THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-40-8854

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

v.

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

Of Whom, South Carolina Law Enforcement Division is ..... Respondent.

PETITION FOR REHEARING

The Respondent South Carolina Law Enforcement Division petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Grimsley v. South Carolina Law Enforcement Division*, Op. No. 5201 (S.C. Ct. App. filed February 26, 2014).

The grounds for the Respondent South Carolina Law Enforcement Division's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

This petition for rehearing is based on the Court's decision in *Grimsley v. South Carolina Law Enforcement Division*, Op. No. 5201 (S.C. Ct. App. filed February 26, 2014), the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

DAVIDSON & LINDEMANN, P.A.

BY: /s/ _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent
South Carolina Law Enforcement Division

Columbia, South Carolina

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Of Whom, South Carolina Law Enforcement Division is ..... Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent South Carolina Law Enforcement Division (SLED) has petitioned this Court for a rehearing of the recent decision in *Grimsley v. South Carolina Law Enforcement Division*, Op. No. 5201 (S.C. Ct. App. filed February 26, 2014). Respondent SLED respectfully submits that the following points were overlooked or misapprehended by this Court:

1. The opinion states that "the appellants argue this sentence in one of the forms—"You will have a reduction of 13.6% in your salary to cover the amount it will cost SLED to pay the employer portion of retirement"—is evidence the parties agreed to the same salary the appellants received before retirement." Slip op. at 2. The Court then concluded that "[i]f the reduced figure was calculated as a percentage reduction from 'your salary,' then the salary of each rehired employee was the figure before reduction, not the reduced figure." *Id.*

SLED first respectfully submits that the Court overlooked or misapprehended the fact that its holding was not a point that was raised or argued by Appellants, either at the circuit court level or on appeal. Because the issue was not raised before the circuit court, the order of that court did not specifically address the point in the terms that formed the basis of this Court's opinion.[1] Instead, this Court's conclusion, quoted above, that there was some evidence to suggest that the rehire salary was the same as the pre-retirement salary, was reached *sua sponte.*

Appellants' theory of the case was substantially different from the theory that formed the basis of this Court's decision. Appellants' original claim was that the employer contribution was "deducted" from their salaries. However, the order of the circuit court held that that claim was "simply not factual," noting the

[1] Appellants did not file a motion to reconsider under Rule 59(e).

absence of any reasonable dispute that there was no such deduction for the employer contribution from Appellants' salaries at any time. R. 13. The facts supporting the Court's conclusion are found in the order at R. 9-11, in which it is noted, among other things, that "the postretirement pay stubs of the Plaintiffs reflect no deduction at all for retirement. . ., and that "the pay stud would never reflect a deduction for the employer contribution, since that amount was never deducted from salary. . . ." R. 11.

As the case progressed, Appellants virtually abandoned their original claim of an unlawful deduction from salaries, and changed their claim into one of misappropriation of funds.[2] They argued that funds appropriated for their pre-retirement salaries were wrongfully spent by SLED on the employer contribution to the Police Officers Retirement System. *See, e.g.,* Brief of Appellant at 5, where Appellants argue that "SLED is required to pay the employer contributions from the money allocated to it by the General Assembly for that specific purpose." As discussed in detail in Point 4 below, SLED produced an abundance of uncontroverted evidence demonstrating that the funds were indeed paid from that

[2] Appellants also argued in the circuit court that "[t]his case is appropriate for summary judgment as the facts are not in dispute. . . ." R. 90. This is the polar opposite of making the requisite showing that "set[s] forth specific facts showing that there is a genuine issue for trial." SCRCP Rule 56(e). On appeal, they contended for the first time that "there is a factual issue," but even then they only claim that such factual issue was "whether SLED has misappropriated the funds allocated to it by the General Assembly and violated S.C. Code 9-11-90." Brief of Appellants at 8. That issue is not the one on which this Court's decision turned.

allocation for the employer contribution. For purposes of Appellants' claims, it was therefore immaterial whether the old salaries and the rehire salaries were the same. Appellants did not claim otherwise.

