an ordinance); where there are procedural irregularities that render the entire process suspect; where the conflicts of interest are known and kept hidden; where those in key positions in the body have a conflict; and where the action is insulated from the political process. (*See* App. Br. pp. 37-42)

This case does not present only one or two of these circumstances – any one of which could be sufficient to apply the one-tainted-vote rule. Instead, it possesses all of them. The Package was for the benefit of Preston alone, not the public at large. It was passed on a simple motion, not as an ordinance that would require multiple readings. The process by which the Package was introduced, swiftly debated, voted on, reconsidered, and passed again rendered the entire process suspect. Each of Preston and Thompson and Ron Wilson knew, or should have known, of the conflicts. The process was run, overseen, and heavily influenced by the two Councilmen with clear conflicts of interest. And the surprise introduction of the motion (it was added to the agenda moments before it was voted on (R. pp. 1940-1941; p. 1983)) and the process of reconsideration prevented public debate or comment and served to insulate the decision from normal political redress.

Anderson County is not advocating for a general rule that one bad vote would be sufficient to undo legislative acts. But a narrowly tailored rule, drawing on this body of authority, makes sense for circumstances like this one. When the political process has been distorted by interest, affinity, and cynical maneuvering, the courts cannot be helpless to provide a tailored remedy. What is at issue here is ***not*** a carefully considered piece of

general legislation. Instead, this is a hastily passed sweetheart deal for a single individual, whose proponents did everything in their power to shield it from public scrutiny or debate. This deal is not due the same kind of deference that is due a true legislative act.

Baird is not to the contrary. In reciting the "general" rule that a court may "invalidate an ***ordinance***" if "the requisite number of votes to pass the ordinance would not exist but for the improper vote," 333 S.C. at 77-78, 511 S.E.2d at 535 (emphasis added), the Supreme Court said nothing about other circumstances that would justify invalidation. The Court did not consider such an argument. And *Baird* did not present the circumstances present here, that justify application of the one-tainted-vote rule. *Baird* involved an ordinance, requiring multiple readings, that would lead to a law of general application. There is no evidence in the opinion of any procedural irregularities, any attempt to hide conflicts of interest, or impropriety on the part of persons with special influence over the vote. Beyond all this, *Baird* involved a one-vote margin – which means that the one-tainted-vote rule and the margin-of-victory rule merge as a practical matter.

In short, *Baird* is a very different case from this one in every important respect. And because the issue simply is not addressed, *Baird* does not preclude adoption of the one-tainted-vote rule. *See, e.g.*, *Hutto v. Southern Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'"). The decision below, and Preston's argument, overread *Baird* and extend it far beyond the bounds of what it actually decided.

Preston likewise overreads the holdings of *Bear Enterprises* and *Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 691 S.E.2d 453 (2010). Neither of those cases suggests that a court is compelled to stay its hand in the face of capriciousness

and corruption for the sake of deference to the decision making of other branches of government. In *Bear Enterprises* a property owner upset with a county council's refusal to rezone his property brought suit against the County. The property owner at no time suggested improprieties or corruption or conflicts of interest led to the council's decision; he just did not agree with that decision. *See* 319 S.C. at 141-42, 459 S.E.2d at 886. Similarly, in *Segars-Andrews*, a family court judge dissatisfied with a decision of the Judicial Merit Selection Commission foreclosing her candidacy for re-election challenged the legality of the Commission under the South Carolina Constitution. Again, there were no allegations of bad faith or public corruption in the Commission's decision making, and the Court's observation that it would "not intervene in . . . political determinations" came in the context of rejecting the judge's contention that the Commission violated judicial independence. 387 S.C. at 130, 691 S.E.2d at 464.

Relying on inapposite cases, Preston does not contest the County's key point – that numerous courts throughout the country have recognized and applied the one-tainted-vote rule in situations like this. Indeed, most of these courts applied the rule on the basis of only one or two factors, not the entire laundry list present here. The decisions in *Baird*, *Segars-Andrews*, and *Bear Enterprises* are not an obstacle to adoption of such a rule.

There is a second reason one bad vote is enough to invalidate the Package. Because of the highly orchestrated set of steps by which the Severance Package was passed and insulated from further review by reconsideration, the Package was passed by a series of related votes, not just one. Preston's allies intentionally carried out a series of steps on the road to final approval. This resolve to shield their work from later revision had an unintended consequence: the entire series of votes was an integral part of the plan and final approval, and that series of votes included a motion to end debate that carried by only a

single vote. (R. p. 1951, line 10-p. 1953, line 9; p. 1983) Thus, even under a margin-of-victory analysis, the vote for the Package was invalid.

