THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Op. No. 5201
(S.C. Ct. App. filed February 26, 2014)

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that its Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on April 21, 2014. App. 4.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in reversing summary judgment when the undisputed evidence showed that Plaintiffs were rehired at lower salaries and when the circuit court decision was correct in all other respects.

II. Whether the Court of Appeals erred in reversing summary judgment on a ground not raised or argued by Plaintiffs.

III. Whether the Court of Appeals erred in deciding, without explanation, to reverse without considering SLED's affirmative defenses.

STATEMENT OF THE CASE

This action was filed on December 16, 2008, by Plaintiffs Grimsley and Jowers against the South Carolina Law Enforcement Division (SLED) and the State of South Carolina. Plaintiffs, both of whom retired unconditionally from SLED in 2004 and then agreed to be rehired at slightly reduced salaries, claimed that S.C. Code § 9-11-90(4)(b) created certain rights in them with respect to the employer contribution to be paid by SLED on their salary upon their rehire. SLED denied the material allegations of the Complaint, and raised a number of affirmative defenses, including waiver and estoppel, consent, the statute of limitations and laches.[1]

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[1] The State of South Carolina was originally a co-defendant in this case. The State initially moved to dismiss this action on various grounds. That motion was granted by Judge Thomas Cooper by order filed December 29, 2009. Plaintiffs appealed, and by opinion date January 3, 2012, this Court reversed the order of Judge Cooper and remanded the case for further proceedings. *Grimsley v. South Carolina Law Enforcement Div.* 396 S.C. 276, 721 S.E.2d 423 (2012). This Court held that exhaustion of remedies was not required under the South Carolina Retirement Contribution Procedures Act, S.C. Code Ann. §§ 9-21-10, et seq. The Court also held that the Complaint "asserted a cognizable property interest rooted in state law sufficient to

After the case was remanded in early 2012 by this Court for further proceedings, the parties engaged in discovery. Both sides filed cross motions for summary judgment pursuant to a scheduling order. Both sides then filed affidavits and legal memoranda in support of their respective positions. The motions for summary judgment were heard by Judge Kinard on June 7, 2012. By order dated July 20, 2012 and filed August 7, 2012, Judge Kinard denied Plaintiff's motion for summary judgment and instead granted summary judgment for SLED, dismissing this action with prejudice in all respects. R. 2-22.

The Complaint alleged that SLED "had the amount it cost SLED to pay the employer portion of retirement deducted [sic] from their [post-retirement] salaries," R. 24. (Emphasis added). However, and as the circuit court held, there is simply no such thing as a deduction of the employer contribution from the salary of an individual. R. 11, citing R. 206 (Royal Aff. Par. 8 & 9) and R. 197-198 (Kitchens Aff. Par. 6 & 7). Instead, Plaintiffs were simply rehired at lower salaries, following a complete break in the employment relationship. R. 173 (Stewart Aff. Par. 16). To this they voluntarily and readily agreed, as might be expected in light of the total financial benefit to them, discussed herein. At the same time, SLED continued to make the employer contribution to the Police Officers Retirement System (PORS) for the positions occupied by Plaintiffs, and in so doing, used only funds appropriated to it for that purpose.

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survive the motion to dismiss," 396 S.C. at 285, 721 S.E.2d at 428. After the case was remanded, the State was dismissed without objection.

In the prior appeal from the granting of a motion to dismiss, this Court held that the Complaint stated a claim for violation of a property interest in Plaintiffs. 396 S.C. at 285, 721 S.E.2d at 428. The circuit court order was consistent with that premise, but held that under the facts as proven through affidavits and exhibits, as opposed to the facts pled in the Complaint, there was no deduction from Plaintiffs' salary upon rehire for the employer contribution to the PORS. Accordingly, no funds from Plaintiffs' salaries upon rehire were in fact "used to pay the employer portion of the retirement contributions," R. 17, quoting this Court's opinion, 396 S.C. at 285, 721 S.E.2d at 428. Since the factual predicate for a due process claim did not occur, no due process claim violation existed. *Id.* The circuit court also held that "SLED, and not the Plaintiffs, unquestionably paid the employer contribution." R. 13.

