THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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 others similarly situated,

Respondents,

vs.

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

Defendants,

of whom,
South Carolina Law Enforcement Division is.

Petitioner.

RESPONDENTS' RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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This case involves a scheme by SLED in which it kept money that should have been paid to Appellant-Retirees, who returned to work for SLED. SLED, *by its own admission*, asked for and was appropriated, as salaries for Appellant-Retirees, the amount Appellant-Retirees had been paid prior to retirement. These salaries were included in the personal service line item of the appropriations bill. (R.p. 209). SLED was also provided with an appropriation for the 13.6.% employer contributions for these salaries under the employee benefits line item provision of the appropriations bill. (R.p. 209, 205). However, SLED came up with a scheme that took "13.6%" of [Appellant-Retirees'] appropriated salary to cover the amount it cost SLED to pay the employer portion of retirement. (R.p. 158). By doing this, SLED also profited by keeping the 13.6% appropriated elsewhere for the employer retirement contribution since it took that money from these employees' salaries. The Supreme Court recognized the illegality of SLED's actions:

> Specifically, [Respondents]' takings claim is predicated on their entitled to retain the percentage of their salary --13.6%--that was used to pay the employer portion of the retirement contributions.

Grimsley v. S. Carolina Law Enforcement Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012)("*Grimsley I*").

Petitioner is seeking a writ of certiorari for a case that was unanimously decided in favor of Respondents and for which rehearing by the Court of Appeals has been denied. Furthermore, Petitioner has failed to set forth any considerations that render this matter appropriate for review by this Court.

As set forth in Rule 242, SCACR, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will only be granted where there are special an important reasons." The Rule also sets forth type of reasons that would support a grant of certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals;

(3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. While this Court does have discretion in determining whether to grant a petition for certiorari, Petitioner has failed to even provide any reasons for certiorari, other than their claim that the Court of Appeals "erred." Rule 242, SCACR states that "a writ of certiorari is not a matter of right, but of sound judicial discretion and will only be granted where there are special and important reasons." If "the Court of Appeals erred" were considered "special and important reasons" for certiorari, every petition would be granted. Petitioners are simply attempting to reargue issues that have been unanimously rejected by the Court of Appeals and have failed to meet the standards of Rule 242.

I. The Court of Appeals properly found 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 and an illegal requirement that the employee pay the retirement contribution the employer is required to pay" by law.

Respondent first argues that because Lynn Hutto, the 30(b)(6) designee for SLED, referred to Respondent-Retirees' rehire salaries as "new salaries," the Court of Appeals was required to accept that Respondent-Retirees were not entitled to the salaries they had before. This is merely a play on words. The forms themselves do not state that Respondent-Retirees will be hired at "new" salaries. The forms provided a figure that was identified as "a reduction of 13.6% in *your* salary," thus recognizing that SLED took 13.6% away from Respondents-Retirees to pay the employer contributions. ROA 158 (emphasis added). SLED's argument that the forms referred to the pre-retirement salary simply for purpose of calculating the amount of the post-retirement salary was properly rejected by the Court of Appeals, citing the evidence in the

record (such as the forms) and finding:

> 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 that the employer is required to pay under subsection 9-11-90(4)...."

Grimsley Slip. Op. at p. 2.

In other words, the Opinion correctly recognized that the salary amounts (and any reductions) were disputed issues of material fact that should be determined by a jury.[1]

Furthermore, contrary to Petitioner's assertion, the cases of *Ahrens* and *Alston* do not apply to this matter. SLED claims that even if Respondent-Retirees were rehired at their old salary which was then reduced, there has no violation of their property rights because *Ahrens v. State*,392 S.C. 340, 709 S.E.2d 54 (2011), allows an employer to impose new conditions, such as a reduction of salary, when an employee retires and returns to work. SLED also claims that under *Alston v. City of Camden*, 471 S.E.2d 174 (S.C. 1996), it can "impose prospective changes in the conditions of employment."

This argument is merely a rehash of the arguments made in the Respondent's Brief to the Court of Appeal (see Resp. Brief, p. 29) that the Court refused to adopt. This Court has already recognized that Respondent-Retirees have a "cognizable property interest in the percentage of their salary that was deducted in violation of section 9-11-90[.]" *Grimsley I*, 396 S.C. at 285, 21 S.E.2d at 428.

In this case, S.C. Code 9-11-90 states:

> An employer **shall pay to the system the employer contribution for active members** prescribed by law with respect **to any retired member** engaged to perform services for the employer, regardless

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[1]As a matter of law, it is illegal for SLED to profit from their scheme.

> of whether the retired member is a full-time or part-time employee or permanent employee.

