THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 08-CP-40-8854

Phillip D. Grimsley, Sr., and
Roger M. Jowers, on behalf of
themselves and others similarly situated,

Appellants,

vs.

South Carolina Law Enforcement Division
and the State of South Carolina,

Respondents.

APPELLANTS' BRIEF

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Questions Presented

1. Did the lower court erred in finding that Respondent did not violate S.C. Code § 9-11-90?

2. Did the lower court err in holding that Appellants had no property interest sufficient to sustain a taking?

3. Did the lower court err in finding that Appellants waived or relinquished their interests, consented to the reduction of salary and/or are estopped from asserting their claims?

STATEMENT OF FACTS

Appellants are former employees of the South Carolina Law Enforcement Division and were members of the Police Officers Retirement System. (R. pp. 107, 139). While employed, Appellants were given the opportunity to participate in a retirement program that was created internally created by SLED. (R. pp. 107, 139). This program required Appellants to retire from SLED and then be rehired by SLED as a full time employee. (R. pp. 107, ¶ 1, 139, ¶ 1).

In order to participate in the program, Appellants had to complete certain forms. (R.p. 172, ¶ 11). One of the conditions of the program was that Appellants would "have a reduction of 13.6% in [their] salary to cover the amount it will cost SLED to pay the employer portion of retirement." (R. pp. 107-108, ¶ 3, 158). In other words, Appellants were responsible for the employer contribution to the retirement system through the reduction of their own salary.

SLED's obligation to pay the employer's contribution to the retirement system when a member of the Police Officers Retirement System retires and returns to employment is established by S.C. Code Ann. § 9-11-90:

> An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or permanent employee.

Id.[1] However, under SLED's program, Appellants -- the "retired members" described in the statute-- are paying the employer's portion of the retirement contribution.

Furthermore, as it has admitted, SLED receives appropriations from the General

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[1]See also, S.C. Code § 9-11-220(1) which requires "each employer shall contribute to the System" a certain percentage for its employees.

Assembly, including the monies to pay the employer portion of the retirement contribution. (R. pp. 205-206). In fact, "Employer Contributions" is a line item in the Appropriations Act that represents the monies appropriated by the General Assembly for that specific purpose. (R. pp. 205-206, ¶¶ 5-9, 209-213). However, SLED, in effect, misappropriates monies due the retirement system and hides the misappropriation by taking money from the retirees' wages. (R. pp. 191, 205-207).

Appellants, who are only two of approximately 70 other SLED employees affected, lost thousands of dollars to which they were entitled. (R. pp. 108-109 ¶ 6-9, 140-141 ¶ 6-9). For example, in 2005, which was the first full year of reemployment for both Appellants, Appellant Grimsley's lost salary in the amount of $7,330.74 and Appellant Jowers lost $6,382.53. Appellants then sued SLED for the violation of the statute and unconstitutional taking. (R. pp. 23-32). Appellants and SLED each filed motions for summary judgment (R. pp. 56-64). By Order dated July2, 2012, the lower court granted SLED's motion for summary judgment. This appeal followed.

Standard of Review

Summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Quality Towing, Inc. v. City of Myrtle Beach,* 340 S.C. 29, 530 S.E.2d 369 (2000). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage

of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 320 S.C. 143, 463 S.E.2d 618 (Ct.App.1995), *rev'd in part on other grounds,* 327 S.C. 238, 489 S.E.2d 470 (1997). The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. *South. Carolina Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

ARGUMENT

I. The lower court erred in the Respondent did not violate S.C. Code § 9-11-90.

The lower court concluded, as a matter of law, that no employer contribution was "Deducted" from Appellants' salaries, and that Appellants agreed to a salary "REduction" so that 9-11-90 was not violated. (R. p. 13). As noted above, Section 9-11-90 S.C. Code Ann. § 9-11-90, requires:

> An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or permanent employee.