Preston's Brief, in one of its extended footnotes, resists this conclusion by citation to authorities holding that rulings on parliamentary procedure are not subject to appeal. (Resp. Br. p. 28 n.40) This misses the point. The County is not asking for reversal of a ruling from the Chair that a particular motion was out of order; ***that*** would be a question of parliamentary procedure. Instead, the County points out that the chain of votes that led to approval of the Severance Package – a chain specifically designed to protect the Package from scrutiny – contained a vote by Council that passed by one vote. Ultimate approval of the Package was dependent on that vote, and without it the final approval becomes void.

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

Preston knew Michael Thompson was actively courting him for a job. Preston also knew that he had signed a substantial enrichment of Ron Wilson's daughter's contract with the County while Ron Wilson was overseeing negotiation of Preston's Severance Package. Yet, as Councilmen Thompson and Wilson prepared to vote on that Package, Preston sat silent. Because he was still an employee of the County at that moment, he owed the County a fiduciary duty, and so was obligated to speak up to point out those disqualifying facts. His failure to do so means that the Severance Package was colored by breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation.

Preston's suggestion that this high duty disappeared because Preston had asserted a claim against the County goes too far. While Preston could certainly negotiate regarding his own claim in his own interest, he retained his other obligations to the County.

Preston also incorrectly argues that his clear factual knowledge of these improprieties was insufficient to trigger his obligation to speak. First, as a legal matter, a

defendant's duty does not arise only if he knows that he is committing fraud or another breach of duty. Instead, the obligation to speak – or to avoid misrepresentation – springs from the combination of a fiduciary relationship and factual knowledge. *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other ***all known information that is significant and material***, and when this duty to disclose is triggered, silence may constitute fraud." (emphasis added)). Preston knew of his improper dealings with Thompson and with Wilson's daughter, and like any person of common understanding knew that those circumstances could affect their votes. This gave rise to his duty to speak.

Preston finally suggests that the outcome of the vote would have been the same even if the interest of those two key players had been publicly announced, and that the County has therefore not proved the necessary elements of its claims for fraud, constructive fraud, and negligent misrepresentation. Preston is wrong on both the facts and the law. As for the facts, Ron Wilson had the only copy of the Agreement and announced he was the only Council member to have seen it. Thompson was the Chair. Without their crucial participation, the Agreement could not even have been introduced. By allowing Thompson and Wilson to participate, Preston's silence caused passage of the Package.

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

attending the transaction . . . ."). The burden upon the County, in other words, is to show the materiality of the information Preston concealed, and materiality is clear here.

Importantly too, in discussing the element of causation in a fraud claim, the Restatement makes clear that a misrepresentation need not be "the sole or even the predominant or decisive factor" in influencing a plaintiff's conduct, nor is it necessary for a plaintiff to show that he "would not have acted or refrained from acting as he did unless he had relied on the misrepresentation." RESTATEMENT (SECOND) OF TORTS § 546 cmt. (b). Instead, the inquiry is whether the representation "played a substantial part, and so has been a substantial factor, in influencing [the plaintiff's] decision." *Id.*

Without question, the roles that Councilmen Thompson and Wilson played in passing the Severance Package, and their votes, were a "substantial factor" in the Council making the decision it did. That is enough to support the County's claims of breach of duty, fraud, constructive fraud, and negligent misrepresentation.

V. When the Circuit Court Reached Out to Invalidate Other, Unchallenged Votes, It Injected a New Issue in the Case and Destroyed the Quorum for the Vote on the Severance Package

Anderson County's Complaint alleged improprieties with respect to only three Council members – Thompson, Ron Wilson, and McAbee. (R. pp. 129-133) Anderson County offered proof and made arguments for impropriety only concerning those three. Despite this, the Circuit Court reached out on its own to invalidate two other votes – those of Bob Waldrep and Cindy Wilson, who opposed the Severance Package. This extraordinary action by the Circuit Court created an extraordinary situation in this case – when the Circuit Court issued its opinion, for the first time in the case there was a prospect of disqualification of four votes, with the effect of destroying the County Council's quorum and thus voiding approval of the Severance Agreement.

The Circuit Court's conclusion that these votes were challenged in the pleadings is not sound. The statement that Anderson County "challenges the entire process of passing the Severance Agreement, not just particular votes," (R. p. 6) is entirely conclusory and incorrect. In fact, Anderson County did challenge only "particular votes." The assertion that Preston's Ninth Affirmative Defense – which simply asserts that some or all of the County's claims are barred by the holding in *Baird* – served to challenge those votes is also visibly incorrect. In short, the Cindy Wilson and Bob Waldrep votes became an issue only when the Court made them an issue in its written opinion.