In other words, SLED must treat Respondent-Retirees the same as any other member. SLED cannot gain by requesting and receiving from the General Assembly salaries appropriated to SLED employees and then reducing those salaries by 13.6% , claiming they really were not salaries. Such a scheme allowed SLED to profit by not giving the retirement system the contributions for which SLED had been specifically appropriated. The type of mandatory language or "express guarantee"[2] of § 9-11-90 requiring SLED to make the employer contribution was not present in the statute in the *Ahrens* case and the court found no right had been violated. Because there is an "express guarantee" in this case (that SLED has violated), *Ahrens* has no application.

The *Alston* case involved a change in the amount of employee vacation and sick days given to city employees. Here, this dispute is over whether SLED can illegally and unconstitutionally reduce Respondent-Retirees' salaries and require Respondent-Retirees to pay the employer contributions, contrary to the express requirement of the retirement statute -- a very different issue than those present in *Alston*. See, *Layman v. State*, 368 S.C. at 640, 630 S.E.2d at 270 (Recognizing that retirement benefits are different from the "terms of employment" and the fringe benefits that were the subject of *Alston v. City of Camden).* Neither *Ahrens* nor *Alston* provide any justification for SLED's violation of the mandate in S.C. Code 9-11-90.

SLED's justification that salaries and employer contributions were never commingled has no effect on this case.

SLED argues that the employer contributions were never paid from the "personal service

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[2]*Ahrens*, 392 S.C. at 352.

accounts" from which the Respondent-Retirees' salaries were paid, and were only transmitted from the "benefit account." Whether that statement is true or not has no bearing. From which pocket SLED withheld money from Respondent-Retirees does not change the fact that they withheld money. Respondents-Retirees were entitled to the 13.6% appropriated to them as salaries, which SLED kept.

As already argued to this Court, SLED admitted that the General Assembly appropriates funds for both the salaries for the agency's employees and for the other employee benefits such as the employer portion of the retirement contribution. In other words, SLED submitted to the General Assembly the amount of the salaries for these employees and was appropriated the requested salaries. However, SLED reduced Respondent-Retirees' salaries by 13.6 percent, keeping that amount for itself. SLED also calculated and was appropriated the 13.6% employer retirement contribution for the appropriated salaries ®. pp. 65-86). Whether or not the personal service account and the benefit account were separate and never commingled has no bearing here. The impropriety of SLED's actions turns on whether SLED, having been appropriated Respondent-Retirees' salaries and the employer retirement contributions, improperly reduced those salaries by 13.6 percent. This is no ministerial act of transferring contributions to the retirement but a scheme to keep money that should have been paid to Respondents-Retirees.

Finally, Respondents have standing to bring this suit and challenge SLED's actions and a property interest affected by SLED's actions. Petitioner claims that the Court of Appeals ignored the absence of standing and also did not address whether Respondent-Retirees had a property right.

With regard to standing, Petitioner claims that once Respondent-Retirees became fully retired and were no longer working retirees, they had "no legally protected right or interest with

regard to what Petitioner did with the money that had funded their former salaries during the original period of employment." Petitioner's argument was clearly rejected in the Court of Appeals opinion, which was decided on substantive, not procedural, issues. Furthermore, Respondent-Retirees contributed to the retirement system, as both regular employees and as working retirees and thus, have standing as to what SLED did with the money the General Assembly appropriated to that agency for the retirement system. See, *Myers v. Patterson*, 315 S.C. 248, 433 S.E. 2d 841 (1993)(a taxpayer who has contributed to the sum jeopardized, is considered to have sufficient interest for standing).

In addition, this Court previously addressed Respondent-Retirees' property rights and held:

> Properly construing Appellants' claim, we hold section 9-11-90 provides a basis to assert a property interest. Specifically, Appellants' takings claim is predicated on their entitlement to retain the percentage of their salary—13.6%—that was used to pay the employer portion of the retirement contributions. It follows that Appellants are able to point to a property interest rooted in state law.

Grimsley I, 396 S.C. at 285, 721 S.E.2d at 428.[3] In finding that the there was a jury question as to whether SLED agreed to pay Respondent-Retirees' salaries and then illegally reduced those salaries by the percentage of the employer retirement contribution, the Court of Appeals obviously concurred with this Court's earlier decision that Section 9-11-90 provided the basis for a property interest.

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[3]In fact, the Supreme Court reiterated this tenet in *Bell v. S. Carolina Dep't of Corr.*, 397 S.C. 320, 337, 724 S.E.2d 675, 684 (2012), in which that Court acknowledged and affirmed that the statutory right in *Bell* and the statutory right in right in *Grimsley*, were the same and that the state could not "through an internal policy, deprive Respondent-Retirees of these interests rooted in state law."

II. Respondent argued throughout this case that SLED had improperly reduced their salaries and the Court of Appeals properly ruled on it.

