THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
HONORABLE J CORDELL MADDOX

CASE NO 2009-CP-04-4528

RICHARD FREEMANTLE, individually and on behalf of himself and all others similarly situated APPELLANT

VS

JOEY PRESTON, in his official capacity and individually, while 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 capacity and individually, BILL MCABEE, in his official capacity and individually, LARRY GREER, in his official capacity and individually, MICHAEL THOMPSON, in his official capacity and individually, GRACIE FLOYD, in her official capacity and individually RESPONDENTS

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INDEX – SUPPLEMENTAL RECORD

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)

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

Plaintiff

v

Joey Preston in his official capacity and individually while 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 capacity and individually Bill McAbee in his official capacity and individually Larry Greer, in his official capacity and individually, Michael Thompson in his official capacity and individually Gracie Floyd in her official capacity and individually

Defendants

Civil Action Number 09-CP-04 4528

AMENDED ORDER

This matter comes before the Court upon numerous Motions to Dismiss filed by the Defendants in response to Plaintiff's Complaint and Amended Complaint In response to Plaintiff's original Complaint filed on November 16 2010, Defendants filed motions to dismiss which the Court consolidated and heard arguments on March 17, 2010 Plaintiff also filed an amended complaint on March 16 2010 prompting Defendants to file additional motions to dismiss which the Court consolidated and heard arguments on September 7, 2010 On September 28 2010 the Court signed an Order dismissing Plaintiff's claims contained in the original Complaint based upon Plaintiff's lack of standing among other things This is an

Amended Order again dismissing Plaintiff's original claims and those contained in the Amended Complaint for the reasons set forth below The Plaintiff was represented by Charles R Griffin, Jr Esquire The Defendants were represented as follows D Randle Moody, II Esquire and Joseph O Smith Esquire, of Roe Cassidy Coates & Price P A for Defendants Preston Wilson, McAbee Greer Thompson and Floyd, Kate A Rice, Esquire of Davidson & Lindemann, P A for Defendants Wilson, McAbee Greer Thompson and Floyd, Donald L Chuck Allen Esquire, of The Allen Law Firm for Defendant McAbee Candy M Kern-Fuller, Esquire, of Upstate Law Group LLC for Defendants Preston Greer and Floyd, Kevin Sturm, Esquire, of Sturm & Cont, P A for Defendant Anderson County Council and James W Logan, Jr , Esquire of Logan, Jolly & Smith LLC for Defendant Anderson County

The Court has carefully considered all the evidence in the record, the memoranda filed by the parties and the parties' arguments Construing the facts in a light most favorable to the Plaintiff for the reasons set forth below, Defendants' Motions to Dismiss are granted

I FACTS AND PROCEDURAL BACKGROUND

The Plaintiff filed suit on November 16 2009 against the above-named Defendants in their official and individual capacities Joey Preston the former County Administrator, individually and in his official capacity Anderson County Council and Anderson County During all times relevant to this action the Defendants Wilson McAbee Greer, Thompson and Floyd were members of the Anderson County Council This action arose from their votes in favor of a severance agreement between the County and Joey Preston The Plaintiff alleges that the votes of the Defendant Council Members in favor of the severance agreement violated their fiduciary duties to the County and seeks to hold them personally liable for said votes The Plaintiff also names Anderson County Council, Anderson County and Joey Preston and alleges various wrongs involving the severance agreement

The Plaintiff further alleges 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 in Plaintiff's Amended Complaint he alleges that Defendants violated the federal Racketeer Influenced and Corrupt Organizations Act (*hereinafter* RICO) 18 U S C § 1961 *et seq* Finally, the Plaintiff alleges that the various actions of each of these Defendants has damaged him as 'a citizen resident taxpayer and registered elector of Anderson County" and seeks money damages and declaratory judgment voiding the severance agreement between Anderson County Council and Preston among other things

The Defendants raise a number of issues in their Motions to Dismiss, including lack of standing and legislative immunity

II APPLICABLE LAW AND ANALYSIS

A STANDING

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) *See also Brock v Bennett*, 313 S C 513 443 S E 2d 409 (S C 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) Generally a party must be a real party in interest to the litigation to have standing A real party in interest is a party with a real material, or substantial interest in the outcome of the litigation *Sloan v Friends of the Hunley Inc*, 369 S C 20 28, 630 S E 2d 474, 479 (2006)(internal citations omitted) 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)

(1) Constitutional Standing Requirements

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 evaluating whether the Plaintiff has established 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* 380 S C at 198, 669 S E 2d at 341 (2008) *See Sloan v Greenville County* 356 S C 531, 547 590 S E 2d 338, 347 (S C App 2003)(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) *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)

The Plaintiff brought this action in his general capacity as a citizen resident taxpayer and registered elector of Anderson County, South Carolina" (Compl ¶ 3) The only harms alleged by the Plaintiff are general in nature and shared equally by the public at large[1] Therefore without a showing of an injury particular to the Plaintiff that is not borne by the other taxpayers citizens residents and registered electors of Anderson County, he cannot establish constitutional standing

(2) The Public Importance Exception

The courts have carved out a public importance exception to the general standing rules that can confer standing upon a party that otherwise fails to meet the constitutionally required minimum threshold *Sloan v Dep t of Transp* 365 S C 299 618 S E 2d 876 (2005) The scope of the exception has and continues to be narrow, confined to those cases which involve issues of such public importance that their resolution is required for future guidance *See Sloan v Dep t of Transp* 365 S C 299 618 S E 2d 876 (2005)(Concerning violations of statutory bidding requirements of state agencies) *Sloan v Sanford,* 357 S C 431, 593 S E 2d 470 (2004)(Addressing legality of governor s eligibility for military service), *Baird v Charleston County* 333 S C 519, 511 S E 2d 69 (1999)(Involving issuance of hospital bonds) Narrowing the scope further is the fact that this exception has been applied in declaratory judgment actions not

[1] 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 (*See* Compl ¶¶ 70 77 82 87 90 93 101) 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* Compl ¶¶ 128 32) Finally in the Amended Complaint Plaintiff summarily states that the Defendants conduct allegedly in violation of RICO has facilitated the taking of funds property and/or cognizable property interests from Anderson County taxpayers the Plaintiff and the class (*See* Amend Compl ¶ 131) This is again a broad conclusive statement which fails to identify any specific injury to the Plaintiff proximately caused by Defendants alleged misdeeds

in actions for money damages *Id* *See also Sloan v Sanford*, 357 S C 431, 593 S E 2d 470(2004), *Sloan v Greenville County* 356 S C 531 590 S E 2d 338 (Ct App 2003), *Beaufort County v Trask* 349 S C 522 563 S E 2d 660 (Ct App 2002) As our State Supreme Court has recognized [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

a Resolution is not necessary for future guidance

The Plaintiff's allegations do not raise issues of such public importance that judicial resolution would be needed for future guidance, calling for the application of the exception On 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 Specifically the South Carolina Supreme Court s decisions concerning how a state agency bids on construction jobs whether the governor may serve in the military and hospitals issuance of bonds are all matters whose resolution have broad and continued effects on the public State agencies will continue to bid on construction jobs, hospitals will issue bonds, and the State will continue to elect Governors who may want to serve in the military during their tenure 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 The Court also finds it telling that he seeks monetary damages in addition to declaratory relief, an action contrary to Plaintiff's position The public importance exception has been applied only when the Plaintiff sought declaratory relief as such relief in those cases conferred a benefit on the public at large Plaintiff's recovery of monetary damages

would benefit him and him alone The public importance exception should not be utilized in a manner contrary to its name and spirit Courts have and should, rarely apply this narrow exception to the constitutional mandates flowing from Article III

b Judiciary is not "super-personnel" department

The Plaintiff's suit involves the methods by which a personnel matter was investigated and ultimately decided upon by the Anderson County Council The Plaintiff challenges the legality of the individual Defendants (Wilson McAbee, Greer, Thompson, and Floyd) votes in favor of a severance package to Joey Preston the former County Administrator There is no authority for granting standing under the public importance exception to a plaintiff bringing suit concerning the government's handling of a personnel matter *See South Carolina Educ Ass'n v Campbell* 883 F 3d 1251 (4th Cir 1989) In fact, our courts discourage such judicial oversight For example, in dealing with Title VII claims, the Fourth Circuit courts, including the South Carolina District Courts routinely note that courts are not super-personnel departments *See Thompson v S Carolina Dept of Corr*, 3 06-1020 JFA-JRM 2007 WL 1726530 (D S C June 14 2007) It is not the province of the judicial system to weigh the prudence of employment decisions *Anderson v Westinghouse Savannah River Co* 406 F 3d 248 (4th Cir 2005), *See also Rowe v Marley Co* 233 F 3d 825 831 (4th Cir 2000)