SLED therefore respectfully submits that the Court overlooked the fact that the basis for its decision was an argument never asserted by Appellants at any stage of this case. Any concept that the rehire salary was the same as the pre-retirement salary was foreign to the case, as far as the arguments in the circuit court and the briefing in this Court were concerned. The Court's consideration of this issue and using it as a basis for reversal violates well-settled appellate principles.

Specifically, this Court has no authority to *reverse* based on an issue not raised below even if the issue may be gleaned from the record. Rule 220(c), SCACR, provides that "[t[he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. (Emphasis added). However, there is no authority under Rule 220(c) or otherwise for an appellate court to *reverse* on an issue not raised below or even argued on appeal; yet that is precisely the action this Court has taken. This principle has been recognized in several decisions. For instance, in a dissent, Justice Hearn wrote: "I know of nothing in our precedents that would permit us to reverse on a ground that was not properly argued to us." *Town of Mt. Pleasant v.*

Chimento, 401 S.C. 522, 737 S.E.2d 830, 845 (2012). (J. Hearn dissenting). (Emphasis in original). *See also*, *State v. Fonseca*, 393 S.C. 229, 711 S.E.2d 906 (2011) (majority recognized that Rule 220(c) does not allow for decision on appeal to be reversed for any reason appearing in the record).

Likewise, it is well settled that "[t]he same ground argued on appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.,* 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). *See also*, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (a party may not argue one ground at trial and a different theory on appeal). Thus, if parties cannot change theories on appeal, certainly the appellate court cannot change theories for them and reverse on a theory or argument not made below. Furthermore, it is well settled that appellate courts cannot entertain arguments not presented by the appellant. As Chief Judge Sanders famously wrote, "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds,* 286 S.C. 85, 332 S.E.2d 100 (1985). *See*, *Rutland v. South Carolina Dept. of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012) (same). *See also*, *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004) ("It is an error of law for a court to decide a case on a ground not before it").

In sum, the Court's reversal on an issue not raised by the Appellant below or even argued on appeal should therefore be reconsidered. On rehearing, the decision of the circuit court should be affirmed.[3]

2. Because Appellants never claimed that the new salaries and the old salaries were the same, SLED, like the circuit court, had no occasion to address the point specifically. Nevertheless, there is an abundance of uncontradicted evidence in the record showing that the new salaries, that is, the ones paid to Appellants when they were rehired, were not the same as the old salaries. The new salaries started out at specific dollar figures that were lower than the old, pre-retirement, salaries. Appellants simply were not rehired at the same salaries that had previously been theirs prior to retirement.

This is shown in a number of uncontradicted record references, such as the following deposition testimony of Lynn Hutto, SLED's Human Resources Director at the time:

> Q. And you said they [Appellants] came back at a reduced salary?

---

[3] This Court also noted that "a reasonable jury could find SLED agreed to pay each rehired employee the same salary it paid before retirement and the percentage reduction represents an illegal requirement that the employee pay the retirement contribution the employer is required to pay under subsection 9-1 1-90(4)(b)." Slip op. at 2. SLED would ask that at a minimum, this statement be modified or deleted, because if the case does proceed to trial, additional evidence might be produced that would require a directed verdict for SLED. Because Appellants did not raise the issue that formed the basis for this Court's opinion, SLED's presentation was not directly focused on that point.

A. They came back at a brand new salary actually. We rehired them at a new salary.

* * *

Q. Were they-- was the new salary 13.6 percent less than their previous salary?

A. Yes.

Q. So if a person wanted to participate in the program and they were eligible and they went and met with the Chief and the Chief said, "Okay. You can do this," and they were making $50,000 a year at the time, they would have sat out for 15 days and then their new salary would have been 13.6 percent lower than the 50,000?

