

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
The Honorable J Cordell Maddox, Circuit Judge

Case No 2009-CP-04-4528
Case Tracking Number 2010181306

Richard Freemantle, individually and on behalf of himself and all others similarly
situated, Appellant,

v

Joey Preston, in his official capacities and individually, while the Administrator
of Anderson County, Anderson County, a political subdivision of the State of
South Carolina, Anderson County Council, the legislative and executive body of
Anderson County, Ron Wilson, in his official capacities and individually, Bill
McAbee, in his official capacities and individually, Larry Greer, in his official
capacities and individually, Michael Thompson, in his official capacities and
individually, Grace Floyd, in her official capacities and
individually, Respondents

JOINT FINAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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I Statement of the Issues on Appeal

- 1 Did the trial court properly hold that the Plaintiff lacked standing to pursue the claims asserted against Defendants?
- 2 Did the trial court properly observe that the public importance exception to general standing requirements does not apply to a case where the Plaintiff seeks monetary relief?
- 3 Did the trial court properly find that individual Defendants Wilson, McAbee, Greer, Thompson, and Floyd are entitled to legislative immunity for claims arising out of their actions as Anderson County Council members?
- 4 Did the trial court properly find that Plaintiff's claims are also barred under Rule 12(b)(8) of the South Carolina Rules of Civil Procedure?
- 5 Did the trial court properly hold that Plaintiff's lack of standing on his individual claims precludes him from proceeding with any putative class causes of action?
- 6 Did the trial court properly hold that the Plaintiff failed to comply with the requirements under Rule 15 of the South Carolina Rules of Civil Procedure governing amendment of pleadings?

II Statement of the Case

On November 16, 2009, the Plaintiff (*hereinafter* “Freemantle” or “Plaintiff”) filed a Complaint “on behalf of himself and all others similarly situated” against Defendants, Joey Preston, Ron Wilson, Bill McAbee, Larry Greer, Michael Thompson, and Gracie Floyd, in their official and individual capacities, along with Anderson County Council and Anderson County (*hereinafter* Defendants), seeking money damages and a declaratory judgment regarding a Severance Agreement between Anderson County and former Anderson County Administrator, Defendant Joey Preston. The Plaintiff asserted various causes of action, including, but not limited to, covin and collusion, breach of fiduciary duty, illegal gift of county funds, misfeasance, malfeasance, civil conspiracy, violations of South Carolina Freedom of Information Act (*hereinafter* FOIA), S C Code Ann § 30-4-10, *et seq*, violations of public policy, and purporting to set forth “class action allegations.” (R pp 33-80) Defendant McAbee filed a Motion to Dismiss on December 30, 2009 (R pp 221-22) Anderson County and Anderson County Council filed Motions to Dismiss on January 15, 2010 (R pp 208-13) The remaining Defendants, Preston, Floyd, Greer, Thompson, and Wilson filed Motions to Dismiss on January 19, 2010 (R pp 199-207) Defendants’ motions were made pursuant to Rule 12(b)(6) and 12(b)(8) SCRCF and based upon numerous grounds including that (1) the Plaintiff lacked constitutionally required standing as neither he nor the uncertified class members suffered a particularized injury in fact, (2) Plaintiff’s claim was barred by Rule 12(b)(8) as another case currently pending seeks the same or similar relief and involves the parties in interest, and (3) Defendants were entitled to immunity for their alleged actions. (See R pp 33-80, 221-22, 208-13, 199-207)

The Court was set to hear arguments on Defendants' motions on March 17, 2010. On March 16, 2010, Defendant Preston filed a memorandum in support of Defendants' motions with the Court (S R pp 36-57). That same day, the Plaintiff filed an Amended Complaint with the court, adding a cause of action alleging violations of the federal Racketeer Influenced and Corrupt Organizations Act (*hereinafter* RICO), 18 U S C § 1961 *et seq* (R pp 81-173). On March 17, 2010, a hearing on Defendants' Motions to Dismiss was held in the Anderson County Court of Common Pleas before the Honorable J. Cordell Maddox. Following arguments of counsel, the Court ruled from the bench, dismissing Plaintiff's Complaint upon the grounds he lacked standing to proceed (See R p 278-80). Plaintiff's filing of the Amended Complaint the day prior prompted Defendants to file additional motions to dismiss that addressed the RICO cause of action, which the Court consolidated and heard on September 7, 2010 (See R pp 192-98). Defendants submitted a memorandum in support of the additional motions to dismiss on September 7, 2010 (R pp 296-308). At the September 7th hearing the Court dismissed Plaintiff's RICO claims upon the same grounds as well as upon a finding that Plaintiff failed to comply with the requirements for amending the pleadings as set forth in Rule 15 SCRCP (R p 228), (*See also* S R pp 11-16). On September 28, 2010 the Court signed an Order dismissing Plaintiff's claims contained in the original Complaint (R pp 21-29). On October 15, 2010, Plaintiff filed a Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure challenging the Court's September 28, 2010 Order (R pp 174-82). An Amended Order was entered on November 22, 2010, again dismissing Plaintiff's original claims along with those contained in the Amended Complaint (S R pp 2-19). In the Amended Order the Court held that (1) Plaintiff lacked standing to maintain the action,

(2) the case did not warrant application of the public importance exception, (3) the Plaintiff did not have standing under FOIA as he failed to allege any specific injury directly or proximately caused by Defendants' alleged violation of the statute, (4) Plaintiff's lack of standing precluded him from proceeding with any putative class causes of action, and (5) Rule 12(b)(8) further barred the Plaintiff from pursuing the action. (See S R pp 2-19) On December 9, 2010, prior to the trial Court's consideration of Plaintiff's October 15th Motion for Reconsideration and without filing an amended motion for reconsideration addressing the Court's Amended Order of November 22nd, Plaintiff filed a Notice of Intent to Appeal the Amended Order.