In the present action the Plaintiff is essentially asking the Court to convey him standing in order to allow judicial oversight of the County's personnel decision No future guidance can be gleaned from a court order finding that Defendants actions were somehow improper Therefore judicial resolution of the Plaintiff s allegations fails to rise to a level of public importance that would justify application of the standing exception The proper forum for resolution of the Plaintiff's grievances lies in the voting booth, not the court house

I find that the Plaintiff lacks standing to assert the claims set forth in his original Complaint against the Defendants. The only injuries alleged by the Plaintiff are in his capacity as a citizen resident taxpayer and registered elector of Anderson County. I find that under the facts as they are alleged and taken in the light most favorable to the Plaintiff, the Plaintiff fails to demonstrate that this matter is of such public importance as to warrant application of the public importance exception to grant him standing. Moreover, the Plaintiff's attempt to recover monetary damages derides against application of the exception and evidences the fact that the action is a much more private endeavor rather than one undertaken for the greater public good. I find no authority for granting public importance standing under circumstances where monetary damages are sought.

c. ***Improper to proceed against Defendants in their individual capacity.***

Even if this Court were to confer taxpayer standing to the Plaintiff, it would still not allow Freemantle to proceed with a claim against Defendant Preston or the other individual Defendants in their individual capacity. The Plaintiff's Complaint challenges the County's action in entering into a contractual relationship with the former County administrator. The Plaintiff asks that the contract be declared void due to the manner in which Preston and the other individual Defendants allegedly entered into the agreements. However, none of the individual defendants had the power to enter into a contract on behalf of the County as individual council members. Rather, the Council Members had to act collectively as the Anderson County Council, not as individuals. Notably, the taxpayer standing cases from South Carolina do not involve individual legislators. The Plaintiffs in those cases challenged the actions of the entities or government officials in their official capacities. See *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (S.C. App. 2003); *Beaufort*

County v. Trask, 349 S.C. 522, 563 S.E.2d 660 (S.C. App. 2002), *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). Here, the Plaintiff seeks redress from Preston and the other Defendants in their individual capacities. There is simply no authority for this. The proper defendant for any taxpayer challenge would be the County, not the individual defendants.

(3) Statutory Standing – Freedom of Information Act Cause of Action

As to the Plaintiff's claims falling under the Freedom of Information Act, I find that the Plaintiff also lacks standing as to these claims.[2] The only injury alleged is that of a general taxpayer, resident, citizen, and elector of Anderson County. The Plaintiff fails to allege any specific injury directly or proximately caused by Defendants' alleged FOIA violations. As stated above, I find that the Plaintiff's claims do not fall within the public importance exception to the standing rules. The Plaintiff has not alleged a compensable injury and lacks standing to proceed. These claims are also dismissed.

(4) Asserted Class Action

The Plaintiff seeks to assert a class action presumably on behalf of 'all others similarly situated' as himself. (Compl. ¶ 1). Rule 23 of the South Carolina Rules of Civil Procedure 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

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[2] South Carolina Freedom of Information Act (FOIA) allows any citizen to bring a cause of action for violations of the statute. S.C. Code Ann. § 30-4-100. Plaintiff failed to assert standing upon this statutory ground; however, even if he had done so, he would be precluded from pursuing this action under Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as discussed *infra*. Despite this definitive preclusion, if Plaintiff were allowed to proceed by being afforded standing upon this statutory basis, the permissible scope of his action would be greatly limited. Specifically, the applicable one year statute of limitations would prevent him from asserting all but one of the alleged FOIA violations contained in his Complaint, as the actions underlying the other FOIA claims happened more than a year prior to the commencement of the action. S.C. Code Ann. § 30-4-100(a). Furthermore, his remedies would be limited to those provided by the statute. *Lawson v. South Carolina Dep't of Corr.*, 340 S.C. 340, 532 S.E.2d 259 (2000); *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 498, 413 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, Plaintiff could seek declaratory and/or injunctive relief, not monetary damages. S.C. Code Ann. § 30-4-100.

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 S C R Civ P 23, *King v American Gen Finance Inc* 386 S C 82 687 S E 2d 321 (2009), *Tilley v Pacesetter Corp*, 355 S C 361, 585 S E 2d 292 (S C App 2003) *McGann v Mungo*, 287 S C 561, 340 S E 2d 154 (S C App 1986)

The Plaintiff has failed to set forth any evidence establishing the necessary prerequisites for class certification under Rule 23 In fact, the Plaintiff did not even attempt to define what group of individuals for whom he seeks to speak beyond the general description of 'all those similarly situated as himself (Compl ¶ 1) Without more information to identify the putative class any class action claims cannot be permitted to proceed Most importantly, 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) Plaintiff's lack of standing on his individual claims precludes him from proceeding with any putative class causes of action

B PLAINTIFF'S AMENDED COMPLAINT

(1) RICO Cause of Action[3]

a Public importance exception

As to the Plaintiff's claims contained in the Amended Complaint concerning alleged violations of RICO I find that if the Court were to rule upon the claims, the Plaintiff lacks standing to maintain these claims as well The Plaintiff's claims and alleged injuries under the RICO cause

[3] Any claim contained in Plaintiff's Amended Complaint is not properly before the Court due to Plaintiff's failure to comply with Rule 15 of the South Carolina Rules of Civil Procedure which governs amendment of pleadings *See infra* Assuming arguendo that the Court would have granted Plaintiff leave to amend the Complaint the RICO cause of action would not be upheld and/or viable under the facts and circumstances of this case

of action offer nothing which would confer standing and allow him to proceed as to this or any other cause of action The addition of the RICO claim does not change the nature of the action in a manner which would somehow make the resolution of the case of such public importance as to confer standing under the exception In essence the RICO cause of action primarily parrots the allegations contained in the original complaint and the Court s conclusion as to the application of the public importance exception remains unchanged

In fact the public importance exception to the constitutional standing requirements has not been recognized or utilized to confer standing in this context A RICO claim is a federal cause of action which may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962 in any appropriate United States district court " 18 U S C § 1962(c) The proper venue for Plaintiff's RICO claim lies in the district court which is bound by Art III's case and controversy requirement Therefore, the public importance exception has not been applied to confer plaintiffs standing to maintain RICO actions because to do so would violate the United States Constitution Specifically, the exception has not been utilized to confer a party standing for a purely federal cause of action such as a RICO claim who otherwise lacks the constitutionally required elements as detailed in *Lujan* *See supra* at 4 Therefore, maintenance of Plaintiff's RICO cause of action requires that he establish standing either by statute or through the traditional constitutional rubric detailed above *ATC South, Inc v Charleston County* 380 S C 191 669 S E 2d 337 (2008)

b Constitutional standing

As already noted the Plaintiff has failed to allege a particularized "injury in fact" that is not suffered by the general public Just as in the original Complaint, the Plaintiff's RICO claim merely alleges that he has suffered an injury which is common to the general public and impacts

him merely as a taxpayer citizen, and registered voter of Anderson County (*See* Amend Compl ¶¶ 130 131)[4] Specifically Plaintiff alleges that he and the uncertified class suffered injury as a result of Defendants' alleged intimidation of Anderson County residents for the purpose of stifling public dissent the utilization of county funds for interstate travel and Defendants' other alleged actions Plaintiff claims to have violated the federal RICO statute (Amend Compl ¶¶ 129-30) The Plaintiff has claimed a general injury resulting from Defendants' alleged violations of RICO which is suffered by the general public and the commonality of the alleged injury 'defeats' the constitutional requirement of a concrete and particularized injury ' *ATC South, Inc v Charleston County*, 380 S C 191 198 669 S E 2d 337 341 (2008) Also while Plaintiff's failure to establish the first element of constitutional standing particularized injury in fact, is dispositive, he likewise fails to show that the alleged injuries would be redressed by a favorable decision of this Court *See Lujan* 504 U S at 560-61 Lacking any allegation or proof that he has suffered such an injury and without the aid of the public importance exception the only remaining avenue for Plaintiff to garner standing is via statute

c Statutory Standing

RICO allows [a]ny person injured in his business or property by reason of a violation of section 1962 [to] sue therefor in any appropriate United States district court" 18 U S C A § 1962(c) Under the statute a "person' is "any individual or entity capable of holding legal or beneficial interest in property 18 U S C A § 1961(3) In order to maintain a RICO action plaintiffs must allege that Defendants violations were a proximate cause of their injuries *Sadighi v Daghighfek* 36 F Supp 2d 279, 286 (D S C 1999) *See Holmes v Securities Investor Protection Corp* 503 U S 258 268, 112 S Ct 1311 (1992) Here, as in *Sadighi* Plaintiff has alleged