A. Yes.

R. 294-295 (emphases added). Ms. Hutto reiterated this testimony a few pages later:

Q. The reduction that used to take place, the reduction of the 13 percent, where did that money go?

A. When you say where did the money go?

Q. Yes.

A. There was really no -- there was no deduction of salary. There was an agreement that the salary when they were rehired would be different. So there was no place for the money to go, so to speak.

R. 299-300 (emphasis added). At still another point in her deposition, Ms. Hutto testified by way of example that when one of the Appellants (Jowers) was rehired, the salary that was transmitted to the Comptroller General was the new, or rehire, salary of $39,828:

> Q. When the information regarding Employee 32 [Jowers] was transmitted to the comptroller general the annual salary would have been listed as what? Would it have been 39,828 or--
>
> A. You mean as a new hire?
>
> Q. Uh-huh.
>
> A. As a new hire it would have been 39,828.
>
> Q. That's the amount that would have been sent to the comptroller?
>
> A. Yeah.

R. 368 (emphasis added).[4]

Other similar evidence exists throughout the record. For example, a spreadsheet prepared by SLED in 2009 or earlier referred to the postretirement salary as the "rehire salary" and in that column listed the amounts that reflected the percentage reduction from the preretirement salary. R. 105-106. For Plaintiff Jowers, for example, the "rehire salary" was the specific dollar amount of $39,828. R. 106 (employee no. 32). This is the same dollar figure to which he agreed when he returned to work as a working retiree. R. 189, 191. There is no suggestion in the record that this individual (or any other one) was rehired at his pre-retirement salary ($44,755 in Jowers' case) and then had his pre-retirement salary

[4] Ms. Hutto was also asked preliminarily whether she, as a Rule 30(b)(6) deponent, was "the person most knowledgeable regarding the deductions made from the salaries of the participants in the SLED retirement program at issue in this matter." She replied that "We did not make any deductions to the salaries on [of] the participants." R. 267, lines 17-22.

immediately reduced to $39,828. Along the same lines, Chief Stewart's affidavit states that "Plaintiffs' new salaries upon rehire were in fact 13.6% lower than their pre-retirement salaries. . . ." R. 174, ¶ 21 (emphases added).

Moreover, there is no reason for SLED to have taken such an action. Appellants have expressly agreed that SLED could have rehired the Appellants at any salary that was mutually agreed on.[5] SLED also could have declined to rehire the Appellants at all. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). SLED would therefore have had no legal, factual, or logical reason to have gone through the meaningless exercise of rehiring the retirees at their preretirement salaries and then immediately making a percentage cut to those salaries. As the record shows, SLED did not in fact take any such action.[6]

Finally, Appellants agreed to return to work at specific dollar figures, $45,702 for Grimsley and $39,828 for Jowers. R. 181, 189. The forms stated that "Your salary will be $45,702 (Grimsley), or "Your salary will be $39,828 (Jowers). R. 181, 189. In addition to supporting SLED's contention as to consent (Point 6(b) below), these forms also evidence the terms of each Appellant's agreement to return to work.

---

[5] As the Supreme Court held in the appeal from the grant of the State's motion to dismiss, "[Appellants] do not claim they are entitled to a particular salary level." *Grimsley v. South Carolina Law Enforcement Div.*, 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012)

[6] Also, if SLED had actually rehired Appellants at the old salary, there would have been tax consequences, but Appellants have not suggested that that happened, any more than they have ever argued that they were actually rehired at the old salaries.

Appellants did not controvert this evidence, although Appellants had ample opportunity to produce contradictory evidence had it existed. Indeed, they did not even seek to controvert this point, because they never claimed that the new salaries were the same as the old salaries. They did not suggest the inference on which the opinion of this Court is based. Specifically, Appellants never showed, nor tried to show, record evidence that they were in fact rehired at the old salary and that SLED thereafter took some action to reduce the rehire salary. They produced no payroll records or other personnel office records reflecting rehire at the old salaries, accompanied by an immediate reduction. As is made clear by the evidence cited above, such events simply never happened.