III Statement of the Facts

This action arose as a challenge to the County Council's vote and legislative action in favor of the Severance Agreement between Anderson County and Defendant Joey Preston, Administrator for Anderson County. The Plaintiff alleged that the votes of the Defendant Council Members in favor of the severance agreement violated their fiduciary duties to the County and sought to hold them personally liable. The Plaintiff also named Anderson County Council, Anderson County and Joey Preston and alleged various wrongs on behalf of these Defendants involving the severance agreement. The Plaintiff further alleged that all of the Defendants violated the South Carolina Freedom of Information Act (*hereinafter* FOIA), S C Code Ann § 30-4-10, *et seq* and the federal Racketeer Influenced and Corrupt Organizations Act (*hereinafter* RICO), 18 U S C § 1961 *et seq*. Finally, the Plaintiff alleged that the various actions of each of these Defendants damaged him as "a citizen, resident, taxpayer, and registered elector of Anderson County" and sought money damages and a declaratory judgment voiding the severance agreement between Anderson County Council and Preston.

IV Legal Arguments and Authorities

A Standard of Review

A court's dismissal for lack of standing, and therefore lack of jurisdiction, is a legal ruling that an appellate court reviews *de novo*. *White Tail Park Inc v Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (internal citations omitted). The appellate court reviews a trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure *de novo*. *Doe v Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (In reviewing a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6), the appellate court applies the same standard of review as the court below.) In considering a motion to dismiss a complaint based upon Rule 12(b)(6), "the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* Only if the facts alleged and inferences reasonably deducible therefrom would not entitle plaintiff to any relief on any theory of the case, may a court grant a motion to dismiss pursuant to Rule 12(b)(6). *Id.* "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.*

Likewise, an appellate court reviews the trial court's grant of a motion to dismiss pursuant to Rule 12(b)(8) SCRPC *de novo*. *Capital City Ins. Co. v BP Staff Inc.*, 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009). As this Court recently stated, "[i]n other words, we may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law." *Id.* at 99-100.

B Argument & Authorities

1 The trial court properly held Freemantle lacked standing to maintain the action

Freemantle challenges the Court's¹ holdings as to his lack of standing on brief by arguing that the court erred because (1) this case falls within the public importance exception, (2) the Plaintiff suffered particularized harm as a taxpayer, and (3) the Plaintiff has standing under FOIA to maintain the relief sought for alleged violations of the statute (App Br at 11-15) The trial court did not commit reversible error in dismissing Freemantle's suit The Plaintiff lacks standing to bring suit against any of the Defendants under the causes of action alleged

a Freemantle failed to allege or demonstrate he suffered a particular injury uncommon to the general public

A plaintiff must have standing to maintain an action *Joytime Distrib & Amusement Co Inc v State*, 338 S C 634, 639, 528 S E 2d 647, 649 (1999), *Blandon v Coleman*, 285 S C 472, 475, 330 S E 2d 298, 299 (1985), *See also Brock v Bennett*, 313 S C 513, 443 S E 2d 409 (Ct App 1994) (Standing is a fundamental requirement for instituting an action, and no justiciable controversy is presented unless the plaintiff has standing to maintain the action) Standing may be acquired (1) by statute, (2) through the rubric of "constitutional standing", or (3) under the "public importance" exception *ATC South Inc v Charleston County*, 380 S C 191, 669 S E 2d 337 (2008) In this case Richard Freemantle (*hereinafter* "Plaintiff" or "Freemantle") brought this action in his alleged capacity as "a citizen, resident, taxpayer, and registered elector of Anderson County, South Carolina ' (R p 36) Under the facts and circumstances of the case, none

¹ As an initial note Appellant s Initial Brief consistently asserts that [t]he Respondents have claimed At this point Respondents believe and will respond to the initial brief as if Appellant is referring to the trial court s holdings and findings rather than Respondents with these phrases

of these capacities afford Freemantle adequate standing to maintain the causes of action against the Defendants, and therefore the trial court rightfully held that he failed to establish constitutional standing (S R p 6), *Brock v Bennett*, 313 S C 513, 519, 443 S E 2d 409, 413 (Ct App 1994) (Once is it determined that plaintiff has no standing, the court must dismiss the action)

The principle of standing under the Constitution remains “an essential and unchanging part of the case-or-controversy requirement of Article III *Lujan v Defenders of Wildlife*, 504 U S 555, 560 (1992) In South Carolina “[a] party seeking to establish standing must prove the irreducible constitutional minimum of standing ” *Sloan v Greenville County*, 356 S C 531, 549, 590 S E 2d 338, 348 (Ct App 2003) The United States Supreme Court has established a three-part test for constitutional standing

First, the plaintiff must have suffered an “injury in fact”- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical ’ Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly trace[able] to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court ’ Third, it must be “likely,’ as opposed to merely ‘speculative, that the injury will be ‘redressed by a favorable decision ’

Lujan, 504 U S at 560-61

An individual cannot maintain an action without establishing that they have personally suffered, or will likely suffer an injury that is particular as to them and not one inflicted upon the general public An injury that is common to all does not provide adequate grounds for a plaintiff to maintain suit In fact “[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury,’ and “a

taxpayer lacks standing when he suffers in some indefinite way in common with people generally’ *ATC South Inc v Charleston County*, 380 S C 191, 198, 669 S E 2d 337, 341 (2008), *Florence Morning News Inc v Bldg Comm n of the City & County of Florence*, 265 S C 389, 398, 218 S E 2d 881, 884-85 (1975)(A private citizen cannot test the validity of legislative action unless he or she has sustained or will sustain some prejudice not common to the public from such action)