[4] The Court also believes it is worth noting that Plaintiff fails to plead for any specific damages under the RICO cause of action and the injuries alleged appear to be set forth by implication *See* Amend Compl ¶¶ 128-134

Defendants have engaged in conduct in violation of 18 U S C §§ 1962(b) (c) and (d) and [t]o have standing to assert private causes of action for these RICO violations Plaintiffs must allege (1) violation of § 1962 and (2) injuries to their business or property that were proximately caused by these RICO violations *Id See also Sedima S P R L v Imrex Co , Inc* 473 U S 479 496-97, 105 S Ct 3275 3285 87 L Ed 2d 346 (1985)("In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation of RICO)

The Plaintiff's Amended Complaint fails to allege that property in which he or the uncertified class holds a legal or beneficial interest and/or his or the uncertified class business(es) have been damaged by the Defendants' actions which allegedly violated § 1962 The Amended Complaint states that Plaintiff and the class have suffered injury as set forth above as required under 18 U S C § 1964(c) based upon the defendants prohibited activities in violation of 18 U S C § 1962 (Amend Compl ¶ 130) What Plaintiff fails to do is establish the necessary causal nexus between the Defendants activities alleged to have violated § 1962 and any damage or harm to his or the uncertified class' business or property *See Sadighi* at 286 ([P]roximate cause requires a nexus between the proscribed acts and the injuries ") Therefore, he cannot obtain standing to proceed via statute Plaintiff has exhausted all available avenues by which he may obtain standing to proceed with his RICO claim and accordingly his RICO cause of action, if it was properly before the Court should be dismissed

d Improper Venue

Even if the Plaintiff could pursue his RICO cause of action, he seeks to do so in an inappropriate venue 18 U S C A § 1964(a) confers jurisdiction to the District Courts of the United

States to hear claims for alleged RICO violations This is not to say that state courts may never hear a civil RICO claim when considered in conjunction with viable state causes of action, however, without any surviving state causes of action this Court may not obtain supplemental jurisdiction to hear Plaintiff's federal claim

(2) Rule 15 South Carolina Rules of Civil Procedure

Plaintiff filed the original complaint on November 16, 2009 Defendants filed motions to dismiss on January 13 15, and 19 2010[5] The Court scheduled oral arguments on the motion for March 17 2010 The evening prior to oral arguments on March 16, 2010 Plaintiff filed an Amended Complaint adding the RICO claim as an additional cause of action Neither the parties nor the Court addressed the RICO claim at the March 17th hearing Addressing the RICO claim at that time would have prejudiced Defendants as they did not have adequate notice and opportunity to address and refute the new claims, a disadvantage Rule 15 is designed to protect against *See Collins Entertainment, Inc v White*, 363 S C 546, 611 S E 2d 626 (S C App 2005), *Parker* 362 S C 276 607 S E 2d 711 (S C App 2005), *Staubes v City of Folly Beach*, 339 S C 406, 529 S E 2d 543 (S C 2000)(The prejudice envisioned by Rule 15 is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it) Following the March 17th hearing, Defendants filed additional motions to dismiss, and the Court heard arguments on those motions on September 7 2010

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 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

[5] Anderson County filed a motion to dismiss on January 13 2010 Anderson County Council filed a motion to dismiss on January 15 2010 and the remaining Defendants filed a motion to dismiss on January 19 2010

S C R Civ Pro 15 The Plaintiff contends that his amendment was within the time allowed under Rule 15 because Defendants' motions to dismiss were 'responsive pleadings" and therefore their filing extended the timeframe in which he could amend his complaint. Under Plaintiff's theory, the deadline for amending a complaint re-sets each time a motion to dismiss, or presumably any other motion related to the complaint is filed. Acceptance of Plaintiff's position would hinder the judicial process and is contrary to the spirit, purpose, and language of the Rules of Civil Procedure. However, even assuming Plaintiff is correct, Defendants filed and served their motions to dismiss on January 19, 2010, which, under Plaintiff's theory, would make the latest permissible date to amend February 19, 2010. Plaintiff's attempted amendment was too late even under his incorrect interpretation of the Rule.[6]

Rule 15 is clear that the time for amendment starts to run when a responsive pleading is served. In the present case, no responsive pleadings were filed, but rather Defendants responded to the complaint by filing motions to dismiss. These filings were not "responsive pleadings" as Rule 7(a) pertaining to pleadings makes clear by including 'a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint [and] a third-party answer.' S C R Civ P 7(a).

At the time Plaintiff attempted to amend his complaint the trial was on the roster and therefore his only options for adherence to Rule 15 was to either obtain leave of the court or Defendants' consent to amend. Plaintiff failed to do either and therefore his amendment was impermissible under Rule 15.

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[6] Defendants' motions filed after the March 17th hearing were in response to the new cause of action in Plaintiff's amended complaint and cannot be utilized, as Plaintiff appears to argue, to retroactively toll the timeframe in which the complaint may be amended.

C LEGISLATIVE IMMUNITY

While the ruling of standing is dispositive of the issues raised in the various Motions to Dismiss, I also find that had I reached the issue, I would have granted legislative immunity to Defendants Wilson McAbee Greer Thompson and Floyd South Carolina has long honored the public policy of recognizing an absolute immunity of members of legislative bodies for acts in the performance of their duties " *Richardson v McGill* 273 S C 142, 146, 255 S E 2d 341, 342 (1979) There is no duty more essential to the position of a County Council member than voting It is a long standing principle throughout this nation that judicial inquiries into legislative motivation should be avoided *Fletcher v Peck*, 10 U S 87 (1810) Each of these individual Defendants were a member of the Anderson County Council which voted in favor of the severance agreement at issue in this case The Plaintiff alleges impropriety in the voting process and questions the motivations of these individuals in casting said votes Defendants' actions in this regard constitute discretionary actions for which they are immune from liability Judicial scrutiny of such discretionary actions would violate the political question doctrine and threaten the necessary immunity afforded legislators so that they may act without fear of personal liability *Bear Enterprises v County of Greenville*, 319 S C 137 459 S E 2d 883 (S C App 1995) Therefore, I find that these issues are not a proper inquiry for this Court, Defendants are entitled to legislative immunity for their actions as County Council members, and, therefore, the Plaintiff's claims should be dismissed

D ADDITIONAL BAR UNDER S C R CIV P 12(B)(8)

Finally while the ruling regarding Plaintiff's lack of standing remains dispositive of all the issues raised by Defendants various Motions to Dismiss I find that Plaintiff would be further barred from pursuing the present action by Rule 12(b)(8) of the South Carolina Rules of Civil

Procedure Rule 12(b)(8) 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 individual Defendants, all as defendants in this case 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 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 also seeks to revoke the severance agreement granted to Preston The Plaintiff's suit in this respect, is duplicative Furthermore the Anderson County case deals with the same substantive issues raised by the Plaintiff and involves the true parties in interest Therefore even if the Plaintiff were granted standing for this suit, all of his claims should be dismissed pursuant Rule 12(b)(8) S C R Civ P

III CONCLUSION

Taken in the light most favorable to the Plaintiff, the Complaint fails to set forth facts and allegations that would confer Plaintiff standing to pursue his claims in the present action Plaintiff's only conceivable means of obtaining standing under the present circumstances would be through the application of the public importance exception However, this Court finds that the present controversy and the fact that Plaintiff seeks monetary damages derides against application of the exception Lacking this fundamental constitutional requirement Plaintiff's claims must be dismissed

Further Plaintiff's claim should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as there is currently an action pending before this Court that concerns the same issues involves proper parties to the action, and seeks nearly identical relief

As to the remainder of the issues and defenses raised in the Defendants' Motions to Dismiss I make no ruling on them at this time.