Even if Appellants had actually argued that they were rehired at the old salaries, and that those salaries were then immediately reduced, the complete absence of evidence to support such a claim would have reduced such an argument to nothing more than the creation of "a metaphysical doubt as to the material facts. . . ." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 107, 410 S.E.2d 537, 545 (1991)). As *Russell* and other cases hold, and as Rule 56(e) itself provides, a party cannot rely on such metaphysical doubts, but instead "must come forward with specific facts showing that there is a genuine issue for trial." *Id.* Appellants never came forward with such evidence, nor did they attempt to do so.

For all of the above reasons, it is respectfully submitted that the Court misapprehended or overlooked the abundance of uncontroverted evidence in the record that rehire salary was never the same as the pre-retirement salary, but instead was "a brand new salary," as Ms. Hutto testified.

3. Even if there had been a rehire at the old salary followed by an immediate reduction, no rights of Appellants would have been violated as a result. In *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011), cited in the circuit court order, R. 5, 7, 13, 17, the Supreme Court held that the return of a retired employee to the employment from which he retired "was conditioned on whether an employer in the system chose to hire that employee." 392 S.C. at 351-352, 709 S.E.2d at 60. In addition, S.C. Code Ann. § 8-17-370(16) exempts PORS working retirees such as Appellants from coverage under the state personnel grievance process, which means that they had no legal right to complain of a reduction in salary, in and of itself, as this Court's opinion appears to hold. As held in *Alston v. City of Camden*, 322 S.C. 38, 49, 471 S.E.2d 174, 179 (1996), "[a]n employer privileged to terminate an employee at any time necessarily enjoys the lesser privilege of imposing prospective changes in the conditions of employment."

4. SLED also respectfully submits that the Court overlooked or misapprehended the undisputed evidence to the effect that the employer contribution to the Police Officers' Retirement System was never paid from the

personal services account, the account from which employees' salaries were paid. In other words, even if Appellants had been rehired at their old salaries, which SLED strongly denies, the point is immaterial. There was no "illegal requirement that the employee pay the retirement contribution the employer is required to pay under subsection 9-11-90(4)(b)." Slip op. at 2. The uncontroverted evidence makes it clear that SLED's actions did not amount to the imposition of such a requirement.

The order below discussed in detail the mechanics for the payment of salaries and employer contributions. R. 9-12. The order then discussed those facts and the pertinent statutes, R. 13-17, and held that

> [M]oney appropriated for benefits was used at all times to pay benefits, including the employer contribution, and money appropriated for salaries was used at all times to pay salaries. Plaintiffs have not provided any evidence to the contrary

R. 16, citing Royal Affidavit, ¶ 8, R. 206. As indicated in the circuit court order and in the facts and legal authorities citied therein, it is undisputed that there was no factual support for Appellants' claim that the money that had formerly constituted their salaries was later used to pay employer contributions. Salary money stayed in the salary (personal service) account and employer contribution money stayed in the fringe benefit account. *Id.*

5. SLED also respectfully submits that the Court overlooked or misapprehended the absence of standing by Appellants to make their factually-unsupported claim that that SLED "misappropriates monies due the retirement system. . . ." R. 15 (Order, quoting Plaintiffs' brief in the circuit court). Since it is uncontradicted that the funds from Appellants' old salaries was never used to pay the employer contribution, Appellants, having unconditionally retired, "no longer had a legally protected right or interest with regard to what SLED did with the money that had funded their former salaries during their original period of employment." R. 15 (Order). Appellants therefore had no standing to complain about the disposition of their former salaries. *See* R. 15-16 (Order, citing *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012)).

Also, the opinion of this Court did not mention either the existence or the nonexistence of a property right in Appellants. However, SLED would also respectfully point out that no such property right was actually proven under the facts of this case, for the reasons set forth in the order below, R. 16, and in the Brief of Respondent at 26-29. In addition, no "taking" was shown. Brief of Respondent at 26-29.