The circuit court further held that even if a property interest had been found to exist, it was waived by Plaintiffs' acts of voluntarily retiring and then returning to work at lower salaries. R. 18-19. The court similarly held that Plaintiffs' claims were barred by their consent to the arrangement and by estoppel. R. 20-21. The court declined to hold in the alternative that the statute of limitations barred Plaintiffs' claims, or that the claims were barred by laches, R. 19-20, but SLED raised these defenses on appeal as additional sustaining grounds. Br. of Respondent at 34-37.

Plaintiffs filed a Notice of Appeal on August 22, 2012. The Court of Appeals reversed and remanded the case by an opinion issued on February 26, 2014. App. 1-3. As will be discussed herein, the Court of Appeals raised, *sua sponte,* the issue of whether

Plaintiffs had been rehired at the same salaries they were paid prior to retirement. App. 2. The Court of Appeals then held that there was enough evidence of that alleged fact for that newly-raised issue to be submitted to a trier of fact. App. 2. The Court of Appeals did not address any of SLED's avoidance defenses, such as waiver and consent. Instead, the Court of Appeals stated without explanation that its holding "requires the reversal of summary judgment on all grounds stated in the circuit court's order." App. 3.

SLED petitioned for rehearing, and that petition was summarily denied. No substitute opinion was issued. App. 4. SLED now seeks review in this Court by way of writ of certiorari.

ARGUMENT

Plaintiffs have tried in this litigation to claim victim status. They assert in effect that SLED's generous and completely voluntary retire/rehire program, which permitted them to return to work while collecting full retirement at the same time, was an effort of some kind by SLED to take advantage of them. Any such view of the case, however, is entirely incorrect.

Plaintiffs 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 Plaintiffs the highly-beneficial, and otherwise unavailable, option of being able to work and collect retirement at the same time. R. 171-175 (Stewart Affidavit).

Had Chief Stewart never offered that option to Plaintiffs, 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. Once retired, 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). 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. Plaintiffs 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 voluntary and optional for the agents, Plaintiff Grimsley, upon rehire, was receiving about 168% of what he had previously been making prior to his retirement. R. 9, citing Stewart Affidavit, R. 174, 193.[2] It was a win-win situation for all concerned. But Plaintiffs still seek to claim more.

Once the Plaintiffs left SLED employment four years after their initial retirement, they apparently believed they had nothing to lose by trying to assert a very belated claim to that last 13.6% of their original salaries, notwithstanding their unequivocal consent to be rehired at the lower salaries. Far from being "victims," Plaintiffs (1) consented to the

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[2] Plaintiff Jowers' situation was similar.

arrangement that greatly favored them, then (2) collected 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, filed this action claiming that the arrangement from which they derived so much benefit was "illegal," and that their unequivocal consent to it was invalid.[3]

The entire retire/rehire program was unquestionably a matter of grace that benefited Plaintiffs enormously. This optional program was not a matter of right. Each Plaintiff, so to speak, accepted a gift horse and rode it without complaint for four years. Once the gift was exhausted after those four years, they then decided to look it in the mouth, demanded that the donor 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 grant certiorari and reverse the decision of the Court of Appeals. This case should not be prolonged further, simply in order to afford Plaintiffs another chance at the trial court level to present claims that they manifestly have never presented before, and that are without merit in any event. In addition, even those claims had had merit, they are precluded by any one or more of the affirmative defenses inexplicably ignored by the Court of Appeals.

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[3] 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 in advance not to be paid upon their return to work. R. 217 at ¶ 14.

I. The Court of Appeals erred in reversing summary judgment when the undisputed evidence showed that Plaintiffs were rehired at lower salaries and when the circuit court decision was correct in all other respects.

As discussed in Point II below, Plaintiffs never claimed that the new salaries and the old salaries were the same. As a result, neither SLED nor the circuit court had any occasion to address the point specifically. But even though the record was not developed with that specific issue in mind, it contains an abundance of uncontradicted evidence showing that the new salaries, that is, the ones paid to Plaintiffs 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. Plaintiffs 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 [Plaintiffs] came back at a reduced salary?
>
> 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 Plaintiffs (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

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[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.

