THE STATE OF SOUTH CAROLINA
In The 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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Respondent SLED submits the following Reply Memorandum in support of its Petition for Rehearing.

1. Appellants have tried to claim victim status, describing SLED's generous retire/rehire program as a "scheme." Appellants' Return at 1. The word "scheme" appears frequently in Appellants' Return, but it is a complete

mischaracterization of the actual events. SLED voluntarily offered Appellants the attractive option to retire, collecting full retirement pay, and return to work at nearly full salary. The arrangement was to the great benefit of Appellants. To view it as a "scheme" that somehow harmed them is completely at odds with the facts.

Appellants were law enforcement agents. Because they were members of the Police Officers' Retirement System, they did not have the opportunity to be "TERI" retirees, as was the case for state employees who were not in the Police Officers' Retirement System. In order to provide them with a similar program, Chief Stewart of his own volition offered Appellants the highly-beneficial, and otherwise unavailable, option of being able to work and collect retirement at the same time.

Had Chief Stewart never offered that option to them, they would have been much worse off financially. They could have continued working as SLED agents indefinitely, but they would have received nothing but their salaries until such time as they decided to retire. At that time they would have received only their retirement pay, which was about 60% or more of their salary at retirement, but nothing more.

Instead, Chief Stewart offered them the option to retire and return to work, collecting their full retirement pay along with a new, but slightly lower, salary (85% or more of their former salary). As discussed in prior filings, there was

nothing that required SLED to rehire its retirees at all, and nothing that required them to be paid the same salary if indeed they were rehired. Appellants and a number of others accepted that option. Upon rehire, they began collecting that slightly lower salary and their full retirement benefit at the same time. Under this arrangement, which was completely optional for the agents, Mr. Grimsley was being paid about 168% of what he had previously been making prior to his retirement. R. 9, citing Stewart Affidavit, R. 174, 193.[1] It was a win-win situation for all concerned. But Appellants still want more.

Once the Appellants left SLED employment four years later, they apparently believed they had nothing to lose by trying to claim (belatedly) that last 13.6%, notwithstanding their unequivocal consent to be rehired at the lower salary. If there is any kind of "scheme" involved in this case at all, it was a scheme by Appellants to (1) consent to the arrangement, (2) collect four years of the agreed-upon salary along with retirement at the same time, and then, (3) once their SLED employment ended four years later, to file this action claiming that the arrangement from which they derived so much benefit was "illegal," and that their unequivocal consent to it was invalid.[2]

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[1] Plaintiff Jowers' situation was similar.

[2] Chief Stewart averred that he never would have offered them the arrangement in the first place, had he known that they would later seek to collect the amount they agreed not to be paid when they returned to work. R. 217 at ¶ 14.

The entire retire/rehire program was unquestionably a matter of grace that benefited Appellants enormously. This optional program was not a matter of right. Each Plaintiff, so to speak, accepted a gift horse without complaint and rode it for four years. Once the gift was exhausted after four years, they then decided to look it in the mouth, demanded that the giver be ordered to give them a better one, and claimed that the whole gifting process was nothing but a "scheme" to deprive them of something. This Court should not lend any support to this inconsistent course of action by the Appellants.

2. While Appellants now try to assert otherwise, they have never claimed, nor sought to prove, that they were rehired at the same salary they had been receiving at the time they retired. In fact, there was no evidence documenting that Appellants were rehired at their former salaries. Instead, there was an abundance of evidence to the contrary, as set forth in the Memorandum in Support of Petition for Rehearing at pp. 6-11. As was there shown, the uncontroverted evidence showed that Appellants were rehired at new salaries that were listed as

specific dollar amounts, $45,702 for Grimsley and $39,828 for Jowers. R. 181, 189.[3]

Respondent would therefore reiterate that there is no evidentiary support for the Court's conclusion that a trier of fact could conclude that "SLED agreed to pay each rehired employee the same salary it paid before retirement." Slip op. at 2. The Court relied on a document that the Court viewed as describing the rehire salary, but that view of that document is conclusively rebutted by the above-referenced direct evidence, such as the statements in the forms that "Your salary will be $45,702" (Grimsley), or "Your salary will be $39,828 (Jowers). R. 181, 189.[4]

3. Appellants have also shown no reason why their claims should not have been held to be precluded by their consent, or their waiver, or through

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[3] Appellant Jowers' first pay stub after his rehire confirms that rehire salaries were lower at the very outset. That pay stub is in the record at R. 200. It shows a gross salary of $1,809.50. This includes an addition of $150.00, which is part of the $600.00 annual clothing allowance authorized for SLED agents in the 2004-2005 Appropriations Act. Act No. 248 of 2004, Part 1B, Sec. 56DD.13. ("The State Law Enforcement Division is hereby authorized to provide agents and criminalists with an annual clothing allowance (on a pro rata basis) not to exceed $600 per agent/criminalist for required clothing used in the line of duty"). The bimonthly gross pay without that clothing allowance is $1,659.50, which multiplied by 24 pay periods equals exactly $39,828.00. That is the same rehire salary shown for Jowers as appears on two of the forms. R. 189, 191. The rehire salary was therefore never the pre-retirement amount of $44,755. R. 106, line 32.