The lower court's ruling allows SLED to evade that requirement by claiming that as long as SLED engaged in the ministerial act of transferring the money to the Retirement Systems without "DEducting" it from Appellants paychecks, the statute has not been violated. If the lower court's interpretation is accepted, the intent of the General Assembly has will be frustrated and spirit of

the statute would be eviscerated.[2] It is clear that the General Assembly's intent was that the funds it appropriates to SLED be used for the purposes appropriated. There is simply no foundation in law for SLED to reduce Appellants' salaries to try to recoup or offset expenses that have been specifically appropriated by the legislature.

The lower court then asserts that even the contributions had been deducted from Appellants' salaries, there was still no violation of S.C. Code 9-11-90. The lower court states that S.C. Code § 9-11-90 did not require the State to rehire Appellants, and thus, SLED did not violate any right by requiring Appellants to accept a reduced salary. What the lower court fails to recognize is that SLED is required to pay the employer contributions from the money allocated to it by the General Assembly for that specific purpose.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). The statute is very clear as to retirement contributions. It requires the employer to "**pay to the system the employer contribution for active members** prescribed by law with respect to **any retired member**...." (emphasis added) In other words, working retirees such as Appellants must be treated the same way as other employees with regard to employer retirement contributions. The statute's intent is that SLED will make the required employer contributions for <u>all</u> employees from its appropriations.[3]

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[2]In addition, if that interpretation is accepted, all agencies could then reduce any employee's salary, whether the employee was an active member or working retiree, and use those funds for its own use.

[3]The lower court's order eviscerates that requirement by claiming that as long as SLED engaged in the ministerial act of transferring the money to the Retirement Systems, regardless of whether SLED is paying the contribution from its appropriated funds or the withheld wages of Plaintiff, the statute has not been violated. If the court's interpretation is allowed to stand, the

The General Assembly specifically appropriates money for agency costs and those funds must be used as directed:

> The General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill. In writing the appropriations bill, it attempts as best it can to predict the needs of the various departments of state government.

State ex rel. McLeod v. McInnis, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982). S.C.Code Ann. § 11-9-10 states that:

> It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act.

The lower court found that once Appellants retired, they had "no legally protected right or interest with regard to what SLED did with the money that had funded their former salaries during the original period of employment." (R. p. 15). The lower court also found that Appellants' had no standing to make claims regarding the appropriations that funded their salaries and benefits once they retired and returned to work. However, regardless of whether the Appellants are regular employees or working retirees, they contribute to the retirement system, (and receive benefits from the same), and thus, have standing as to what SLED does with the money it is appropriated for the retirement system. See, *Myers v. Patterson*, 315 S.C. 248, 433

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intent of the General Assembly has will be frustrated and spirit of the statute would be eviscerated. It is clear that the General Assembly's intent was that the funds it appropriates to SLED be used for the purposes appropriated. There is simply no foundation in law for SLED to reduce Appellants' salaries to try to recoup or offset expenses that have been specifically appropriated by the legislature.

S.E. 2d 841 (1993)(a taxpayer who has contributed to the sum jeopardized, is considered to have sufficient interest for standing).

The lower court then erroneously states that Appellants' claim that SLED has misappropriated funds allocated by the General Assembly was factually unsupported. (R. pp. 14-15). That finding ignores the admissions of SLED.

SLED admitted that the General Assembly appropriates funds for both the salaries for the agency's employees and for the "fringe benefits"[4] of the employees. The annual appropriations acts contain sections designated "Employee Benefits," which include a line item designated "State Employer Contributions." As admitted to the lower, SLED was appropriated the full amount of Appellant Grimsley's salary ($52,896) as well as the funds with which to pay the employer contribution. R. pp. 65-86). However, SLED reduced the salary to 48,318,[5] and then made the employer contribution based on this reduced amount. By SLED's calculations, this resulted in SLED saving and retaining $4,600 "for salaries for other employees." (R. pp.11, 76).[6]

Despite the admissions by SLED, the lower court found as a matter of law that there was no misappropriation. The court based this finding on a provision of the 2004-2005 Appropriations Act, Part 1B, § 72.10 which allowed an agency to transfer appropriations of up to

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[4]According to SLED, "fringe benefits" includes the employer portion of the retirement contribution, and other benefits, such as workers compensation and health insurance .