I find that the Plaintiff lacks standing to proceed in this matter. The Defendants' Motions to Dismiss as amended are hereby GRANTED.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.
Tenth Judicial Circuit

11/22/2010
Anderson, South Carolina

ISSUE SHEET IN SUPPORT OF MOTION TO DISMISS
Freemantle v Preston et al
March 17, 2010

I STANDARD FOR A MOTION TO DISMISS A COMPLAINT

A Review of motion based solely upon the allegations set forth on the face of the complaint *Hill v Watford,* 276 S C 344, 278 S E 2d 347 (1981)

B Factual allegations must be enough to raise a right to relief above the speculative level – *Bell Atlantic Corp v Twombly* 550 U S 544, 545, 127 S Ct 1955, 1959 (2007)

1 When a Complaint is attacked by a Rule 12(b)(6) motion to dismiss it does not need detailed factual allegations – a Plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the Complaint's allegations are true *Id*

a "The pleading must contain something more than a statement of facts that merely creates a suspicion [of] a legally cognizable right of action, on the assumption that all the allegations in the complaint are true (even if doubtful in fact) *Id*, *See e g Swierkiewicz v Sorema N A* , 534 U S 506, 508, n 1 (2002)

2 A plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

not do *Twombly*, 550 U S 544, 545, 127 S Ct 1955, 1959 (2007),

3 On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation" *See Papasan v Allain* 478 U S 265, 286, 106 S Ct 2932, 92 L Ed 2d 209 (1986)

E It is recognized that a motion to dismiss is generally held to a strict standard in South Carolina Nonetheless, a motion to dismiss may be granted by the circuit court when a defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court *See Sloan Const Co v Southco Grassing Inc*, 368 S C 523, 525, 629 S E 2d 372, 373 (Ct App 2006)

1 In considering a motion to dismiss, the court may take judicial notice of well-known facts and principles of law, and in "[v]iewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case" *Chewning v Ford Motor Co* 346 S C 28, 32-33, 550 S E 2d 584, 586 (Ct App 2001)

II PLAINTIFF LACKS STANDING – (MEMO PGS 2-7)

A **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)

B **Constitutional Standing** established by three part test per U S Supreme Court in *Lujan v Defenders of Wildlife*, 504 U S 555, 560 (1992), whereby plaintiff must show

1 Suffered a particularized injury in fact – an invasion of a legally protected interest which is, (i) concrete and particularized and (ii) actual or imminent, not conjectural or hypothetical

2 Casual connection between the injury and the conduct complained of – injury must be "fairly traceable to the challenged action(s) of Defendant

3 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

a Freemantle fails to establish or allege that he has suffered a particularized injury in fact – one that is not common to the public as a whole – therefore lacks constitutionally required standing

i Compl ¶¶ 70, 77, 82, 87, 90, 93, 101 – merely state in 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 is liable

ii Compl ¶¶ 110, 114, 122, 127 – Plaintiff request attorneys' fees and declaratory relief pursuant to FOIA and/or under SC Declaratory Judgments Act "

iii In fact "[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury " *ATC South*, 380 S C at 198

C **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)

1 Exception allows standing to be conferred "without requiring the plaintiff to show that he has an interest greater than other potential plaintiffs " *Id*

2 "The 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

3 ***SLOAN* CASES NOT APPLICABLE (see below C(5) also)**

"For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance " *ATC South*, 380 S C at 199

a Resolution of Plaintiff's grievances are not necessary/needed for future guidance

i Challenges Severance Agreement between Preston and former Council Members

ii **Plaintiff's grievances are petty when compared with other cases in which public importance exception applied – Compare degree and/or magnitude of public importance in *Sloan* cases v present case**

iii First, each of these cases were declaratory judgment actions whereas Freemantle is seeking monetary damages in addition to declaratory relief

- *Sloan v Greenville County*, 356 S C 531, 590 S E 2d 338 (Ct App 2003) – challenged County bidding procedures
  - a Multi-million dollar sums at stake
  - b Often repeated process
    - i **FUTURE GUIDANCE** – without resolution the County

would stand to waste millions, adversely impacting taxpayers, the bidding contractors, etc

c Mandated procedures (ministerial act) as opposed to personnel decisions (discretionary act) – immunity for latter

- Issuance of hospital bonds *Baird v Charleston County*, 333 S C 519, 511 S E 2d 69 (1999)
  a **Public Importance** – "[T]he issuance of hospital bonds clearly impacts a profound public interest—the public health and welfare It is hard to conceive of any greater social interest than this one " 333 S C at 531
- Legality of a governor's eligibility for military service *Sloan v Sanford*, 357 S C 431, 593 S E 2d 470 (2004)
  a **Public Importance** – "The eligibility of South Carolina's governor to serve in this State's highest elected office is at least as important as the proper funding for a clinical hospital for MUSC " 357 S C at 434
  b **FUTURE GUIDANCE** – needed b/c pertained to permissibility of Governor's actions Especially when those actions have potential life threatening consequences
- Violations of statutory bidding requirements of state agencies *Sloan v Dep t of Transp* , 365 S C 299, 618 S E 2d 876 (2005)

iv Issues in these cases had much wider sweeping implications and effects upon a great number of people In other words, resolution necessary for future guidance

v Plaintiff seeks to collect money for himself, and invalidate a severance agreement – comparatively trite and localized

4 Even if Court confers standing to Plaintiff under exception, Freemantle still cannot proceed against individual Defendants in their individual capacity

a Plaintiff challenges the County's action in entering into contractual relationship with Preston He asks that contract be declared void due to the manner in which Preston and the other individual Defendants entered into the agreement

b No individual council member had power to contract on behalf of County with Preston

c South Carolina Taxpayer standing cases do NOT involve individual legislators

d Plaintiffs in those cases challenged actions of the entities or gov't officials in their official capacity

i *Sloan v Dept of Tranp*365 S C 299, 618 S E 2d 876 (2005)

ii *Sloan v Sanford* 357 S C 431, 593 S E 2d 470 (2004)

iii *Sloan v Greenville County*, 356 S C 531, 549, 590 S E 2d 338, 348 (Ct App 2003)

iv *Beaufort County v Trask*, 349 S C 522, 563 S E 2d 660 (Ct App 2002)

v *Baird v Charleston County*, 333 S C 519 (1999)

vi *Crews v Beattie*, 197 S C 32 (1941)

5 ***SLOAN* CASES NOT APPLICABLE,**

a Cannot proceed against Defendants in their individual capacity

b Defendants in their official capacities immune from liability (see Immunity section *infra*)

D Statutory Standing

1 SC FOIA § 30-4-100 allows any citizen to bring a cause of action for violation of the statute however no FOIA violation has occurred and therefore Plaintiff cannot garner statutory standing via FOIA

a Additionally, to the extent Plaintiff has alleged statutory standing via FOIA such standing is further precluded by Rule 12(b)(8) SCRCP

III ACTION BARRED UNDER RULE 12(B)(8) SCRCP (MEMO PG 7)

A **12(b)(8)** provides action should be dismissed if "another action is pending between the same parties for the same claim "

1 Plaintiff names Preston, Anderson County, and individual Defendants all as defendants

2 Complaint seeks to invalidate Severance Agreement granted by Anderson County to Preston, and to hold him along with individual defendants liable

3 *Anderson County v Joey Preston*, C A No 2009-CP-04-4482 pending in the Anderson Count Court also seeks to revoke Severance Agreement

a Plaintiff's suit duplicative in this respect

4 Anderson County case involves same substantive issues raised by Freemantle and involves the true parties in interest

5 Therefore, even if Plaintiff afforded standing, claims should be dismissed per 12(b)(8) SCRCP

IV PLAINTIFF FAILS TO MEET THE REQUIREMENTS OF RULE 23 SCRCP (MEMO PGS 7-8)

A **Rule 23** establishes prerequisites for plaintiff seeking to bring a class action – Before class certified court must find

1 Class 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 the representative parties are typical to those of the class

4 Representative parties will fairly and adequately protect interests of the class, and

5 The amount in controversy exceeds $100 for each class member

6 Complaint seeks to invalidate Severance Agreement granted by Anderson County to Preston, and to hold him along with individual defendants liable

a Plaintiff did not define class

b Only offered general description of "all those similarly situated" as himself

c 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)

i Plaintiff's lack of standing precludes him from proceeding with any putative class causes of action

V PRESTON'S EMPLOYMENT CONTRACT AND SEVERANCE AGREEMENT (MEMO PGS 8-16)

A Plaintiff's claim "Preston's contract was not binding on the current or future county councils" (Compl ¶ 66)