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 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 the unnecessary action of rehiring Plaintiffs at their old salaries and immediately reducing the rehire salaries. Plaintiffs have expressly agreed that SLED could have rehired the Plaintiffs at any salary that was mutually agreed on.[5] SLED also could have declined to rehire the Plaintiffs 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

[5] As this Court held in the appeal from the grant of the State's motion to dismiss, "Plaintiffs 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)

percentage cut to those salaries. As shown by the undisputed facts in the record, SLED did not take any such action.[6]

Finally, Plaintiffs 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. Those figures are the reduced amounts at which they were rehired. In addition to supporting SLED's contention as to consent, discussed below, these forms also evidence the terms of each Appellant's agreement to return to work. [7]

Plaintiffs did not controvert this evidence, although Plaintiffs had ample opportunity to produce contradictory evidence had it existed, and had they attempted to make this claim. Instead, 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

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

[7] Appellant Jowers' first pay stub after his rehire confirms beyond any dispute that the 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. There is accordingly no need for a remand for a trial on this undisputed issue, the only issue for which the remand was ordered.

suggest the *sua sponte* issue on which the opinion of the Court of Appeals was based. Specifically, Plaintiffs 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 in any event.

Even if Plaintiffs 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.* Plaintiffs never came forward with such evidence, nor did they attempt to do so.

For all of the above reasons, the Court of Appeals erroneously ignored 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.

Even if there had been a rehire at the old salary followed by an immediate reduction, no rights of Plaintiffs 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, this 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 Plaintiffs 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 the opinion of the Court of Appeals effectively holds Instead, 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."

The Court of Appeals also ignored 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 Plaintiffs 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. This had been Plaintiffs' primary, if not only, claim in the circuit court, but it was clearly without merit.

The circuit court order 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 Plaintiffs' 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.*

Finally, the Court of Appeals also ignored the absence of standing by Plaintiffs 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 Plaintiffs' old salaries were never used to pay the employer contribution, Plaintiffs, 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. Plaintiffs 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)).

The opinion of the Court of Appeals did not mention either the existence or the nonexistence of a property right in Plaintiffs. 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.

For all of these reasons, SLED submits that decision of the Court of Appeals, remanding the case for trial, should be reversed. There is no reason for this case to go through another round of proceedings in the circuit court, when there are no triable issues of fact.

II. The Court of Appeals erred in reversing summary judgment on a ground not argued by Plaintiffs.

The opinion of the Court of Appeals 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." App. 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.*

Contrary to the above-quoted statement by the Court of Appeals, however, Plaintiffs did not in fact make the argument ascribed to them by the Court of Appeals, 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 the opinion of the Court of Appeals.[8] The Court of Appeals concluded *sua sponte* that there was an issue of whether the rehire salary was the same as the pre-retirement salary. In addition to its error in raising this issue on its own, the Court of Appeals then erred by concluding that there was enough evidence to submit this new issue to the trier of fact.

Plaintiffs' view of the case in the circuit court was distinctly different from the theory that formed the basis of the decision of the Court of Appeals. Plaintiffs' original claim was that the employer contribution was "deducted" from their salaries upon rehire. However, the order of the circuit court held that that claim was "simply not factual," noting the absence of any reasonable dispute that there was no such deduction for the employer contribution from Plaintiffs' salaries at any time. R. 13. The facts supporting the circuit 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 stub would never reflect a deduction for the employer contribution, since that amount was never deducted from salary. . . ." R. 11.

As the case progressed, Plaintiffs virtually abandoned their original claim of an unlawful deduction from salaries, and changed their claim into one of misappropriation

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

of funds.[9] 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 Plaintiffs 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 shown above, however, SLED produced an abundance of uncontroverted evidence demonstrating that the funds were indeed paid from that allocation for the employer contribution. For purposes of the claims actually made by Plaintiffs, it was therefore immaterial whether the old salaries and the rehire salaries were the same. Plaintiffs did not contend otherwise.