Freemantle, whether in the capacity of taxpayer, citizen, resident, or elector fails to allege and cannot evidence that he has suffered a particularized injury in fact Under seven of the eleven causes of action Plaintiff has merely stated in a summarily general fashion that as a result of Defendants’ actions “Plaintiff and members of the class have been damaged both actual and punitive [sic], for which damages” some combination of Defendants are liable (R pp 50-54, 56)² Under the remaining causes of action Plaintiff requests “attorneys fees and declaratory relief pursuant to FOIA and/or under the South Carolina Declaratory Judgments Act’ (See R pp 58-61) The alleged injuries or damages Plaintiff claims to have suffered due to the individual Defendants actions are common to the general public and that “commonality defeats the constitutional requirement of a concrete and particularized injury *ATC*, 380 S C at 198, 669 S E 2d at 341 Freemantle and those “similarly situated as the Plaintiff” did not have to pay more taxes as a result of the Defendants actions nor were they otherwise personally encumbered by them If any adverse effects stemmed from Defendants actions, they were borne by the public in general Likewise, any consequences that would flow from a court issuing a declaratory judgment invalidating Preston s employment agreement

² This does not include what could be deemed the 12th cause of action Class Action Allegations under which no particular damage or injury is alleged See R pp 61 62

and/or severance (and requiring the return of those funds), would be felt by Anderson County taxpayers, not only or uniquely Freemantle. Therefore, the trial court correctly found that Plaintiff failed to establish the preliminary and essential element required for constitutional standing.

In his initial brief, Freemantle asserts that the trial court erred in finding “the only harms alleged by the Appellant are general in nature and shared equally by the public at large” and “without a showing of direct injury the Appellant cannot establish constitutional standing, and his only avenue to standing is through the public importance exception.” (App Br at 13-14). Freemantle fails however to offer any argument and/or evidence that demonstrates he has suffered a particularized injury in fact that is not shared by the general public. Nor does he cite any authority to support his position on this issue and therefore it should be deemed as abandoned. “This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review. *Eaddy v Smuifit-Stone Container Corp*, 355 S C 154, 164, 584 S E 2d 390, 396 (Ct App 2003), *See also Glasscock Inc v United States Fid & Guar Co* 348 S C 76, 81, 557 S E 2d 689, 691 (Ct App 2001), *R & G Constn Inc v Lowcountry Reg'l Transp Auth* 343 S C 424, 437, 540 S E 2d 113, 120 (Ct App 2000)(Where no authority is cited and argument in brief is conclusory, the issue is deemed abandoned), *First Sav Bank v McLean* 314 S C 361, 363, 444 S E 2d 513, 514 (1994)(Appellant was deemed to have abandoned issue where he failed to provide any argument or supporting authority.)

Putting abandonment of the issue aside, Freemantle argues that “[h]e is not suing as a member of the general public” and his “interest as a taxpayer in how public funds

were spent (or wasted) gives him standing” (App Br at 14) This statement and the supporting authority cited by Freemantle in his brief is at odds with his position that the trial court erred in finding he could only establish standing via the public importance exception This Court in *Sloan v Dep t of Transportation* conferred standing upon the Plaintiff as a taxpayer under the public importance exception, not under the traditional constitutional rubric that requires claimants to have suffered a particularized injury uncommon to the general public 379 S C 160, 66 S E 2d 236 (Ct App 2008) A taxpayer may not maintain an action against government officers when he or she has ‘no special interest and [their] only standing is the exceedingly small interest of a general taxpayer’ *Sloan v Greenville County*, 356 S C 531, 547, 590 S E 2d 338, 347 (Ct App 2003) Plaintiff’s own argument is one for the application of the public importance exception and in no way evidences he suffered a particular injury uncommon to the general public

Furthermore, at the hearing on Defendants’ Motions to Dismiss on March 17, 2010, Plaintiff’s counsel expressly recognized and conceded that the Plaintiff could only obtain standing via the public importance doctrine

THE COURT But I’m just not sure there’s any standing—that any individual taxpayer has a [sic] standing as a result of their taxpayer status under the law

MR GRIFFIN Well, under some of these *Sloan* cases, Your Honor, standing may be conferred upon a party when issues such as public importance as requires [sic] resolution for future guidance

THE COURT So it comes down to the public importance doctrine?

MR GRIFFIN Yes, sir

THE COURT Okay So really all these motions, if you boil them down—and ya ll tell me if I’m wrong—it comes down to whether or not I

determine that the lawsuit comes under the public importance doctrine. Is that right?

MR. GRIFFIN: That would be my argument, Your Honor.

(R. p. 240 lines 5-25; p. 241 lines 1-5) Later in that same hearing Plaintiff's counsel stated "I think this is an issue of public importance that grants my client standing. He's a taxpayer. He's suffered injury as a result thereof." (R. p. 273 lines 15-18)

Freemantle has failed to allege or argue, much less establish, that he has suffered a particular injury uncommon to the general public. Therefore, the trial court correctly found that he lacked constitutional standing to maintain the action. (S.R. p. 6)

b The trial court properly held that this matter did not justify application of the public importance exception

Freemantle challenges the trial court's finding that this matter does not warrant the application of the public importance exception. (App. Br. at 13) He points to the allegations which allege Defendants violated the notice requirements of FOIA regarding the proper amendment of agendas. (App. Br. at 13) Freemantle summarizes this argument stating that "[w]hether or not the Council could amend the agenda during a council meeting to include a large expenditure of County funds is obviously a matter of public importance that requires guidance by the Court." *Id.* What Plaintiff has failed to demonstrate, in the pleadings, during oral arguments, and in his initial appellate brief is why the court's future guidance is necessary in this instance.