[4] Petitioner's Point 2 seeks to suggest that Ms. Hutto's deposition was the only evidence that the rehire salaries were new salaries. Return at 4. Appellants ignore the rest of the considerable, and uncontradicted, body of evidence cited in SLED's Memorandum in Support of Petition for Rehearing at pp. 6-11.

estoppel. Appellants do not deny that they consented to receive the salaries they received upon rehire. They claim instead that such consent or waiver on their part was "illegal." Return at 9. However, Appellants' only basis for the "illegality" claim is their assertion that under the facts of this case, a property interest was created by § 9-11-90. Return at 8. This gets Appellants nowhere, though, because there can be no doubt that one can consent to, or waive, the deprivation of constitutional rights. *See, e.g., Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 213 (4th Cir. 2007)("[w]here a party knowingly and willingly enters into an agreement that waives a constitutional right, the agreement is enforceable so long as it does not undermine the public's interest in protecting the right"). Appellants here have shown no "public[ ] interest in protecting the right." No such interest exists, because the only public policy actually expressed by § 9-11-90 is that an employer cannot rehire a retiree and then not make a contribution to the PORS for the salary paid for that position. The undisputed evidence showed that SLED did in fact pay the employer contribution. The payments were made from the funds appropriated for that purpose, and not from funding for salaries, as reiterated in Point 6 below. Accordingly, there is no question that SLED was in full compliance with that expressed policy of the General Assembly.

Appellants cite several cases in which agreements were held to be against public policy and therefore not subject to valid consent. Return at 9. These are

inapposite, however, because in this case, Appellants' agreements did not affect the payment of the employer contribution by SLED. That was the main, if not the only, policy expressed by § 9-11-90. Also, there is no public policy against the non-coerced, voluntary, waiver of a constitutional right, as already discussed.[5] Finally, as held in the Circuit Court order, the General Assembly has in recent years adopted the same policy as was used in the retire/rehire program, endorsing "the idea of permitting retirees to return to work while collecting full retirement benefits and with a reduction in the amount paid by agencies for salaries." R. 19. Appellants therefore cannot validly claim that their agreements were inconsistent with public policy, nor have they really tried to do so.

4. On almost every page of the Return, Appellants continue to frame their case as one that has something to do with appropriation of funds. Return at 2, 4, 5, 6, 7, 8. This Court did not base its opinion on that ground, and with good reason. 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

[5] If the source of the right is based on some other theory of the right created by the statute other than the "property interest" theory, the principles set forth in *Pee Dee Health Care, supra,* still apply, because that case referenced the waiver of statutory rights as well as constitutional rights. 509 F.3d at 212.

employer contributions. Circuit Court order, R. 16, citing Royal Affidavit, ¶ 8, R. 206.[6]

5. Appellants also seek to invoke the "property interest" claim referenced by the Supreme Court in its decision that involved only the sufficiency of the pleadings. Return at 3, 5-6, 7. However, the opinion of this Court did not mention either the existence or the nonexistence of a property interest in Appellants. Even if a property interest existed under the proven acts of this case, which SLED denies, Appellants' consent to this optional arrangement could and did waive any claim of a property interest.

6. Appellants claim that even if the employer contribution was made from the benefits account, as indeed it was, and not from the personal services account, that issue "has no bearing." Return at 6. Appellants asserted in the Circuit Court, however, that "the General Assembly's intent was that the funds it appropriates to SLED be used for the purposes appropriated." R. 92. SLED proved that its actions were consistent with the General Assembly's purpose, because

> [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

[6] Appellants' arguments pertaining to standing, Return at 7-8, are also without merit. They claim standing on the ground that SLED's actions reduced the amount in the PORS (the "sum jeopardized"). Return at 8. However, it is undisputed that SLED paid the PORS everything it was due.

Circuit Court Order, R. 16, citing Royal Affidavit, ¶ 8, R. 206. In other words, now that Appellants' misappropriation claim has been shown to be factually incorrect, they now claim that it does not matter.

CONCLUSION

For the foregoing reasons, 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 and in Respondent's Petition for Rehearing.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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March 31, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent, does hereby certify that service of the **Reply Memorandum in Support of Petition for Rehearing** was made upon all 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 31st day of March 2014:

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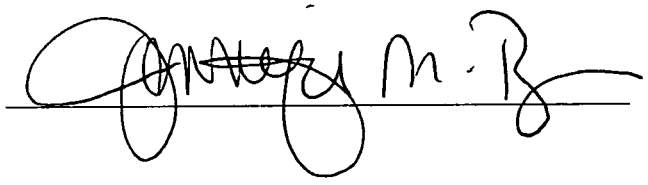

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March 31, 2014

Hand Delivered
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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 **Reply 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.

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.

/Ken Woodington

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KPW/jmb
Enclosures

cc: (w/ Enclosure)

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