SLED therefore respectfully submits that the Court of Appeals erred in basing its decision on an argument never asserted by Plaintiffs 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 the Court of Appeals

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[9] Plaintiffs also argued in the circuit court that "[t]his case is appropriate for summary judgment as the facts are not in dispute. . . ." R. 90. The Court of Appeals, while deciding in favor of Plaintiffs, came to the polar opposite of Plaintiff's own contention, holding that there was indeed an issue of fact for trial. Even on appeal, when Plaintiffs contended for the first time that "there is a factual issue," they still only claimed 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 was not the one on which the decision of the Court of Appeals turned.

were concerned. The Court of Appeals' consideration of this issue and using it as a basis for reversal violates well-settled appellate principles.[10]

Specifically, the Court of Appeals had 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 taken by the Court of Appeals. This principle has been frequently recognized. 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,

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[10] SLED does not mean to suggest that Plaintiffs' counsel erred in not raising this issue, because To the contrary, the issue is clearly without factual merit, and Plaintiffs' counsel were entirely

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, it was erroneous for the Court of Appeals to reverse on an issue not raised by the Appellants below and not argued by them on appeal.

III. The Court of Appeals erred in deciding, without explanation, to reverse without considering SLED's affirmative defenses.

The Court of Appeals also concluded without elaboration that its holding concerning the salary amount "requires the reversal of summary judgment on all grounds stated in the circuit court's order." App. 3. This unexplained conclusion effectively ignored the remaining grounds set forth in the circuit court's order. Even if SLED had

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correct in not seeking to make the claim that the rehire salaries were the same as the former salaries.

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.

The conclusion of the Court of Appeals that there was a triable issue of fact on liability did not logically preclude consideration of these five separate affirmative defenses, any one of which would render immaterial the issue of liability. Each of these five affirmative defenses is briefly discussed below.

a. *Waiver.*

The circuit court 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 Plaintiffs .

Plaintiffs' only response on appeal to this holding was a very brief claim that Plaintiffs' agreements were on forms that Plaintiffs 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 well as being to Plaintiffs' benefit. 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 <u>not</u> 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 reverse the Court of Appeals and hold that Plaintiffs voluntarily waived any rights they may have had (although SLED maintains that they had none).

b. *Consent.*

The circuit court order 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, Plaintiffs 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.

Plaintiffs 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 Plaintiffs 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, as well as beneficial to them, 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. Plaintiffs 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 Plaintiffs is the ground of estoppel, discussed in the circuit court order, R. 20. Plaintiffs, 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 Plaintiffs 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 raised by SLED. This defense 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, Plaintiffs induced SLED to change its position to its detriment, which occurred when SLED paid them the agreed-upon salaries for four years. Plaintiffs 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

For the foregoing reasons, Petitioner SLED respectfully requests that this Court grant its petition for a writ of certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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BY: _____

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May 19, 2014

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May 19, 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. and Roger M. Jowers, on behalf of themselves and other similarly situated v. South Carolina Law Enforcement Division and the State of South Carolina
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 two copies of the **Petition for Writ of Certiorari** and **Certificate of Service** in the above referenced matter that has been filed with the South Carolina Supreme Court. Please provide me with a clocked-in copies of each document by way of my courier.

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)

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May 19, 2014

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Hand Delivered
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Clerk of Court
South Carolina Supreme Court
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Columbia, South Carolina 29201

RE: Phillip D. Grimsley, Sr. and Roger M. Jowers, on behalf of themselves and other similarly situated v. South Carolina Law Enforcement Division and the State of South Carolina
Appeal Tracking Number: 2012-212815
Civil Action Number: 2008-CP-40-8854
Our File Number: 79.8022

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven copies of the **Petition for Writ of Certiorari** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. Additionally, please find enclosed for filing two copies of the **Appendix.** I have not enclosed the filing fee since the Petitioner, South Carolina Law Enforcement Division, is exempt pursuant to Rule 242(c), SCACR.

By copy of this letter, I am serving a copy of the Petition on all counsel of record as well as the Clerk of the Court of Appeals. I am also serving a copy of the Appendix on all counsel of record; however, have not provided counsel with the briefs or Record on Appeal filed with the Court of Appeals since they are already in possession of those documents.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.

/s/ Kenneth P. Woodington

Kenneth P. Woodington

KPW/jmb
Enclosures

cc: (w/ Enclosures As Stated)

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