The "Public Importance" Exception recognizes that "standing is not inflexible and [it] may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). In instances which fall within the realm of the

exception, standing may be found “without requiring the plaintiff to show that he has an interest greater than other potential plaintiffs” *Id*. Justice Kittredge recognized in *ATC South*, “[t]he key to the public importance analysis is whether a resolution is needed for future guidance, [and] it is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.” *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341.

The exception has been applied to declaratory judgment actions concerning the issuance of hospital bonds, the legality of a governor’s eligibility for military service, and violations of statutory bidding requirements of state agencies. *See Baud v Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Sloan v Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v Dept of Transp*, 365 S.C. 299, 618 S.E.2d 876 (2005). Judicial determination of those issues necessarily had broader implications outside the confines of the particular case. In contrast, no future guidance can be gleaned from this case. Plaintiff is attempting to invalidate a Severance Agreement between Preston and County Council Members with which he does not agree. His allegations concern isolated events that produced a specific and unique outcome. If the Court declared the Agreement void, its holding could not provide any “future guidance” of public importance. In light of the facts and circumstances, judicial resolution of the Plaintiff’s allegations fails to rise to a level of public importance as to justify application of the standing exception.

Furthermore, the Plaintiff alleges that Defendants’ violated a FOIA provision mandating that “[a]gendas for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings.” S.C. Code Ann. § 30-4-80(a). The statutory language of this

section is clear and it is merely a question of fact as to whether the Defendants' violated it. *See Hodges v Rainey*, 341 S C 79, 85, 533 S E 2d 578, 581 (2000)(' The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch Dist v State Budget and Control Bd* 313 S C 1, 437 S E 2d 6 (1993) Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J* 333 S C 233, 509 S E 2d 261 (1998) (citations omitted) Therefore, no future guidance would be had if the court afforded Plaintiff standing to address these allegations. The cases under which courts have utilized the public importance exception to abrogate constitutional standing requirements involved unclear, complicated, and consequential determinations of the law and its application, not a simple finding of fact.

The trial court rightly recognized that the matter did not warrant application of the exception and stated that "[o]n the contrary, any public impact resulting from the Court's resolution of the present matter would pale in comparison to the degree, breath, and longevity of the decisions in which the exception was utilized." (S R p 7) The court continued noting that "Plaintiff's action seeks to redress alleged injuries/wrongs flowing from an isolated event that he can prevent from happening in the future by voting to replace those he felt wronged the taxpayers of Anderson County." *Id* The trial court correctly found and held that the Plaintiff failed to demonstrate the matter is of such public importance as to warrant a grant of standing under the public importance exception.

c Freemantle failed to argue that he had statutory standing under S C Code Ann § 30-4-100

In his initial brief, Freemantle impliedly argues that the court below should have granted him statutory standing under FOIA (App Br at 12) In a close review, Freemantle's initial brief appears to essentially quote S C Code Ann § 30-4-100 although there is no indication of a quotation or citation (App Br at 12) That section of the statute provides that "[a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter S C Code Ann § 30-4-100(a) Plaintiff's entire argument on this point is one simple sentence which states "[c]learly Appellant has alleged that he is a citizen of this state (App Br at 12) Freemantle, however, has abandoned this issue on appeal *See Eaddy v Smuifit-Stone Container Corp*, 355 S C 154, 164, 584 S E 2d 390, 396 (Ct App 2003)("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review')

Despite the Plaintiff's abandonment of the FOIA argument, if this Court were to consider the issue, the trial court properly found Freemantle did not assert standing upon these grounds (*See* S R p 10) In both hearings below, Freemantle did not clearly or adequately argue that he should be granted standing under FOIA's applicable section, S C Code Ann § 30-4-100 The closest Plaintiff came to doing so was in the March 17th hearing during which Plaintiff argued that

Mr Freemantle is free to bring his FOIA claim without hindrance That gives him standing to bring suit based on the 24-hour – the fact that they did not notice – give notice, 24-hour notice, that they were going to amend the agenda to include this over one-million-dollar severance package Given the fact that that's such a significant event, it should have been notice [*sic*] And therefore, FOIA was violated and Mr Freemantle should be allowed to go forward on that issue

(R pp 271-72, *See also* R p 227)

Furthermore, as the trial court recognized, Freemantle failed to argue any specific injury to himself directly or proximately caused by Defendants' alleged FOIA violations (S R p 10). Moreover, even if the Plaintiff had successfully asserted standing upon FOIA grounds, Rule 12(b)(8) SCRPC would preclude him from pursuing the action (S R p 10 fn 2), *See also* discussion regarding Rule 12(b)(8) *infra*.

Importantly, if Freemantle were afforded standing under FOIA, the applicable one-year statute of limitations would greatly narrow the permissible scope of his action. S C Code Ann. § 30-4-100(a) provides that “[a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later.” The statute of limitations forecloses Freemantle from pursuing all but one of the FOIA claims contained in the Complaint as the Defendant's alleged actions underlying the other FOIA claims all occurred more than a year prior to filing. (*See* R pp 37-49, pp 56-60). His remedies would likewise be limited to those provided by the statute. *Lawson v South Carolina Dept of Corr*, 340 S C 340, 532 S E 2d 259 (2000), *Dockins v Ingles Markets Inc*, 306 S C 496, 498 S E 2d 18, 19 (1992) (“[W]hen a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy.”) Therefore, Freemantle would be left to pursue a singular FOIA cause of action under which he may obtain declaratory or injunctive, not monetary, relief.

