

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)

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JUL 14 2014

S.C. Supreme Court

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 REPLY IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

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1. Petitioner SLED has contended in its Petition for Certiorari that the Court of Appeals should not have reversed a grant of summary judgment for SLED when there was no evidence that the Plaintiffs were rehired at their original salaries and when Plaintiffs had never even argued that they were rehired at their original salaries. In addition, SLED has contended that the Court of Appeals should not have remanded the case without considering SLED's affirmative defenses, any one of which would end the case even if Plaintiffs had been rehired at their original salaries. In so holding, the Court of Appeals contravened a number of decisions of this Court.

2. A careful reading of Plaintiffs' Return indicates that they have cited no evidence that they were rehired at their original salaries. To the contrary, the record contains an abundance of uncontradicted evidence that their salaries upon rehire were "brand new" or "different" salaries." R. 299, 300. Those new salaries were the ones transmitted to the Comptroller General's Office when Plaintiffs were rehired. R. 368. Those new salaries, by dollar amount, were specifically agreed to by Plaintiffs.¹ No deductions for retirement were taken from those new salaries. Plaintiff Jowers' first pay stub upon rehire is in the record. *See* Petition at 10, n.7, citing R. 200. As might be expected, it reflects the same lower salary amount which Plaintiff Jowers agreed to accept upon rehire. The pay stub shows no deduction for retirement of any kind. Other evidence, all unaddressed by the Return, to the same effect is discussed at pp. 7-11 of the Petition.

¹ The specific dollar figures for which Plaintiffs agreed to return to work were \$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). *Id.*

In light of all of this uncontradicted evidence, the remand by the Court of Appeals for the purpose of determining that factual issue will require an undue prolongation of this case. In addition, Plaintiffs' constantly shifting position in this case, as most recently shown by their Return and as discussed below, indicates that unless certiorari is granted, the proceedings will not only be unduly prolonged, they also will be subject to the insertion by Plaintiffs of a number of irrelevant or abandoned issues.

3. Plaintiffs' first and primary argument at this stage of the case appears to be that they had a right to a certain appropriated salary even upon their return to employment as working retirees. Return at 2, 5, 6, 9. However, they abandoned any such argument before this Court in the prior appeal, admitting that they "do not claim they are entitled to a particular salary level." *Grimsley v. SLED, supra*, 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012). Plaintiffs' fluctuating and circular positions in this case suggest that any proceedings on remand would waste still more time as Plaintiffs try to revive meritless claims that they previously abandoned.²

Plaintiffs also attempt to contend that reasons not specified, their status is unlike that of the plaintiffs in *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011), a case that involved working retirees like Plaintiffs. However, this Court in *Ahrens*, 392 S.C. at 351-352, 709 S.E.2d at 60, has made it clear that the General Assembly did not intend for employees who retired outside the TERI program (including Plaintiffs) to have a right,

² Plaintiffs also cite this Court's opinion in the earlier appeal of this case (*Grimsley I*). Return at 2, 4, 8. However, the circuit court held that Plaintiffs had not proven the facts that would support the claim recognized in that case. R. 17. The Court of Appeals did not base its opinion on the holding of *Grimsley I*.

contractual or otherwise, to return to work. Plaintiffs' position is therefore not supported by their attempt to distinguish *Ahrens* and *Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996), which involved the rights of at-will employees, a term that includes working retirees. Perhaps more importantly, Plaintiffs' arguments concerning *Ahrens* and *Alston* have nothing to do with the issue on which the Court of Appeals remanded, that is, the issue of whether Plaintiffs were rehired at their old salaries, which manifestly did not occur.

4. SLED has contended in the Petition that Plaintiffs never claimed at any point in this case that the rehire salaries were the same as the pre-retirement salaries. Plaintiffs' Return is pointedly devoid of any citation to the record showing that they have previously put forth such a claim. All they can show is that they argued something else, i.e., that "SLED could not reduce their salaries by the percentage of the employer retirement contribution." Return at 8. This is not the same as arguing the point that underlay the Court of Appeals decision, i.e., that Plaintiffs might have been rehired at the previous salaries, which were then promptly reduced. They have never made such a claim. They do not now claim that they made such a claim, and as a result, they obviously do not cite evidence in support of such a claim.

By reversing on a ground not raised by Plaintiffs either in the trial court or on appeal, the decision of the Court of Appeals conflicts with established precedent of this Court 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). A number of other cases to the same effect are cited in the Petition for Certiorari at 14-18.

5. Finally, Petitioner SLED also has contended 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.³

In addition, 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

³ For reasons not entirely clear, Plaintiffs cite *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990) in response on this point. Return at 9. The one thing that is clear about *Bramlette* is that it did not actually contain a holding on the apparent point for which it is cited. As held in *Hutto v. Southern Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8 (1972), for instance, “[i]t is, of course, settled law that ‘a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.’”)

Plaintiffs also contend that that § 9-11-90 created rights that could not, as a matter of public policy, be waived. Return at 9-10. However, as SLED has pointed out, Petition at 19-20, to the extent that § 9-11-40 embodies a public policy regarding the employer contribution 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. There is no question that SLED made the employer


Brief of Respondent cited in that section of the Petition.

CONCLUSION

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

Respectfully submitted,

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contribution. SLED's agreements with the Plaintiffs had no effect on that duty on the part of SLED, so they did not conflict with the specific purpose of § 9-11-90.

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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 Reply in Support of 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 14th day of July 2014:

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