1 Assume assertion based on *Piedmont Public Service Dist v Cowart*, 324 S C 239, 478 S E 2d 836 (1996)

a However precedent inapplicable to present case

2 SC Constitution and Home Rule Act Supplanted Common Law Regarding the Power of Municipalities

a SC Const , Home Rule Act, and *Cowart* case itself compel the conclusion that the common law principles discussed in *Cowart* simply have no application to Preston's contracts which were entered into pursuant to Home Rule Act

i *Cowart* – applied *Newman* and held appointment or removal of public officer governmental function that cannot be impaired by employment contract extending beyond the terms of the members of the local governing body Such a contract is not binding on successors to the local governing body

ii *Newman* exception – "where enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms"

- Note *Newman* decision pre-Home Rule Act
- Note – *Cowart* dealt with special purpose district, not county council

b *Cowart/Newton* Principles Do Not Apply to Home Rule Act

i Common Law Principles of Dillon's Rule

- A municipal corporation possesses and can exercise the following powers and no others First, those granted in express words, second,

those necessarily or fairly implied in or incident to the powers expressly granted, third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensible *Williams v Town of Hilton Head*, 311 S C 417, 421, 429 S E 2d 802, 804 (1993)

- Ct of Appeals decision in *Cowart* involved faithful application of Dillon's Rule
- For reasons below court's adherence to Dillon's Rule in *Cowart* not instructive here b/c a County operates under entirely difference set of rules

II **Constitution of 1973 and Home Rule Act Abrogated Dillon's Rule as to the Authority of Counties**

- SC Const Art VIII § 7 – "Provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor " (Home Rule Act same language § 5-7-10)
- Anderson chose Council-Administrator form of gov't following Home Rule Act 1975 enactment
- Under this form of gov't Home Rule Act provides ***"The council may in its discretion employ the administrator for a definite term."***
- Home Rule Act abolished Dillon's Rule in SC as to counties
    a "This Court concludes that by enacting the Home Rule Act , the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government "

Hospitality Ass'n of South Carolina Inc v County of Charleston, 320 S C 219, 225-26, 464 S E 2d 113, 117-18 (1995)

- **Home Rule did not affect special purpose districts such as the one at issue in *Cowart***
- "Home Rule applies only to counties and municipalities, not special purpose districts" *Evins v Richland County Historic Preservation Commission*, 341 S C 15, 19, 532 S E 2d 876, 878 (2000)

c **Even if *Cowart* Applied, the Home Rule Act Provisions Supply the Necessary Authority to Contract under the *Newman* Exception**

i In this case, Home Rule Act expressly authorizes administrator contracts "for a definite term" SC Code § 4-9-620

- General Assembly did not grant such authority to special purpose district in *Cowart*

ii Accordingly, if Court finds, contrary to controlling precedent, Dillon's Rule still applies, the *Newman* exception would also apply

- Under *Newman* exception through power conferred by General Assembly to Council under § 4-9-620 Council could enter into contracts that bind subsequent councils as long as they are for a definite term

iii Defendant recognizes Home Rule Act does not contain language stating that a contract can extend beyond the terms of a particular council

- Such language unnecessary

- Prior to Home Rule, there was no need for legislative authority to hire someone merely for term of the members of the governing council
- Accordingly, if § 4-9-620 read as limiting any appointment to the terms of the current council members, it is superfluous
- *Lee v Thermal Engineering Corp* , 352 S C 81, 94, 572 S E 2d 298, 305 (Ct App 2002) ("We presume that the legislature did not insert idle verbiage or superfluous language in the statute Each word, clause, sentence, and section of a statute should be given meaning ")
- Limiting interpretation would also violate constitutional and statutory language that grants of power to counties be interpreted broadly as possible to include any fairly-implied powers

VI PRESTON HAS IMMUNITY FROM SUIT (MEMO PGS 16-19)

A Preston has immunity from liability for discretionary actions

1 **S C Code Ann § 15-78-60(5)** protects gov't entities and employees from liability for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee "

2 **Discretionary v Ministerial Actions/Duties**

a **Discretionary** when the gov't entity or employee proves it actually weighed competing considerations, faced with alternatives, and made a conscious decision based upon those

considerations *Faile v SC Dept of Juv Justice*, 350 S C 315, 330 (2002)

b **Ministerial** when it is absolute, certain, and imperative, involving merely an execution of a specific duty arising from fixed and designated facts *Id*

c Discretionary actions protected or immune from suit so long as actor is not grossly negligent *Richland County v Carolina Chloride Inc* , 382 S C 634, 677 (Ct App 2009)

3 **Powers and Duties of County Administrator**

a The duties of public officials are generally classified as either ministerial or discretionary, for purposes of determining discretionary immunity under the Torts Clams Act a duty is "ministerial" when it is absolute, certain, and imperative, involving merely an execution of a specific duty arising from fixed and designated facts, while a duty is "discretionary" if the government entity [or employee] proves it actually weighed competing considerations, faced with alternatives, and made a conscious decision based upon those considerations *Faile*, 350 S C 315 (2002)

i All of these duties involve some degree of discretion and none contain absolute or stringent procedural requirements or mandates

ii County Administrator's actions therefore, discretionary (rather than ministerial) and immune from suit except upon showing of gross negligence

b Plaintiff takes issue with discretionary actions of Preston and Council Members

i However practicality in the name of gov't efficiency mandates government officials be able to exercise considerable amounts of discretion to effectively serve the public

ii Without such immunity government entities and employees would be paralyzed by fear of litigation

4 **Preston has Immunity under S C Torts Claims Act**

a SC Code § 15-78-10 *et seq* "exclusive remedy available for torts committed by a governmental entity, its employees, or its agents, except where the conduct was not within the scope of official duties or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude "

b SC Code § 15-78-70(c) also explicitly provides that the entity for whom the employee is acting be named as the party defendant, not the employee himself

c Anderson County is a named Defendant in this matter

d If Plaintiff granted standing, and allowed to proceed, Preston and the individual Defendants should be dismissed pursuant to SC Torts Claims Act

e No allegations against individual Defendants that involve actions outside their official duties or Preston's role as County Administrator

f As such Torts Claims Act mandates they be dismissed as a matter of law and that the County be substituted as the proper party

VII ALLEGED VIOLATIONS OF SOUTH CAROLINA FOIA (MEMO PGS 19-21)

A Parliamentary Irregularities Cannot Invalidate Contracts and the Issue Represent a Nonjusticable Political Question

1 Plaintiff attempts to obtain declaratory judgment that Preston's Severance Agreement was/is "void because it was signed, prepare and agreed upon in violation of FOIA's requirements of open and honest government " (Compl § 109)

a If any such procedural missteps occurred they cannot serve to invalidate the Severance Agreement

2 **Nonjusticable Political Question**

a Nonjusticablity of political question is primarily a function of the separation of powers *Baker v Carr*, 369 U S 186, 210-11 (1962)

b 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)

c ***Bradshaw v Anderson County*, C A No 2009-CP-04-00491**

i 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

ii [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 "
(Order of March 26, 2009 at 15-16) (emphasis added)

VIII CONCLUSION (MEMO PGS 21-22)

A Taken in light most favorable to Plaintiff, the Complaint fails to set forth allegations against Preston and other individual defendants which would entitle Plaintiff to relief

1 Dismiss per 12(b)(6) SCRCP

B All actions of these Defendants taken pursuant to respective duties as Council Members and Preston as Administrator

1 Immunity Shield

C Plaintiff fails to adequately establish standing

1 Constitutional – no particularized injury in fact

2 Public Importance Exception – resolution of issues would not offer future guidance

a Does not rise to level of public importance

3 Statutory --- no FOIA violations, therefore unable to garner standing via statute

D Claim should be dismissed pursuant to Rule 12(b)(8) as there is currently an action pending before this Court that concerns the same issues, involves proper parties, and seeks nearly identical relief

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

C A No 2009-CP-04-4528

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

Plaintiffs,

vs

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,

Defendants

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I FACT AND PROCEDURAL BACKGROUND

The Plaintiff filed suit on November 16, 2009 against the above-named Defendants, Joey Preston, the former County Administrator for Anderson County, Anderson County Council and Anderson County This action arises as a challenge to the duly elected Council's vote and legislative action in favor of a Severance Agreement between the County and Joey Preston During all times relevant to this action, the Defendants Wilson, McAbee,