Accordingly, the trial court properly dismissed Freemantle's claims under SCRCP 12(b)(6) and 12(b)(8) respectively

Further FOIA claims may only be brought against a "public body," as defined under the statute. *See* S.C. Code Ann. § 30-4-20. There is simply no statutory authority for asserting a FOIA claim against any individual employees of a government entity or an elected official.

2 The trial court properly observed that the public importance exception to general standing requirements had not been utilized in cases where the Plaintiff sought monetary relief

Freemantle argues that the trial court erred in finding that there is no authority for granting public importance standing under circumstances where money damages are sought. (App. Br. at 15). However, Plaintiff does not provide citation to any cases in which public importance standing was granted to a party seeking monetary damages. (*See* App. Br. at 15). It appears that no such cases exist. Therefore, the Court's finding that "[t]he public importance exception has been applied only when the Plaintiff sought declaratory relief" is accurate. (S.R. p. 7). While Freemantle is correct in that the question of whether a party granted standing under the public importance exception may claim money damages has not been decided by the courts of this State, he fails to address the glaring contradiction that his pleas for economic relief present. The court below recognized the contrarian dilemma this would pose and viewed Freemantle's pleas for monetary relief as further evidence that the action "is a much more private endeavor rather than one undertaken for the greater public good." (S.R. p. 9). A party's plea for money damages directly contravenes the argument that the matter is one of public importance, as only the individual litigant benefits from economic relief. Therefore,

allowing a party to abrogate the constitutional standing requirements via the public importance exception should remain reserved for those cases in which the Plaintiff seeks relief beneficial to the general public rather than pursuing personal economic gain. See *Baird v Charleston County*, 333 S C 519, 511 S E 2d 69 (1999), *Sloan v Sanford*, 357 S C 431, 593 S E 2d 470 (2004), *Sloan v Dep t of Transp*, 365 S C 299, 618 S E 2d 876 (2005)

3 The trial court properly found that Defendants Wilson, McAbee, Greer, Thompson, and Floyd as individuals would be entitled to legislative immunity for claims arising out of their actions as Anderson County Council members

a Defendants' actions in the voting process that approved Preston's severance agreement were acts undertaken in their official roles as council members for which they have legislative immunity

The court below found that if the issue had been reached, it would have granted legislative immunity to Defendants Wilson, McAbee, Greer, and Thompson (S R p 17). In making its ruling, the court noted this State's long honored public policy of recognizing "an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.* citing *Richardson v McGill*, 273 S C 142, 146, 255 S E 2d 341, 342 (1979). Freeman alleged impropriety in the voting process in which these Defendants participated as members of Anderson County Council. A government employee's participation in this process remains the quintessential discretionary act of legislators. The court below opined that "there is no duty more essential to the position of a County Council member than voting" and "Defendants actions in this regard constitute discretionary actions for which they are immune from liability." (S R p 17)

Defendants Wilson, McAbee, Greer, Thompson, and Floyd were all members of Anderson County Council which voted to approve Preston's severance agreement. The Plaintiff has alleged impropriety in the voting process and challenged the motivations behind the votes. These Defendants' actions in the voting process qualify as legislative actions for which legislative immunity must apply.

In addition, the South Carolina Torts Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, is the 'exclusive remedy available for any tort committed by an employee of a governmental entity' as well as the entity's officers and agents, including elected officials. S.C. Code Ann. § 15-78-30(c). The Tort Claims Act serves as a limited waiver of sovereign immunity and expressly preserves common law immunities, which include legislative immunity. Nevertheless, the legislature specifically provided that governmental entities, and likewise its elected officials, are not liable for a loss resulting from legislative action or inaction, nor are they liable for administrative action or inaction of a legislative nature. S.C. Code Ann. §§ 15-78-60(1), (2). These individual Defendants are entitled to common law and statutory legislative immunity pursuant to the South Carolina Tort Claims Act, specifically S.C. Code Ann. §§ 15-78-60(1) and (2).

The Tort Claims Act not only constitutes the exclusive civil remedy for any tort committed by an employee of a government entity but also explicitly provides that the entity for whom the employee is acting be named as the party defendant, not the employee himself. S.C. Code Ann. § 15-78-70. From the outset, Anderson County was a named Defendant in this matter. The Plaintiff's allegations against the individual Defendants involve their votes on a personnel matter and actions in their official capacities. There are no allegations made against these Defendants which involve actions outside their role as

council members. The trial court correctly ruled that legislative immunity barred all of the Plaintiff's claims against these Defendants. (S R p 17) Assuming arguendo that the dismissal of all of the Plaintiff's claims against these individuals was not proper, the Tort Claims Act would still mandate a dismissal of the individual Defendants. If the Plaintiff is permitted to seek redress for these claims, the proper Defendant is Anderson County, not its elected officials.

Freemantle has failed to argue these Defendants acted in a manner that precludes legislative immunity. Despite Defendants addressing legislative immunity during the hearings on this matter at length, Freemantle was silent on this issue. (See R pp 234-82), (See also R p 227 lines 4-7)(While arguing for standing to maintain his RICO claim and other causes of action, Freemantle mentions discretionary actions however does not argue against legislative immunity.) In his initial brief, Freemantle mirrors the argument set forth in his Memorandum in Opposition to Defendant's Motions to Dismiss. (See App Br at 16, R pp 306-07) Freemantle argues that because he alleged Defendants' actions in approving Preston's severance agreement were illegal, they should not be entitled to legislative immunity. (App Br at 16) He provides no alleged factual basis for this claim other than citing the Amended Complaint which sets forth allegations of civil conspiracy. *Id.* The mere allegation of illegal conduct cannot serve to preclude legislative immunity. Freemantle has utterly failed to allege that these Defendants' actions should not be afforded legislative immunity.