Anderson County's response to that turn of events has been proper. Once the issue was injected for the first time, Anderson County – while maintaining that the Waldrep and Cindy Wilson votes were in fact proper – noted in a motion to alter or amend the judgment that if four votes were improper, then no quorum was present and the Severance Package was void. This was the earliest point at which this argument could be made, and the motion to alter or amend was the proper vehicle for doing so.[5] *See* J. TOAL, S. VAFAI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA at 60 (2d ed. 2002) (post-trial motion is appropriate vehicle to address relief not requested or inconsistencies in final order). In addition, because these votes had never been challenged in the pleadings, Anderson County moved to amend its Complaint to address the issue. Again, this motion was timely because the issue did not previously exist.[6]

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[5] Preston argued to the Court that the Waldrep and Cindy Wilson votes should be invalidated (R. pp. 1351-1353), and both the Court itself and Anderson County made note of the fact that this had not been pled. (R. pp. 1377-1379, 1382-1383) When pressed on this theory, Preston's counsel could not point to any pleadings to support it, but simply pressed the argument, effectively urging the Court to reach beyond the pleadings to make this ruling (R. pp. 1389-1394), and cannot now complain about the ramifications of that action.

[6] Preston's statement that Anderson County's appeal on of the denial of its motion to

If this Court agrees that four improper votes were cast, it is inescapable that a quorum was not present, and that the Severance Package is void. The law is clear: Section 2-37(d) of the Anderson County Code requires four members to constitute a quorum, and South Carolina law holds that a member of a body who cannot participate because of a conflict is not counted toward the quorum. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238, 153 S.E. 141 (1930); *see generally* App. Br. pp. 48-49; *see also* 56 AM. JUR. 2D *Municipal Corporations, Etc.* § 143 ("While a law on conflict of interest may leave quorum requirements undisturbed, recused members are not counted in determining the presence of a quorum, and action taken when, as a result, a quorum is not present, is invalid.").

Preston's arguments that disqualification of four votes would not destroy a quorum are without merit.[7] First, Anderson County did not omit operative language from *Garris v. Governing Bd. of South Carolina Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998), because there is no "statutory or other controlling provision" that answers the question of what to do when a quorum has been removed by disqualifications. Preston's claim that the Anderson County Code "establishes what constitutes a quorum based upon

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amend is not preserved because the County did not file a motion to reconsider, Resp. Br. p. 47 n.68, is obviously incorrect. A motion to reconsider is not required, where the issue to be appealed has been ruled on. *See* discussion *infra* p. 24.

[7] Preston suggests that Anderson County "conceded" the Circuit Court's decision on this point. This is incorrect, as Anderson County plainly argued in its opening brief that the disqualification of four votes means a quorum was destroyed. This preserves this issue. Preston's position dramatically overreads what is required in this regard. Findings of fact that fall within the scope of the issues raised on appeal are preserved for review. *Cf. Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (noting that findings of fact and law in an administrative hearing are law of the case "unless within the scope of the appellant's exception . . . and its notice to the respondent"). In addition, even where an issue is not "specifically set out" in the statement of issues on appeal, an appellate court may nevertheless consider the issue if it is "reasonably clear" from the appellant's arguments. TOAL, *supra*, at 75. Especially in an equitable action like this one, where review is *de novo*, Preston's contention that the County has "conceded" any unchallenged sentence in the Circuit Court's opinion is plainly incorrect.

presence at the meeting site, not voting eligibility," Resp. Br. p. 44, is a pure misstatement. Section 2-37(d) says in relevant part that "a quorum shall consist of a majority of the council." It does not tie this to presence. And while § 2-37(d) does address what happens when members leave and thereby destroy the quorum, it is silent on what happens when they are disqualified. The County Code provides no guidance on this point.

Preston's next argument – that § 2-37(g) eviscerates the quorum requirement by allowing action by a majority of those present, without regard to the presence of a quorum – is self-evidently wrong. The two provisions must be read together; Council can act only when there is a quorum.

Preston's contention that the County is now somehow estopped from arguing that disqualified members do not count toward a quorum is wrong. A single ruling, "on the fly," by a County Attorney is not a binding usage. Even the language of the County Code cited by Preston says only that the County should be "guided" by prior usage – not bound.