Throughout this case, Respondent-Retirees have consistently argued that SLED could not reduce[4] their salaries by the percentage of the employer retirement contribution. In fact, this was the argument Respondent-Retirees made in the first appeal, and the South Carolina Supreme Court said:

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

Grimsley v. S. Carolina Law Enforcement Div., 396 S.C. 276, 283-84, 721 S.E.2d 423, 427 (2012)("*Grimsley I*")(emphasis added). The *Grimsley I* opinion recognized that Respondent-Retirees' claim was predicated on their "entitlement to retain the percentage of their salary -- 13.6-- that was used to pay the employer portions of the retirement contributions." *Id.* After *Grimsley I* was remanded to the lower court, Respondent-Retirees again argued that they had "a statutory right to be paid without a reduction for the 13.6% employer contribution." (R.p. 93). The Court of Appeals, recognized, as this Supreme Court did:

> [SLED's] form ...identifies the reduced figure as "a reduction...in *your* salary."

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[4]SLED tries to recast Respondent-Retirees' theory of the case and argues that Respondent-Retirees asserted monies were wrongly "deducted" from their salaries instead of "reduced." Resp. Pet. p. 2. This is merely wordplay by SLED in attempt to distract the court from the inescapable truth that SLED has violated the retirement statutes and kept Respondent-Retirees' money for itself. Deduction and reduction have the same meaning, as both mean a lowering or decreasing. In fact, synonyms for "decrease" include **reduction**, lessening, lowering, **deduction** (Roget's Int'l Thesaurus, 3rd Ed. § 39.1). See also, Merriam-Webster Dictionary ("Deduction" is defined as: the act of taking away something from a total. Synonyms: abatement, discount, **reduction.)**

(emphasis added). If the reduced figure was calculated a percentage reduction from "your salary", then the salary of each rehired employee was the figure before reduction, not the reduced figures.

Grimsley Slip Op., p. 2. Before the lower court (and in this appeal), Respondent-Retirees argued that the General Assembly appropriated Respondent-Retirees' salaries as well as the 13.6% employer retirement contribution, but that SLED then reduced the appropriated salaries and kept that portion for itself in violation of the law on appropriations, which states:

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

S.C.Code Ann. § 11-9-10. Respondent-Retirees argued that SLED's retention of the 13.6% of the salary appropriated for Respondent-Retirees was unlawful. (R.p. 90-91; 93). Respondent-Retirees' argument is not a "new" argument that was not raised before the Court of Appeals as Petitioner suggests.

III. The Court of Appeals was not required to set forth specific findings on Respondent's affirmative defenses.

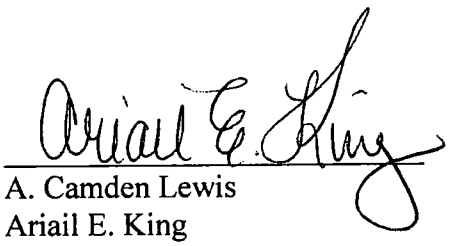
Petitioner claims the Court of Appeals' opinion is deficient because it reversed the lower court's order but did not address the defenses of consent, waiver or estoppel. However, the Court need not address with all other issues present in the appeal. Cf. *Bramlette v. Charter-Medical-Columbia*, 302 S. C. 68, 393 S. E. 2d 914 (1990) (court reversed the verdict against the hospital for errors related to one employee but did not discuss a second employee's alleged wrongdoing as an independent basis for imposing liability on the hospital; as to the first employee, liability was vicarious; as to the second employee, liability was primary, based upon alleged inadequate training by the hospital).

Since SLED's conduct is illegal, Respondent-Retirees could not consent or waive the illegality, and it cannot form the basis for estoppel. Courts have refused to enforce agreements

that are illegal, unconstitutional or against public policy. *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 555. 606 S.E.2d 752, 758 (2004) (This Court will not enforce an agreement which is violative of public policy, statutory law, or provisions of the Constitution); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (An illegal contract is unenforceable); 717A *Am. Jur. 2d Contracts* § 309(an illegal agreement cannot be valid by invoking waiver or estoppel). If the jury finds, as this Court stated, that "the percentage reduction represents an illegal requirement that the employee pay the retirement contribution that the employer is required to pay under 9-11-90(4)(b)," there can be no consent or waiver. In addition, SLED again tries to assert that the matter is barred by the statute of limitations or the doctrine of laches, which the trial court clearly rejected, stating that "it could be held that the statute commences to run anew with each [pay]check presented." R.p. 19. *See also*, *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 20 (1998)("Accordingly, although we find the three year statute of limitations applicable, it begins to run from each payment [in violation of the statute], such that plaintiffs' claims are not barred.").

CONCLUSION

Petitioner has failed to set forth any "special and important reasons" to support a writ of certiorari, as required by Rule 242, and is merely seeking further appeal "a matter of right." For the reasons set forth above, the Petition for Writ of Certiorari should be denied.



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July 3, 2014

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PROOF OF SERVICE

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

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This 3rd day of July, 2014.