Practicality in the name of government efficiency mandates that government officials be able to exercise their personal judgment and take legislative action, i.e. vote, without fear of personal retribution from unsupportive constituents. If each action an

elected official took risked personal liability for any losses or injury that may result, government entities and employees would be paralyzed by fear of liability. The trial court properly found that if Freemantle's lack of standing were not dispositive of the issue, then Wilson, McAbee, Greer, Thompson, and Floyd should all be afforded legislative immunity for their discretionary actions. (S R p 17)

b Parliamentary irregularities cannot invalidate contracts and the issue represents a nonjusticiable political question

Judicial scrutiny of the legislature's discretionary actions violates the political question doctrine.³ In this action Freemantle attempts to obtain a declaratory judgment that Preston's Severance Agreement was/is "void because it was signed, prepared and agreed upon in violation of FOIA's requirements of open and honest government." (R p 58) Nevertheless, judicial scrutiny of these alleged parliamentary irregularities is an issue that represents a nonjusticiable political question.

The nonjusticiability of a political question is primarily a function of the separation of powers. *Baker v Carr*, 369 U S 186, 210-11 (1962). The Political Question Doctrine excludes from judicial review those controversies that revolve around policy decisions, legislative procedures, and the like, which are committed to the halls of the legislatures. *South Carolina Public Interest Foundation v Judicial Merit Selection Comm*, 369 S C 139, 142, 632 S E 2d 277, 278 (2006). Courts will not rule on questions which are predominately political in nature. *Chicago & S Au Lines v Waterman S S Corp Civil Aeronautics Board*, 333 U S 103, 111 (1948).

³ The restrictions on a court's ability to address political questions was addressed by the South Carolina Supreme Court in *Wilson v Preston* wherein Chief Justice Toal and Justice Pleicones opined that the case was an issue of political question and should not have been before the court. *Wilson v Preston* 378 S C 348 360 61 662 S E 2d 580 586 (2008) Chief Justice Toal concurring in separate opinion in which Justice Pleicones concurred ([I]ssues related to the propriety of Respondent's actions present purely political questions the resolution of which rests solely within the Council's domain ')

It was previously argued by other taxpayers that Anderson County resolutions were passed contrary to the procurement code and potentially in violation of FOIA. In that case, this Court found that it is improper for the judiciary to referee procedural disputes in order to resolve allegations that council actions violated FOIA. In *Bradshaw v Anderson County*, citizens challenged the hiring by Council of an auditor and the Nexsen Pruet law firm to conduct an investigation. One challenge they mounted was that the hiring was not done in accordance with the requirements of FOIA because it was not listed on the agenda.⁴ Anderson County submitted a proposed order, which the trial court adopted, rejecting the argument

[T]he Court finds that it would not be appropriate for the Court to sit as in effect a parliamentarian for the County Council reviewing each of its motions and committee appointments. See *South Carolina Public Interest Foundation v The Judicial Merit Selection Commission*, 369 S.C. 139, 143, 632 S.E.2d 277, 278 (2006) ("the courts will not rule upon question which are exclusively or predominantly political in nature rather than judicial"). Also, it is undisputed that each of the resolutions at issue passed by two thirds of the Council members present and voting. Section 2-38(c)(5) of the Anderson County Code provides that "[n]o advance notice of such introduction of an ordinance or resolution shall be required if so approved by two thirds of the members present and voting."

Bradshaw v Anderson County, C.A. No. 2009-CP-04-00491 (S.C. Cir. Ct. 2009) (Order of March 26, 2009 at 15-16) (emphasis added)

It also bears noting that Appellant's FOIA related causes of action are statutory creations. Therefore, the sole remedies Freeman may seek are provided by statute. *Lawson v South Carolina Dept of Corr.*, 340 S.C. 340, 532 S.E.2d 259 (2000) ("[W]hen a statute creates a substantive right and provides a remedy for infringement of that

⁴ FOIA provides that "[a]genda if any for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty four hours prior to such meetings and that [a]ll public bodies shall notify persons or organizations local news media or such other news media as may request notification of the agenda of all public meetings." S.C. Code Ann. § 30-4-80(a)

right the plaintiff is limited to that statutory remedy'), *Dockins v Ingles Markets Inc*, 306 S C 496, 413 S E 2d 18 (1992) The alleged violation of this procedural statute cannot serve to invalidate or void Preston s Severance Agreement because the statute does not allow such a remedy Without a statutory provision providing that a FOIA violation can serve to void a contract, Freemantle may not seek to do so

In sum, any alleged procedural deficiency cannot invalidate a binding contract Likewise, this Court should not address the vague, underdeveloped and naked allegations concerning alleged FOIA violations because such an inquiry, without more, would violate the Political Question Doctrine

Therefore, the trial court properly held as an alternative that if its ruling on the standing issue were not dispositive of the entire matter, the court would have granted legislative immunity to Defendants Wilson, McAbee, Greer, Thompson, and Floyd as their alleged actions of which Freemantle complains, were discretionary acts taken in their official capacities as members of Anderson County Council (S R p 17)

4 The trial court properly found that Plaintiff's claims would be further barred under Rule 12(b)(8) of the South Carolina Rules of Civil Procedure