Preston's reliance on FOIA is also misplaced. FOIA has nothing to say about what constitutes a quorum of County Council ***for purposes of conducting business***, nor about whether a member disqualified for bias counts toward that quorum. FOIA is concerned only with whether a meeting must be open to the public. A meeting might be open to the public under FOIA, yet at the same time it could lack the quorum required take a given action under the law governing that body. FOIA neither expressly nor impliedly preempts a county from determining what constitutes a quorum necessary to take action.

Preston's reliance on an opinion of the South Carolina Ethics Commission is also unavailing. That advisory opinion is not binding authority, but the Supreme Court's decisions in *Fidelity Fire* and the other cases cited in our opening brief are. Second, the Ethics Commission failed even to mention these binding Supreme Court decisions. Third,

the Commission's decision is in conflict with other administrative decisions, which recognize and follow the *Fidelity Fire* line of cases. *See, e.g.* 1975 S.C. Op. Att'y Gen. No. 4018 (April 14, 1975). The law is clear. If four votes were improper, the Package is void.

VI. Imposition of a Constructive Trust on the Excess Pension Payments Generated by the Severance Package Is an Appropriate Part of the Remedy in This Case

As discussed above, the clearest extracontractual excess in the Severance Package was the payment of over $350,000 to the South Carolina Retirement System ("SCRS") to allow Preston to begin drawing a full pension at age 45. At trial, Anderson County presented unrebutted expert testimony that, along with the unrebutted testimony from SCRS, demonstrates how the excess payments that Preston stands to receive from January 1, 2009 through the day he turns 60 (the amount of which will total approximately $1,333,000) could be redirected from Preston to the County as part of a remedy upon rescission of the Severance Package. (R. pp. 251-252 at ¶¶ 5-11; pp.253-255 at ¶¶ 5-7, 11-14; pp. 2671-2681; p. 1290) This can be accomplished without harming SCRS. As the affidavits submitted by SCRS demonstrate (R. pp. 249-263), the lump sum payment from the Severance Package allowed Preston to receive payments he would not have received otherwise before age 60, and also increased his prospective benefits after that time. In its brief, SCRS expresses concern that any remedy not harm the retirement fund by making it worse off than it would have been had the Package never been adopted. The County recognizes this concern, and its proposed remedy of imposing a constructive trust on any future excess payments to Preston (as compared to retirement funds he would have received in the absence of the Severance Package) would satisfy SCRS. SCRS also notes that, under the combined requirements of S.C. Code Ann. § 9-1-1680 and *Briggs v. Richardson*, 288 S.C. 537, 539, 343 S.E.2d 653, 654 (Ct. App. 1986), a constructive trust

may be imposed on retirement benefits if Preston holds those retirement benefits "by fraud, actual or constructive, by duress or abuse of confidence, by ***commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience***." *Id.* (emphasis added). This standard is broader than Preston's contention that a constructive trust requires "fraud," and the facts of this case satisfy it.

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

VII. Rescission Is the Correct Response to a Void Public Act

In arguing rescission is not available, Preston continues his efforts to conflate the conduct of individuals with the conduct of Anderson County. This Court should reject this sleight of hand. Just as Anderson County did not do any act that anticipatorily breached Preston's Employment Agreement, the County also did nothing that would constitute unclean hands and thus bar an equitable remedy. While Preston invokes the "eight bullet points" relied on by the Circuit Court as evidence of unclean hands, the Circuit Court's own description of those actions undermines this argument. The Circuit Court stated that "[e]ach bullet point outlines conduct involving either ***sitting County Council members acting alone*** or in ***concert with Council-elect***." (R. p. 57; emphases added) Actions of Council members "acting alone" and actions of the "Council-elect" are not actions of

Anderson County. Nothing in the record supports a finding of any action constituting unclean hands on the part of ***the County itself***.[8]

Nor, for the reasons set forth in our opening brief, is Preston shielded from equity because some of the money paid to him has already been spent. Because of Preston's own fault in this matter, the change-of-circumstances defense is not available to him. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007); *see generally* 17B C.J.S. *Contracts* § 652. The perceptive court in *Atlantic City* recognized this principle. 921 A.2d at 442 ("We are not persuaded . . . that equity demands that they should keep their settlement monies because they have already spent them . . . . [W]e conclude that the only appropriate remedy to vindicate the public trust is the immediate restoration of the funds to the City.").

