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.

PETITIONER'S RETURN TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

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On May 19, 2014, Petitioner SLED filed a Petition for Certiorari in this matter. Respondents on May 29, 2014, filed a Motion to Dismiss the Petition. For the reasons set forth herein, Respondents' motion should be denied.

Respondents base their motion on SCACR Rule 242(b), of which they quote only a part. They set forth the part of Rule 242(b) that lists five examples of the "character of reasons" which this Court will consider in determining whether to grant certiorari, but they omit the language of Rule 242(b) which notes that those examples are "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review. . . ." Rule 242(b), SCACR. Similarly, in Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 276 (2nd ed. 2002), it is noted that "The Supreme Court is, of course, not bound by the above factors," i.e., the five factors listed in Rule 242(b). For this reason alone, Respondents' motion is without merit and does not provide a basis for dismissing the Petition for Certiorari. Instead, Respondents should be required to follow the normal course of filing a Return to the Petition, setting forth the reasons why they claim certiorari should be denied.

In addition, the Petition does indeed refer to several different reasons why the decision of the Court of Appeals falls within Rule 242(b)(3), i.e., "where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." First, as pointed out in the Petition for Certiorari at pp. 11-12, the Court of

Appeals effectively held that working retirees had a right not to have their postretirement salaries reduced. This conflicts with In *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011), where 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. Moreover, 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 once rehired, they had no legal right to complain if terminated, much less if their salary was reduced after rehire. Given this legal status of Plaintiffs as at-will employees, the decision of the Court of Appeals therefore also conflicts with *Alston v. City of Camden*, 322 S.C. 38, 49, 471 S.E.2d 174, 179 (1996), which holds that "[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."

Secondly, as pointed out in the Petition for Certiorari at pp. 17-18, the decision of the Court of Appeals, by reversing on a ground not raised by Plaintiffs either in the trial court or on appeal, conflicts with established Supreme Court precedent to the contrary. *See, e.g., 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); *Rutland v. South Carolina Dept. of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012).

Thirdly, Petitioner SLED also noted that the Court of Appeals erred by remanding the case for a determination of liability without considering SLED's affirmative defenses, including consent, waiver, estoppel, the absence of standing, the statute of limitations and laches. Petition for Certiorari at 13, 18-23. That conclusion is in conflict with the axiomatic rule long recognized by this Court that an affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action. *See, e.g., Lawrence v. Southern Railway-Carolina Division*, 169 S.C. 1, 167 S.E. 839 (1933). In other words, a remand on the issue of liability should have led the Court of Appeals to proceed to consider SLED's affirmative defenses, rather than remanding the case without considering those defenses.

Finally, by not considering SLED's affirmative defenses, the Court of Appeals reached a result that was inconsistent with the Supreme Court cases cited in support of those defenses in the Petition at 19-23, or in the portions of the circuit court order or the Brief of Respondent cited in that section of the Petition.[1]

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[1] SLED would also reiterate that that even the Court of Appeals was correct in requiring a trial on an unraised factual issue concerning liability, a conclusion legally contrary to this Court's cases cited above, the decision was also in error because there were no facts in the record to support the Court's conclusion that genuine issues of fact existed. See Petition at 7-14. In view of

CONCLUSION

For the foregoing reasons, Petitioner SLED respectfully submits that Respondents' Motion to Dismiss should be denied.

Respectfully submitted,

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this absence of evidence, there was nothing more than "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). Such a showing is insufficient to defeat summary judgment. *Id.*

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for Petitioner South Carolina Law Enforcement Division, does hereby certify that service of the **Petitioner's Return to Motion to Dismiss Petition for Writ of Certiorari** in the above-captioned matter 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 9th day of June 2014:

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