[5]This salary amount was for 2005, the first full year of Grimsley's reemployment after retiring.

[6]There appears to be a calculation problem in that SLED notes that there was a savings for a "salary reduction of $4,600, as well as an additional $600 in benefits, i.e., the amount by which the employer contribution was reduced." SLED and the lower court then concluded that the "4,600 accordingly was available for salaries of other employees." However, it would appear to Appellants that the total "savings" by SLED would be $5,200 (4600 + 600).

20% of the program budget (provided that the agency notify the Division of Budget and Analyses and the Comptroller General) even though the court acknowledged that no such transfers occurred. Because SLED did not utilize the transfer provision in Part 1B, the lower court cannot rely on that provision to skirt the requirement of the statute that states:

> It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated....

S.C. Code § 11-9-10. Clearly, there is a factual issue as to whether SLED has misappropriated the funds allocated to it by the General Assembly and violated S.C. Code 9-11-90.

II. The lower court erred in holding Appellants' lacked a sufficient property interest to support a takings claim.

The lower court erred in finding that Appellants had no property interest. In the lower court, SLED did not dispute that Appellants' salary was reduced in order to "cover the amount it will cost SLED to pay the employer portion of retirement." The South Carolina Supreme Court has already considered the existence of a property interest in this case and held:

> ...Appellants do not claim they are entitled to a particular salary level. Rather, Appellants contend that they have a cognizable property interest in the percentage of their salary that was deducted in violation of section 9-11-90, regardless of any particular salary level.... **Properly construing Appellants' claim, we hold section 9-11-90 provides a basis to assert a property interest.**

Grimsley v. S. Carolina Law Enforcement Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012)(emphasis added). The lower court tries to avoid this ruling by finding Appellants had no property interest to support a taking because the retirement contributions were not "deducted" from their actual pay checks. Again, the lower court ignores the fact that Appellants have a statutory right to be treated the same as any other member and that SLED must "**pay to the system the employer contribution for active members** prescribed by law with respect to **any**

retired member...." (emphasis added). This statutory right constitutes a property interest. SLED cannot avoid the effect of the statute by instituting an a program that requires Appellants to pay the employer contributions, thereby depriving Appellants of their property interests.

The Supreme Court has further commented on this property interest in *Bell v. S. Carolina Dept. of Corr.*, 397 S.C. 320, 337, 724 S.E.2d 675, 684 (2012), finding that employees who were recalled to former positions after a RIF should not have their salaries reduced:

> Similar to the employees' statutory right in *Grimsley,* Appellants as "covered employees" were statutorily entitled to be recalled to vacant positions for a period of one year following the RIF. Furthermore, those employees who were retained after the RIF and performed the same educational duties were entitled to a salary based on the teachers' pay schedule established in *Abraham.* The SCDC could not, through an internal policy, deprive Appellants of these interests rooted in state law.

Id. Here, SLED is using internal policies to, in effect, thereby depriving Appellants of their property interests derived from S.C. Code § 9-11-90.

In this case, state laws set forth the amounts that can be deducted from wages for retirement contributions, as well as the contributions that must be paid by the employer. In other words, the State has created a statutory right to be paid without a reduction for the 13.6 % employer contribution. It is undisputed that Appellants ' salaries, as well as the other class members, were reduced by this amount, which caused them to lose thousands of dollars.[7] The reduction of wages is contrary to the specific statutory requirements and constitutes a taking of the property interest created by statute. *See, e.g., Wicker v. South Carolina Dept. of Corrections,* 360 S.C. 421, 424, 602 S.E.2d 56, 57 (2004) ("We find that where, as here, the state has created a statutory right to the payment of a prevailing wage, it cannot thereafter deny that right without

[7]Affidavits of Grimsley and Jowers (R.pp. 108-109 ¶ 6-9, 140-141 ¶ 6-9).

affording due process of law."). Appellants who were rehired to perform the same jobs as before retirement, should not have their salaries reduced to pay the employer contribution under SLED's "internal policy." Plaintiffs clearly have a property interest, which SLED has illegally taken.[8]

III. The lower court erred in finding that Appellants waived or relinquished their interests, consented to the reduction of salary and/or are estopped from asserting their claims.