6. This Court also concluded that its holding concerning the salary amount "requires the reversal of summary judgment on all grounds stated in the circuit court's order." Slip op. at 3. Respondent respectfully submits that this

conclusion, which was not explained, overlooked or misapprehended the effect of the remaining grounds set forth in the circuit court's order. Even if SLED had agreed to pay the rehired employees the same salaries as originally and then reduced those salaries immediately upon after rehire, there were three different reasons, consent, waiver, and estoppel, set forth in the order of the Circuit Court, that would still bar Plaintiff's claims. In addition, SLED presented two other additional sustaining grounds, the statute of limitations and laches, either or both of which would also operate as a bar.

SLED therefore respectfully submits that the Court overlooked or misapprehended the effect of these five separate affirmative defenses, any one of which would render immaterial the issue of whether a right of Appellants was violated. Each of these five affirmative defenses is briefly discussed below.

a. *Waiver.*

The order below held that "[i]t is axiomatic that constitutional rights may be voluntarily waived, as indicated, for instance, by every case upholding a guilty plea." R. 18. This principle applies with as much or more force to rights that are not of a constitutional nature, such as the alleged statutory right claimed by Appellants.

Appellants' only response on appeal to this holding was a very brief claim that Appellants' agreements were on forms that Appellants did not negotiate, or

that the terms of their rehire violated § 9-11-90. Br. of Appellants 10-11. Their contention about alleged lack of negotiation is without merit, because the actions they took were completely optional and voluntary. As for the alleged statutory violations, to the extent that § 9-11-90 embodies a public policy at all, that policy is only that an employer cannot rehire a retiree and then not make a contribution to the PORS for the salary paid for that position. That did not happen, because SLED made the employer contribution from the funds appropriated for that purpose. As a result, this Court should reconsider this issue and hold that Appellants voluntarily waived any rights they may have had (although SLED maintains that they had none).

b. *Consent.*

The order below also held that "It is axiomatic that consent can serve as a defense to numerous acts that might otherwise be held tortious, such as assault, trespass or invasion of privacy, among many others." R. 20-21, citing and quoting *Hawkins By and Through Hawkins v. Multimedia, Inc.,* 288 S.C. 569, 571, 344 S.E.2d 145, 146 (1986).

In addition to waiving any rights they conceivably might have had, as noted above, Appellants indisputably consented to accept the salaries they were actually paid upon rehire. Such consent occurred when they agreed to accept the percentage reductions shown on their "Requests to be rehired," R. 179, 187, and to accept

specific dollar figures for the new salaries shown on the documents entitled "Confirmation of your Request to Rehire," R. 181, 189. Their return to work, of course, constitutes additional evidence of their consent to be paid those specific dollar amounts.

Appellants barely addressed the consent issue at all, merely reiterating their unavailing arguments pertaining to waiver in a section of the brief containing only four lines of text. Brief of Appellants at 11. In any event, the facts of the case make it clear that Appellants were in no way coerced to do anything. They could have remained in their prior employment at the old salary indefinitely. R. 174 (Stewart Affidavit, ¶ 24. Their decision to retire and be rehired was therefore not only completely voluntary, it was also completely optional. The chance to retire and return to work at over 150% of what they had previously been paid for doing the same job was not a prospect that they were forced to accept. Instead, it was one that they willingly embraced. Most telling of all, Appellants were not, as they try to cast themselves, victims of SLED's actions. They were major beneficiaries of an optional program to which they voluntarily agreed and which greatly inured to their benefit. They only filed this action after their time as working retirees had run out, seeking now to obtain still more money than they obtained under the already-generous arrangement to which they agreed.

c. Estoppel.

Another alternative reason why relief should be denied to Appellants is the ground of estoppel, discussed in the circuit court order, R. 20. Appellants, having accepted the benefits of the retire/rehire arrangement for four years without ever raising their present claim, should be deemed estopped from attacking that arrangement after SLED more than kept its end of the bargain, keeping both Appellants employed for four full years at the salaries they agreed to accept upon their rehire. *See also,* Brief of Respondent at 32-34.

d. Statute of limitations.