Rule 12(b)(8) SCRCF provides that an action should be dismissed if "another action is pending between the same parties for the same claim" In the present case, the Plaintiff names, Joey Preston, Anderson County, and the other individual Defendants, all as defendants in this case In essence, the Plaintiff's Complaint seeks to undo the Severance Agreement granted by Anderson County to Joey Preston and to hold Preston, along with the individual defendants, liable to him personally for their votes in favor of the Severance Agreement The case of *Anderson County v Joey Preston and the South Carolina*

Retirement System, C A No 2009-CP-04-4482, which is pending in the Anderson County Court of Common Pleas, before the same trial judge, also seeks to revoke the Severance Agreement granted to Preston. The Plaintiff's suit, in this respect, is duplicative. The Anderson County case involves the same substantive issues raised by the Plaintiff, involves the true parties in interest, and is pending in the same court before the same judge. Therefore, the trial court properly found that even if the Plaintiff were granted standing for this suit, all of his claims should be dismissed pursuant Rule 12(b)(8), SCRCP (S R pp 17-18)

In his initial brief, Freemantle argues that Rule 12(b)(8) is not applicable in this instance as no identity of parties, causes of action, or relief sought exist (App Br at 17). He notes that this Court recently ruled that "12(b)(8) must be interpreted narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)" (App Br at 17) *citing Capital City Ins Co v BP Staff Inc*, 382 S C 92, 100, 674 S E 2d 524 (Ct App 2009). Freemantle's notion of identity in this context centers on precise mirror images of parties, causes of action, and relief between the two cases. Under the Plaintiff's argument, one additional cause of action or plea for attorneys' fees in one case but not the other precludes application of Rule 12(b)(8). Such a treatment of the Rule unnecessarily constrains its applicability and ignores both its purpose and spirit. Rule 12(b)(8) seeks to promote judicial economy by disposing of unnecessarily similar actions. *See Capital City Ins Co v BP Staff Inc*, 382 S C 92, 103, 674 S E 2d 524, 530 (Ct App 2009) ("The court has broad discretion in its supervision over the progression and disposition of a circuit court case in the interests of justice and judicial economy.")

In this instance the trial judge presiding over both cases recognized that the essential parties, causes of action, and relief sought were identical in each proceeding and arose from the same facts and circumstances (S R pp 17-18) Therefore, the trial court properly found that, its ruling on the standing issue aside, Rule 12(b)(8) would bar Plaintiff from pursuing the present action (S R pp 17-18)

5 The trial court properly held that Freemantle’s lack of standing on his individual claims precludes him from proceeding with any putative class causes of action

a A litigant must have standing before proceedings with any putative class causes of action

Rule 23 SCRCPC establishes the prerequisites for a plaintiff seeking to bring a class action Before a class can be certified, a court must find that (1) the class is so numerous that joinder of all parties is impracticable, (2) there are questions of law or fact in common to the class, (3) the claims or defenses of the representative parties are typical to those of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) the amount in controversy exceeds one hundred dollars for each member of the class SCRCPC 23

Before a class action suit can be certified, an individual or group must have standing to bring the action *Owens v Magill*, 308 S C 556, 419 S E 2d 786 (1992) A party without standing cannot “fairly and adequately protect the interests of the class’ as they lack the ability to proceed with the action Therefore, the trial court properly found Freemantle’s lack of standing precludes him from proceeding with any putative class causes of action (S R pp 10-11)

Freemantle addresses this issue in one sentence in his initial brief stating that “[t]his ruling was premature since no motion for class certification has been made” (Ap Br at

17) Plaintiff does not offer any argument or evidence to support this declaration. Nor does he cite any authority, legal or otherwise, to support the declaration. Therefore, Freemantle has again effectively abandoned this issue on appeal. *Eaddy v Smurfit-Stone Container Corp*, 355 S C 154, 164, 584 S E 2d 390, 396 (Ct App 2003), *See also Glasscock Inc v United States Fid & Guar Co* 348 S C 76, 81, 557 S E 2d 689, 691 (Ct App 2001), *R & G Constr Inc v Lowcountry Reg'l Transp Auth* 343 S C 424, 437, 540 S E 2d 113, 120 (Ct App 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned), *Fust Sav Bank v McLean* 314 S C 361, 363, 444 S E 2d 513, 514 (1994) (appellant was deemed to have abandoned issue where he failed to provide any argument or supporting authority). Furthermore, the trial court did not rule on certification of a putative class, but rather held that Freemantle's lack of standing precluded him from proceeding with the putative class causes of action. (S R pp 10-11). The trial court properly dismissed the Plaintiff's class action claims due to his lack of standing. (S R p 11).

6 The trial court properly held that Freemantle failed to properly amend his Complaint

a Freemantle failed to adhere to the requirements of Rule 15 SCRPC governing amendment of pleadings

Plaintiff filed the original Complaint on November 16, 2009. Defendants filed motions to dismiss on January 13, 15, and 19, 2010. The evening before the trial court was scheduled to hear oral arguments on Defendants' motions to dismiss, Freemantle filed an Amended Complaint adding the RICO claim as an additional cause of action. (R pp 81-173). Plaintiff filed his amended pleadings without obtaining or even seeking either leave of the Court or Defendants' consent.

Rule 15 provides that

A party may amend his pleadings once as a matter of course at any time before or within 30 days after a responsive pleading is served or if the action has not been in place on the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party.