Greer, Thompson and Floyd were members of the Anderson County Council The Plaintiff alleges that the votes of these individual Council Members in favor of the severance agreement violated their fiduciary duties to the County and seeks to hold them personally liable [1] The Plaintiff also makes allegations of impropriety in other actions of these Defendants which the Plaintiff alleges damaged him as a taxpayer in Anderson County

Preston filed a timely Motion to Dismiss challenging the Plaintiff's standing and asserting various other defenses addressed below

II APPLICABLE LAW AND ANALYSIS

A PLAINTIFF LACKS STANDING

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 " (Compl ¶ 3) Under the facts and circumstances of the case, none of these capacities afford Freemantle adequate standing to maintain the causes of

[1] The final vote on the Severance Agreement was actually five in favor, one opposed, and one abstention According to Roberts Rules of Order and County Ordinance, a vote in abstention is considered an affirmative vote Councilman Robert E Waldrep Jr , who abstained, has not been named as an individual party to this suit

action against Preston or the individual Defendants, and therefore the Complaint should be dismissed *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* , 380 S C at 198, 669 S E 2d at 341, *See Sloan v Greenville*

County, 356 S C 531, 547, 590 S E 2d 338, 347 (Ct App 2003)(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"), *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)

(1) Freemantle Does Not Allege Particularized Injury In Fact

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 (*See* Compl ¶¶ 70, 77, 82, 87, 90, 93, 101) [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* Compl ¶¶ 110, 114, 122, 127) 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

[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* Compl ¶¶ 128 32

stemmed from Defendants' actions, they were borne by the public in general Therefore, Plaintiff has failed to establish the preliminary and essential element required for constitutional standing

(2) Plaintiff Does Not Allege Any Exception to the Standing Requirement

Courts of this State do however, allow for an exception for parties proceeding in their capacity as taxpayers or members of the general public to establish standing 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 For example, 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 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)

In the case at hand no "future guidance" can be gleaned from a court order finding that Defendants' actions were somehow improper Plaintiff is attempting to invalidate a

Severance Agreement between Preston and former County Council Members with which he does not agree If the Court declared the Agreement void, its holding could not provide any "future guidance" of public importance Such a holding would fail to offer anything of substance to the public, and would operate only to the detriment of Preston Therefore judicial resolution of the Plaintiff's allegations fails to rise to a level of public importance as to justify application of the standing exception The proper forum for resolution of the Plaintiff's grievances lies in the voting booth, not the court house

Even if this Court were to confer taxpayer standing upon the Plaintiff, it would still not allow Freemantle to proceed with a claim against Defendant Preston in his individual capacity The Plaintiff's Complaint amounts to a challenge of the County's action in entering into a contractual relationship with the former County administrator The Plaintiff asks that the contract be declared void due to the manner in which Preston and the other individual Defendants entered into the agreements However, none of the individual defendants had the power to enter into a contract on behalf of the County as individual council members Rather the Council Members had to act collectively as the Anderson County Council, not as individuals Notably, the taxpayer standing cases from South Carolina do not involve individual legislators The Plaintiffs in those cases challenged the actions of the entities or government officials in their official capacities See *Sloan v Friends of the Hunley, Inc*, 369 S C 20, 630 S E 2d 474 (2006), *Sloan v Department of Transportation*, 365 S C 299, 618 S E 2d 876 (2005), *Sloan v Sanford*, 357 S C 431, 593 S E 2d 470 (2004), *Sloan v Greenville County*, 356 S C 531, 590 S E 2d 338 (Ct App 2003), *Beaufort County v Trask*, 349 S C 522, 563 S E 2d 660 (Ct App 2002), *Baird v Charleston County*, 333 S C 519, 511 S E 2d 69 (1999), *Crews v Beattie*, 197 S C 32, 14

S E 2d 351 (1941) Here, the Plaintiff seeks redress from Preston and the other Defendants in their individual capacities There is simply no authority for this The proper defendant for any taxpayer challenge would be the County, not the individual defendants [3]

B THE ACTION SHOULD BE BARRED UNDER RULE 12(b)(8) SCRCP

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure 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 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, 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 and involves the true parties in interest Therefore, even if the Plaintiff were granted standing for this suit, all of his claims should be dismissed pursuant Rule 12(b)(8), SCRCP

C PLAINTIFF FAILS TO MEET THE REQUIREMENTS OF RULE 23 SCRCP

Rule 23 of the South Carolina Rules of Civil Procedure 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,

[3] South Carolina Freedom of Information Act (FOIA) §30 4-100 allows any citizen to bring a cause of action for violation of the statute, however no FOIA violation has occurred and therefore Plaintiff cannot garner statutory standing via FOIA Additionally, to the extent Plaintiff has alleged statutory standing via FOIA such standing is further precluded by Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as addressed *infra*

(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 SCRCP 23

Plaintiff did not define what group of individuals for whom he seeks to speak beyond the general description of "all those similarly situated" as himself Without more information to identify the putative class, any class action claims cannot be permitted to proceed Additionally, 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) Plaintiff's lack of standing on his individual claims precludes him from proceeding with any putative class causes of action

D PRESTON'S EMPLOYMENT CONTRACT AND SEVERANCE AGREEMENT

Plaintiff asserts that "Preston's contract was not binding on the current or future county councils" (Compl ¶ 66) This assertion is presumably made upon the decision in *Piedmont Public Service Dist v Cowart*, 324 S C 239, 478 S E 2d 836 (1996) However, as discussed below, this precedent is inapplicable to the case at hand, and Preston's employment contract and Severance Agreement were and are binding on subsequent County Councils

(1) The South Carolina Constitution and the Home Rule Act Supplanted the Common Law Regarding the Power of Municipalities

The South Carolina Constitution, The Home Rule Act, S C Code Ann § 5-7-10 *et seq*, and the *Cowart* case itself compel the conclusion that the common law principles discussed in *Cowart* simply have no application to Defendant Preston's contracts, which were entered into pursuant to the Home Rule Act In *Cowart*, the Piedmont Public

Service District (*hereinafter* District) employed the administrator pursuant to an employment agreement entered into in 1984 The original agreement was for a twenty year term, but provided a two year buyout option The Agreement was later amended in 1985 to increase the buyout term to five years In November of 1982, outgoing board members voted 4-1 to terminate the administrator without cause and to approve an agreement to pay the former administrator out over five years with an initial payment of $30,000 After the new commissioner took office, thereby creating a new 3-2 majority, they deemed the vote to approve to be invalid because it occurred in executive session The new board demanded that the administrator return to work and that he return the $30,000 When the administrator refused, he was terminated for insubordination

The District sued the administrator for a declaratory judgment and for return of the $30,000 The administrator counterclaimed for breach of contract Judge Floyd granted summary judgment for the District on all claims, including a determination that the severance contract was an improper binding of a future commission and that the severance was unenforceable The Court of Appeals affirmed

The Supreme Court agreed with Judge Floyd and the Court of Appeals that the case was controlled by *Newman v McCullough*, 212 S C 17, 46 S E 2d 252 (1948), a pre-Home Rule Act decision involving a municipality

> In *Newman*, we held the appointment or removal of a public officer is a governmental function that cannot be impaired by an employment contract extending beyond the terms of the members of the local governing body *Id* at 23, 46 S E 2d at 255 Such a contract is not binding on the successors to the local governing body

Cowart, 324 S C at 241, 478 S E 2d at 837

Significantly, the *Cowart* Court went on to recognize, "*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms" *Id*, 478 S E 2d at 838 (*citing Newman*, 212 S C at 23, 46 S E 2d at 255)

(a) *Cowart/Newton* Principles Do Not Apply to the Home Rule Act

(1) Common Law Principles of Dillon's Rule

Under the common law principle known as Dillon's Rule

> A municipal corporation possesses and can exercise the following powers and no others First, those granted in express words, second, those necessarily or fairly implied in or incident to the powers expressly granted, third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensible

Williams v Town of Hilton Head, 311 S C 417, 421, 429 S E 2d 802, 804 (1993) The principle of Dillon's Rule applied to restrict the power of counties *South Carolina Ports Authority v Jasper County*, 368 S C 388, 399 n 4, 629 S E 2d 624, 629 n 4 (2006)

The Court of Appeals' decision in *Cowart* establishes that the case involved a faithful application of Dillon's Rule *See Piedmont Publ Serv Comm v Cowart*, 319 S C 124, 131, 459 S E 2d 876, 880 ("A municipal corporation is a creature of statute and has only the powers expressly granted it, those which are necessarily or fairly implied in or incident to the express powers, or those powers essential to the accomplishment of its purpose") *aff'd on other grounds*, 324 S C 239, 476 S E 2d 836 (1996) For the reasons below, the court's adherence to Dillion's Rule in *Cowart* is not instructive here because a County operates under an entirely different set of rules