Beyond all this, it is clear that where a public act was improper, the courts have the power to rescind it. *See Baird*, 333 S.C. at 535, 511 S.E.2d at 77-78 (recognizing in the absence of "direct authority" preventing a court from invalidating a bond ordinance based on a violation of the state ethics act that a court has jurisdiction to do so); *Atlantic City*, 921 A.2d at 441-42 ("strong remedies must be employed to deter improper conduct by public officials" (internal quotation marks omitted)). Because of the public nature of the

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[8] Preston tries to avoid this problem by arguing that a post-Preston resolution that approved of the payment of legal expenses for Bob Waldrep constituted ratification of particular conduct. Given that this resolution occurred long after the transactions at issue here, it can have no bearing on the County's right to equitable relief. Moreover, the point of the ordinance did was ratify payment of Waldrep's legal fees. It made no finding regarding his conduct.

wrong at issue here, rescission was the appropriate remedy, and it would be error to take the crabbed view of the Court's equitable power to fashion a remedy that Preston urges.[9]

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

Preston's lead-off contention that Anderson County may not appeal the Circuit Court's ruling that this lawsuit breached Preston's Severance Agreement, because the County did not address this in its Motion to Alter or Amend the Judgment, is plainly wrong. A motion to reconsider is required to preserve a matter for appeal only where the matter has not been addressed. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial."). The Circuit Court's ruling was in error, but there was no need for a motion for reconsideration.

Preston is equally incorrect in claiming that Anderson County does not contest the Circuit Court's conclusion that this lawsuit was based on Preston's employment and thus fell within the terms of the covenant not to sue. This is addressed expressly at page 58 of our opening brief, and is generally subsumed within the question presented on this point. Here again, and especially in an equitable matter involving *de novo* review, Preston's view of the scope of review is indefensibly narrow. *See supra* note 7. This lawsuit is about the terms of the Severance Package and the manner in which it was approved. Preston has argued vigorously that he owed the County no duties because he was not acting as an

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[9] In an extraordinary footnote, n. 71, that offers no citation, Preston's brief accuses the County of seeking rescission "in order to deprive Preston of an insurance defense and coverage." This is baseless and untrue. Other examples of Preston's reckless attempts to further his case by impugning the County's motives, baselessly, include his footnotes 80 (accusing us of disingenuous argument) and 84 (contending County did not bring lawsuit for purpose of obtaining relief against Preston).

employee with respect to the Severance Package. He cannot now do an about-face and insist that a challenge to the terms of the Severance Package relates to his employment.

More generally, the Severance Agreement's covenant not to sue was intended as a standard reinforcement, common in such documents, that no lawsuit could be brought on claims released by the Severance Agreement. It was not an "incontestability clause," forbidding any question of the validity of the Agreement itself. (R. p. 472) Such a clause would be extraordinary, and such an intent would have to be manifested in very clear language; there is no such language in this clause. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985). And while Anderson County believes that it is clear that the language is not an incontestability clause, if this Court believes the matter is ambiguous it is entitled to rely on the testimony of drafting attorney Tom Bright to conclude no such meaning was intended. (R. p. 472, line 5-p. 473, line 4)

This Court also has authority to address the Circuit Court's stated willingness to entertain a fee petition from Preston on the basis of S.C. Code Ann. § 15-77-300. For all the reasons set forth in the County's briefs, its decision to challenge the extraordinary Severance Package awarded to Preston was "substantially justified," and motivated by "special circumstances." Under the statute, this makes it clear that fees should not be awarded to Preston and this Court, having examined the entire record as it must, can make such a ruling, if solely for the sake of judicial economy.

CONCLUSION

The Severance Package was a collusive political exit strategy, not a reasoned piece of legislation for the public good. The courts have the power to rescind such an act, and to fashion appropriate relief.

Respectfully submitted,

By: J. Theodore Gentry

J. Theodore Gentry (No. 64038)
Troy A. Tessier (No. 13354)
Alice W. Parham Casey (No. 13459)
Wade S. Kolb III (No. 100379)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
864-242-8200

ATTORNEYS FOR APPELLANT ANDERSON COUNTY

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

Appellate Case No.: 2013-002499

Anderson County, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

J. Theodore Gentry (No. 64038)
Troy A. Tessier (No. 13354)
Wade S. Kolb III (No. 100379)
WYCHE, P.A.
44 East Camperdown Way
Greenville, SC 29601
Telephone: 864-242-8200
Telecopier: 864-235-8900
E-Mail: tgentry@wyche.com; ttessier@wyche.com; wkolb@wyche.com

Alice W. Parham Casey (No. 13459)
WYCHE, P.A.
801 Gervais Street, Suite B
Columbia, SC 29201
Telephone: 803-254-6542
Telecopier: 803-254-6544
E-Mail: tcasey@wyche.com

Attorneys for Appellant

October 14, 2014
Greenville, South Carolina