SCRPC 15. The Rule is clear that the time for amendment starts to run when a responsive pleading is served. In this action, Defendants did not file responsive pleadings, but rather filed motions to dismiss. Rule 7(a) pertaining to pleadings includes “a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint [and] a third party answer.” SCRPC 7(a). As the statutory interpretation maxim says, the inclusion of the few is to the exclusion of all others. Defendants’ motions to dismiss were not “responsive pleadings” as contemplated under the Rules. At the time Plaintiff attempted to amend his complaint, the trial was on the roster, thus leaving him with the option to either obtain leave of the court or consent of the Defendants’ to amend his pleadings. By failing to even attempt either, Freemantle did not adhere to the requirements of Rule 15. Therefore, the trial court properly found Plaintiff impermissibly amended his pleadings and should not be allowed to pursue his RICO claims. (S R pp 15-16)

V Conclusion

Taken in a light most favorable to the Plaintiff, the trial court's holdings and rulings in its Amended Order were justified and proper under the facts and circumstances

Freemantle failed to establish the fundamental constitutional requirement for instituting and maintaining an action, standing. Nowhere in the proceedings below did Freemantle adequately allege, argue, or otherwise establish that he suffered a particular injury in fact uncommon to the general public. The Plaintiff's failure in this regard foreclosed him from establishing standing under the traditional constitutional rubric. Nor does Freemantle's suit justify the application of the public importance exception to abrogate the constitutional standing requirement as no future guidance can be gleaned from judicial resolution of the matter. The Plaintiff failed to demonstrate, in his pleadings, during oral arguments, and in his initial appellate brief, why the court's determination of whether a Severance Agreement between the former County Administrator and the County was properly entered into and binding is necessary to provide others future guidance. Without this quintessential feature, the public importance exception to traditional standing requirements has not, and should not be applied. Also, Freemantle's attempt to plead for monetary damages further evidences the fact that his pursuit is personal rather than for the greater public good. The trial court properly recognized the contrarian dilemma allowing a claimant who is afforded standing under the public importance exception to pursue personal monetary relief presents, and refused to allow Freemantle to utilize the doctrine for his personal gain. Furthermore, Freemantle failed to argue he should have been afforded standing under S.C. Code Ann. § 30-4-100 of FOIA. As with other issues noted above, Freemantle failed to clearly

argue this point in his initial brief and therefore has abandoned this issue on appeal. That aside, even if the Plaintiff lodged adequate arguments on his issue, his maintenance of any FOIA causes of action would be severely limited by the applicable statute of limitations and remedies provided under the Act, if the action were not further barred under Rule 12(b)(8) SCRPC.

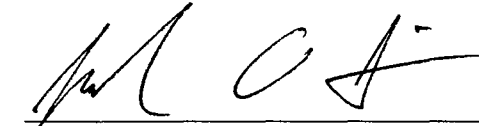
As the trial court properly recognized, that another action is currently pending in the same court, before the same judge, which involves the same substantive issues, and the true parties in interest would further bar Freemantle's action under Rule 12(b)(8) if his lack of standing were not dispositive of the suit.

The trial court also properly held that the individual Defendants, Wilson, McAbee, Greer, Thompson, and Floyd would be entitled to legislative immunity for the claims arising out of their actions as Anderson County Council members. These individuals' participation in a legislative voting process constituted a quintessential action of their duties as legislators. The court below properly foreclosed the Plaintiff from his pursuit to hold these individuals personally liable for alleged injuries or damages that flowed from actions taken in their official capacities. Furthermore, judicial scrutiny of the alleged legislative procedural irregularities presents a nonjusticiable political question.

In sum, Freemantle has alleged many errors on behalf of the trial court below; however, he has failed to present adequate argument(s) or evidence which would justify reversal of the trial court's dismissal. Likewise, in the proceedings below, Freemantle fell markedly short in arguing and establishing that he had standing to pursue the current action. For the reasons set forth above, the Plaintiff should not be allowed to maintain the current action, and therefore the trial court's dismissal should be affirmed.

Dated this 19th day of October, 2011

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
The Honorable J Cordell Maddox, Circuit Judge

Case No 2009-CP-04-4528
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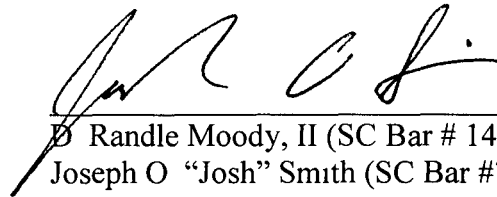
Richard Freemantle, individually and on behalf of himself and all others similarly
situated, Appellant,

v

Joey Preston, in his official capacities and individually, while the Administrator of Anderson
County, Anderson County, a political subdivision of the State of South Carolina, Anderson
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official capacities and individually, Bill McAbee, in his official capacities and individually,
Larry Greer, in his official capacities and individually, Michael Thompson, in his official
capacities and individually, Grace Floyd, in her official capacities and
individually, Respondents

CERTIFICATE OF COUNSEL

The undersigned certify that the Respondents' Final Brief complies with Rule 211(b) SCACR



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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The Honorable J Cordell Maddox, Circuit Judge

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individually, Michael Thompson, in his official capacities and individually, Grace
Floyd, in her official capacities and
individually, Respondents

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENTS' JOINT
FINAL BRIEF was served upon all counsel of record in the above-referenced action this
19th day of October, 2011, by depositing same in the United States Mail sufficient postage
affixed thereon, and addressed as follows

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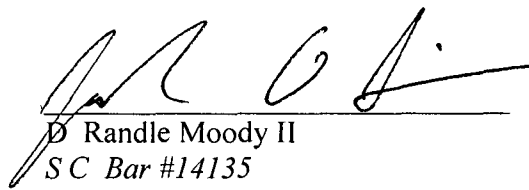
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