(ii) The Constitution of 1973 and The Home Rule Act Abrogated Dillon's Rule as to the Authority of Counties

In 1973, the South Carolina Constitution of 1868 was amended with the new Article VIII, providing for the transfer of government powers from the legislative delegations to the counties and municipalities *See* S C Const Art VIII § 7 Article VIII contains the following rule of construction that is antithetical to the notions of Dillon's Rule

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution
>
> S C Const Art VIII, § 17

The Home Rule provisions of Article VIII were not self executing "Although the General Assembly was required to implement home rule, [the] new Article VIII essentially left it up to the General Assembly to decide what powers local governments should have Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities" *Hospitality Ass'n of South Carolina, Inc v County of Charleston*, 320 S C 219, 225-26, 464 S E 2d 113, 117-18 (1995)

The General Assembly enacted the Home Rule Act of 1975 Of the various forms of government offered to the counties, Anderson County eventually chose the Council-Administrator form of government *Wilson v Preston*, 378 S C 348, 352, 662 S E 2d 580, 581 (2008) Under this form of government, the Home Rule Act provides

> The council shall employ an administrator who shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the

> council has the authority to control He shall be employed with regard to his executive and administrative qualifications only, and need not be a resident of the county at the time of his employment The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine *The council may, in its discretion, employ the administrator for a definite term* If the council determines to remove the county administrator, he shall be given a written statement of the reasons alleged for the proposed removal and the right to a hearing thereon at a public meeting of the council Within five days after the notice of removal is delivered to the administrator he may file with the council a written request for a public hearing This hearing shall be held at a council meeting not earlier than twenty days nor later than thirty days after the request is filed The administrator may file with the council a written reply not later than five days before the hearing The removal shall be stayed pending the decision at the public hearing

S C Code Ann § 4-9-620 (emphasis added) [4]

The Home Rule Act abolished Dillon's Rule in South Carolina as to counties *Williams* 311 S C at 422, 429 S E 2d at 805 ("This Court concludes that by enacting the Home Rule Act, S C Code Ann § 5-7-10, et seq (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government"), *Hospitality Ass'n of South Carolina, Inc v County of Charleston*, 320 S C 219, 225 n 4, 464 S E 2d 113, 117 n 4 (1995)

The Home Rule Act did not, however, affect special purpose districts, such as the one at issue in *Cowart Evins v Richland County Historic Preservation Commission*, 341

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[4] Pursuant to its statutory authority, Anderson County enacted the following Ordinance

> No employed official other than the administrator will be appointed to a "term" of office or have a contract of employment, formal or informal or by operation of law, establishing such "term" of office No "terms of employment" will be construed as a contract of employment for a 'term' of office, except in the case of the county administrator Every county employee other than the administrator is an employee "at will of the county

Anderson County Ordinance § 2-136(b)(3)

S C 15, 19, 532 S E 2d 876, 878 (2000) ("Home Rule applies only to counties and municipalities, not special purpose districts"), *See Id.* n 7 (overruling *D W Flowe & Sons v Christopher Constr Co*, 326 S C 17, 482 S E 2d 558 (1997) to the extent it implies Home Rule applied to special purpose districts) The principles of Article VIII of the Constitution, the Home Rule Act, and the application of the Anderson County Code of Ordinances simply were not at issue in *Cowart* *See* S C Code Ann § 4-9-80[5] Accordingly, *Cowart* is not instructive and this Court should be guided solely by the constitutional and statutory provisions that actually apply

(b) Even if *Cowart* Applied, the Home Rule Act Provisions Supply the Necessary Authority to Contract under the *Newman* Exception

The special legislation authorizing the hiring of the administrator in *Cowart* is materially different than the legislation under which Anderson County contracted with Preston In *Cowart*, Act No 1839 of 1972 amended Act 389 of 1955 and provided, in

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[5] This section provides

The provisions of this chapter shall not be construed to devolve any additional powers upon county councils with regard to public service districts, special purpose districts, water and sewer authorities, or other political subdivisions by whatever name designated, (which are in existence on the date one of the forms of government provided for in this chapter becomes effective in a particular county) and such political subdivisions shall continue to perform their statutory functions prescribed in laws creating such districts or authorities except as they may be modified by act of the General Assembly, and any such act which dissolves a district or absorbs its function entirely within the county government shall provide that such act shall be effective only upon approval of such abolition or absorption by favorable referendum vote of a majority of the qualified electors of the district voting in such referendum Upon the dissolution of any district within a county and the assumption of its function by the county government, the county shall take title to the property of the district and assume all of its debts and obligations which shall be retired by charges or assessment of taxes in those areas of the county receiving benefits from the facilities of the district, provided, however notwithstanding any other provision of law when any county council under existing law is authorized to appoint members to the governing body of a public or special service district or a water resources commission within the county and such governing body by resolution directed to the council requests a change in the size or manner in which members of such governing body are selected, the council may by ordinance effect such changes and the council action shall have the full force and effect of law from the effective date of the ordinance

relevant part "[T]he commission may [s]elect and employ a fire chief or equivalent official " (S C Act No 1839 of 1972 § 4(h) In this case, the Home Rule Act expressly authorizes administrator contracts "for a definite term " S C Code Ann § 4-9-620 The General Assembly granted no such authority to the special purpose district in *Cowart* Accordingly, if this Court found, contrary to controlling precedent, that Dillon's Rule still applies, the exception recognized in *Newman* and *Cowart* also would apply Even this application of non-controlling law would allow Defendants to enter into a contract with Preston that bound subsequent Councils per the *Newman* exception, as long as they contracted for a definite term

Preston recognizes that the Home Rule Act does not contain language stating that a contract can extend beyond the terms of a particular council [6] However, such language is not necessary under these circumstances Prior to Home Rule, there was no need for a legislative authority to hire someone merely for the term of the members of the governing body Accordingly, if Section 4-9-620 was read as limiting any appointment to the terms of the members of the governing body, it is superfluous This Court should not read statutory language in a manner that renders it superfluous , *Lee v Thermal Engineering Corp* , 352 S C 81, 94, 572 S E 2d 298, 305 (Ct App 2002) ("We presume that the legislature did not insert idle verbiage or superfluous language in the statute Each word, clause, sentence, and section of a statute should be given meaning ")

> When interpreting a statute, courts must presume the legislature did not intend to do a futile act *Proctor v Dep't of Health and Envtl Control*, 368 S C 279, 311, 628 S E 2d 496, 513 (Ct App 2006) The legislature is presumed to intend that its statutes accomplish something *State v Long*,

[6] *See Cowart* 324 S C at 241, 478 S E 2d at 838 ("*Newman* allows an exception, however, where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms ") (*citing Newman*, 212 S C at 23, 46 S E 2d at 255)

363 S C 360, 364, 610 S E 2d 809, 812 (2005) "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous " *Matter of Decker*, 322 S C 215, 219, 471 S E 2d 462, 463 (1995) (citing 82 C J S Statutes § 346) *See also Pike v S C Dep't of Transp*, 332 S C 605, 618, 506 S E 2d 516, 523 (Ct App 1998), *aff'd as modified*, 343 S C 224, 540 S E 2d 87 (2000)

State v Sweat, 379 S C 367, 377, 665 S E 2d 645, 651 (Ct App 2008), *cert granted* March 19, 2009

A limiting interpretation of Section 4-9-620 would also violate both the constitutional and statutory requirements that grants of power to Anderson County be interpreted as broadly as possible to include any fairly-implied powers [7]

Finally, any argument that such words are necessary would essentially be grafting words of limitation onto the statute (i e "as long as such term does not exceed the length of the term of individual council members") "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation " *Municipal Ass'n of South Carolina v AT&T Commc n of Southern States Inc* 361 S C 576, 580, 606 S E 2d 468, 470 (2004) (*citing Hitachi Data Sys Corp v Leatherman*, 309 S C 174, 178, 420 S E 2d 843, 846 (1992)), *see, e g Bryant v City of Charleston*, 295 S C 408, 411, 368 S E 2d 899, 901 (1988)