The lower court wrongly found that Appellants could not recover on their claims for three additional and related reasons: a) that Appellants waived or relinquished their interests; b) that Appellants consented to the reduction of salary; and/or c) that Appellants should be estopped from asserting their claims.

A. Appellants did not waive any interests.

The lower court found that the forms signed by Appellants constituted a waiver of to a property interest. However, Appellants' waiver of rights as evidenced by "agreements" were forms created by SLED, and which do not contain language upon which the parties negotiated. If Appellants did not sign the form, they could not be rehired. Furthermore, agreements in violation of statutory or constitutional law will not be enforced. *Beach Co. v. Twillman, Ltd.,*

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[8]While the lower court's order only concludes there is no property interest and thus does not address whether a taking occurred, the taking of one's wages is an obvious violation:

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 342 (1969)(court found the prejudgment garnishment of wages violated Constitution). The amount of money that Plaintiffs and the class have been deprived is significant. According to SLED's own spreadsheet for showing the salary at retirement and the rehire salary for 71 working retirees, show that wages of thousands of dollars were withheld under SLED's program.

351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (An illegal contract is unenforceable); *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (This Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.). The lower court's ruling enforces an "agreement" that violates S.C. Code § 9-11-90, and such "agreements" cannot be enforced and should not be considered a waiver of Appellants' rights.[9]

B. Appellants did not voluntarily consent to the reduction of salary.

The lower court's order merely states that Appellants "consented to the arrangement under which they were rehired" and that the evidence shows a "voluntary agreement." (R. pp. 20-21). However, for the same reasons set forth in Subsection III.A., the lower court erred in finding that Appellants' alleged "consent" barred them from proceeding on their claims.

C. There is no evidence of estoppel.

The lower court states that Appellants' late assertion to their rights to their old salaries would harm SLED, and thus they are estopped. However, SLED has certainly not submitted evidence to warrant summary judgment on an estoppel claim. The elements of estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000). The lower court's order cites no conduct by Appellants that

[9]In addition, as set forth above, SLED's actions result in an unconstitutional taking and is likewise unenforceable. See, *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, supra.

is amounts to false representation or concealment.[10]

Additionally, a party asserting estoppel must show that he or she suffered a definite, substantial, detrimental change of position in reliance on such agreement, and that no remedy except enforcement of the bargain is adequate to restore his or her former position. 30 S.C. Jur. Contracts § 24. Here, however, whether SLED suffered or would suffer any detriment is an issue of fact. There is no evidence in the record, other than argument of counsel, that SLED would suffer any detriment. The lower court's order claims that the detriment is that SLED would be required to "find funding to pay Plaintiffs' salary differentials" for the four year period in which Appellants were in the program. (R. p. 20). Of course, this finding ignores the fact that SLED had the funding to pay Appellants' non-reduced salaries, but "saved" that money by improperly reducing the salaries by the percentage of employer retirement contributions instead of using the funds as required by the Appropriations Bill. As set forth in Section I., there is simply no foundation in law for SLED to reduce Appellants' salaries to try to "save" those funds for other expenses when those funds were specifically allocated by the General Assembly. SLED should not be allowed to use estoppel as a shield for its own improper conduct.

[10]In addition, there is no evidence that Appellants has knowledge of some "true facts" that it withheld from SLED.

CONCLUSION

For the reasons set forth herein, the lower court erred in granting summary judgment to Respondent. The lower court's order should be reversed so that Appellants may proceed to trial.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.

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PROOF OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served Appellants' Brief and Appellants' Reply Brief upon opposing counsel by mailing a copy of same, postage prepaid and address clearly indicated, to said opposing counsel addressed as follows:

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This 12th day of June, 2013.