As contended as an additional sustaining ground in the Brief of Respondent at 34-36, the statute of limitations began to run in this case no later than July and August 2004, when each Appellant knew of the terms of his rehire. Based on the authorities cited therein, those dates in 2004 started the running of the statute, because those were the dates when each party knew or should have known, through the exercise of due diligence, that a cause of action might exist. *Anonymous Taxpayer v. South Carolina Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) (citing *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007)). This action, filed more than four years later in 2008, was filed well after the statute had run. Brief of Respondent 34-36.

e. Laches.

Laches is the fifth and last affirmative defense, and was also raised by SLED as an affirmative defense. This ground is discussed in the Brief of Respondent at 36-37. SLED's laches contention combines the points made in SLED's estoppel argument and in SLED's statute of limitations argument. By accepting the rehire arrangement in 2004, Appellants induced SLED to change its position to its detriment, which occurred when SLED paid them the agreed-upon salaries for four years. Appellants did not raise their present claim until more than four years after the institution of the program of which they now complain (and until they were no longer employed by SLED). Chief Stewart's uncontradicted Reply Affidavit stated that he would never have offered the retire/rehire program in 2004 had either Appellant advised him at the time that "they believed they had a legal claim for the amount of the difference between their old salaries and their new salaries, I would not have offered them the opportunity to participate in the Retirement/Rehire program in 2004, because I would not have wanted SLED to be subject to a later claim for the cumulative amount of the difference." R. 217, ¶ 14.

CONCLUSION

Respondent SLED respectfully requests that the Court rehear its decision and issue an opinion affirming the decision of the circuit court on one or more of the bases set forth above.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: /s/

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent
South Carolina Law Enforcement Division

Columbia, South Carolina

March 12, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
J. Ernest Kinard, Jr., Circuit Court Judge

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

Of Whom, South Carolina Law Enforcement Division is ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Petition for Rehearing** *and* **Memorandum in Support of Petition for Rehearing** was made upon A. Camden Lewis, Esquire and Ariail E. King, Esquire, by hand delivery and upon all other counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of March 2014:

Hand Delivered
A. Camden Lewis, Esquire
Ariail E. King, Esquire
Lewis, Babcock & Griffin, LLP
1513 Hampton Street
Columbia, South Carolina 29201

Stephanie Roche

Via U.S. Mail
Richard A. Harpootlian, Esquire
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201

Via U.S. Mail
John A. O'Leary, Esquire
O'Leary & Associates, PA
714 Calhoun Street
Columbia, South Carolina 29201

Via U.S. Mail
James Walter Fayssoux Jr., Esquire
Fayssoux Law Firm, P.A.
209 East Washington Street
Greenville, South Carolina 29601

Jennifer Baker

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

*Also Admitted In North Carolina
†Certified Mediator

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters
Steven R. Spreeuwers
Todd R. Flippin

Of Counsel
Kenneth P. Woodington

Writer's Email: kwoodington@dml-law.com

March 12, 2014

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Phillip D. Grimsley, Sr., *et al.* v. South Carolina Law Enforcement Division, *et al.*
Appeal Tracking Number: 2012-212815
Civil Action Number: 2008-CP-40-8854
Our File Number: 79.8022

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my courier. I have not included the $25.00 filing since the moving party, South Carolina Law Enforcement Division, is exempt from the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.

Kenneth P. Woodington

KPW/jmb
Enclosures

cc: (w/ Enclosures)

A. Camden Lewis, Esquire
Ariail E. King, Esquire
Lewis, Babcock & Griffin, LLP
1513 Hampton Street
Columbia, South Carolina 29201

Richard A. Harpootlian, Esquire
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201

John A. O'Leary, Esquire
O'Leary & Associates, PA
714 Calhoun Street
Columbia, South Carolina 29201

James Walter Fayssoux Jr., Esquire
Fayssoux Law Firm, P.A.
209 East Washington Street
Greenville, South Carolina 29601