[7] S C Const Art VIII § 17 ("The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution "), S C Code Ann § 4 9 25 ("All counties of the State, in addition to the powers conferred to their specific form of government have authority to enact resolutions[] and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers in relation to order in counties or respecting any subject as appears to them necessary and proper for the convenience of counties and good government in them The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties ")

(rejecting implied additional requirements to annexation powers where statute did not contain words of limitation) [8]

In sum, Plaintiff has no viable argument that Dillon's Rule or *Cowart* apply where controlling authority clearly establishes otherwise Under that controlling authority council had the power to contract with Preston for a definite term and bind subsequent County Councils for the duration of that term

E PRESTON HAS IMMUNITY FROM SUIT

(1) Preston has Immunity from Liability for Discretionary Actions

Governmental entities or employees are protected from liability for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee " S C Code Ann § 15-78-60(5) As the statutory language indicates, government employees enjoy immunity from personal liability when their actions are "discretionary" rather than "ministerial "

> The duties of public officials are generally classified as either ministerial or discretionary, for purposes of determining discretionary immunity under the Torts Clams Act a duty is "ministerial" when it is absolute, certain, and imperative, involving merely an execution of a specific duty arising from fixed and designated facts, while a duty is "discretionary" if the government entity [or employee] proves it actually weighed competing

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[8] Recently, the court reiterated

> 'The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature " *Bayle v South Carolina Dep't of Transp* 344 S C 115, 122 542 S E 2d 736 739 (Ct App 2001) Under the plain meaning rule, it is not the court s place to change the meaning of a clear and unambiguous statute' *Id.* "Where the statute s language is plain and unambiguous, and conveys a definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning' *Id* at 122, 542 S E 2d at 739-40 "What a legislature says in the text of a statute is considered the best evidence of legislative intent or will ' *Id* at 122 542 S E 2d at 740 'Therefore, the courts are bound to give effect to the expressed intent of the legislature ' *Id Hardee v McDowell* 381 S C 445, 453, 673 S E 2d 813 817 (2009)

> considerations, faced with alternatives, and made a conscious decision based upon those considerations

Faile v South Carolina Dept of Juvenile Justice, 350 S C 315, 330, 566 S E 2d 536, 544 (2002)(internal citations omitted), *Jackson v South Carolina Dept of Corr*, 301 S C 125, 390 S E 2d 467 (Ct App 1989) (Discretionary actions are protected or immune from suit, even if the actor abuses his or her discretionary power so long as they are not grossly negligent) This statute must be liberally construed to limit liability *Richland County v Carolina Chloride Inc*, 382 S C 634, 650, 677 S E 2d 892, 900 (Ct App 2009)

The powers and duties of a County Administrator include, among other things

> (1) executing policies, directives, and legislative actions of the council, (2) preparing budgets for submission to the council and, (3) in the exercise of that responsibility, having the authority to require such reports, estimates, and statistics as the administrator deems necessary from all county departments and agencies, (4) preparing annual, monthly, and other reports for council on finances and administrative activities of the county, and (5) performing such other duties as may be required by the council

S C Code Ann § 4-9-630

All of these duties involve some degree of discretion and none contain an absolute or stringent procedural requirement or mandate The County Administrator's actions are therefore discretionary, rather than ministerial, in nature and protected from suit barring a showing of gross negligence In essence, Plaintiff disagrees or takes issue with the discretionary actions of Preston and the council members However practicality in the name of government efficiency mandates that government officials be able to exercise a considerable amount of discretion to effectively serve the public If each action a government employee took risked personal liability for any losses or injury that may result, government entities and employees would be paralyzed by fear of liability

Plaintiff's Complaint should be dismissed due to the fact that absent a showing of gross negligence, Preston is entitled to immunity for the alleged actions forming the basis of the Complaint

(2) Preston also has Immunity under South Carolina Torts Claims Act

The South Carolina Torts Claims Act, S C Code Ann § 15-78-10 *et seq*, is the "exclusive remedy available for torts committed by a governmental entity, its employees, or its agents, except where the conduct was not within the scope of official duties or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude" S C Code Ann §§ 15-78-20(b), 70(b) In addition to common law legislative immunity, Preston is also immune from suit pursuant to the South Carolina Tort Claims Act, specifically S C Code §§ 15-78-60(1) and 15-78-70 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 § 15-78-70

Anderson County is named as a defendant in this matter If the Plaintiff is granted standing and permitted to proceed with this action, Preston and the individual Defendants should be dismissed pursuant to the Tort Claims Act The Act provides that when an individual is named, the entity must be substituted as the party defendant S C Code §15-78-70(c) That has been done in this case, with Anderson County being named as a Defendant 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 or Preston's as County Administrator As such, the Tort Claims Act mandates that they be

dismissed as a matter of law and that the County be substituted as the proper party Because the County is already named in this action, Preston and the other individual Defendants are entitled to a dismissal

F ALLEGED VIOLATIONS OF SOUTH CAROLINA FREEDOM OF INFORMATION ACT

The purpose of the South Carolina Freedom of Information Act, S C Code Ann § 30-4-10 *et seq* , (*hereinafter* FOIA) is to protect the public by providing a mechanism for the disclosure of information by public bodies S C Code Ann § 30-4-15, *Bellamy v Brown*, 305 S C 291, 295, 408 S E 2d 219, 221 (1991)

(1) Parliamentary Irregularities Cannot Invalidate Contracts and The Issue Represents a Nonjusticable Political Question

Plaintiff 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" (Compl ¶ 109) Nevertheless, any parliamentary irregularities cannot invalidate Preston's Employment Contract or Severance Agreement Furthermore, the issue represents a nonjusticable 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 Air Lines v Waterman S S Corp, Civil Aeronautics Board*, 333 U S 103, 111 (1948)

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*, C.A. No. 2009-CP-04-00491, 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.[9] Anderson County submitted a proposed order, which this 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."

(Order of March 26, 2009 at 15-16) (emphasis added).[10]

It also bears noting that Plaintiff's FOIA related causes of action are statutory creations and therefore the sole remedies Freemantle 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

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[9] 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," S.C. Code Ann. § 30-4-80(a), 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." *Id.* § 30-4-80(a).

[10] Defendant has provided the Court with a copy of the Order issued in *Bradshaw v. Anderson County*, C.A. No. 2009-CP-04-00491.

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, Plaintiff may not seek to do so

In sum, any alleged procedural deficiency cannot invalidate a binding contract, nor should this Court address the vague but purported FOIA violations as such an inquiry, without more, would violate the Political Question Doctrine [11]

III CONCLUSION

Taken in the light most favorable to the Plaintiff, the Complaint fails to set forth allegations against the individual Defendants, Joey Preston, Ron Wilson, Bill McAbee, Larry Greer, Michael Thompson, and Gracie Floyd, which would entitle Plaintiff to relief All the alleged actions of these Defendants were actions taken pursuant to their respective duties as members of Anderson County Council and Preston in his role as County Administrator The Plaintiff seeks to assert a claim as a taxpayer, citizen, resident, and elector of Anderson County, but fails to adequately establish the requisite standing required to maintain the current action Further, Plaintiff's claim should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure as there is currently an action pending before this Court that concerns the same issues, involves proper parties to the action, and seeks nearly identical relief

[11] The restrictions on a court s ability to address political questions was also 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)

Based upon the reasons outlined above, the Plaintiff's claims against Defendant Joey Preston must fail, and Defendant Preston's Motion to Dismiss should be granted

Respectfully Submitted,

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March 16, 2010

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
HON J CORDELL MADDOX

CASE NO 2009-CP-04-4528

RICHARD FREEMANTLE, individually and on behalf of himself and all others similarly situated APPELLANT

VS

JOEY PRESTON, in His Official Capacities and Individually, While 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, GRACIE FLOYD, in Her Official Capacities and Individually, RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that she served the Appendix to Record on Appeal on the Respondents by mailing a copy of the same to the attorney's of record for the Respondents via United States Postal Service at the addresses listed below

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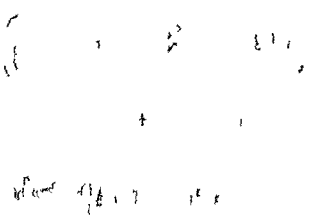

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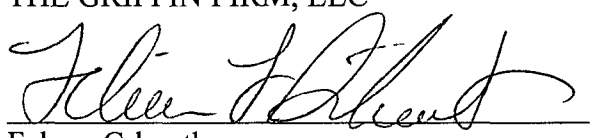
BY 
Felicia Gilreath

Dated September 29, 2011

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