

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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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 isPetitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES

1. 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.
2. Whether the Court of Appeals erred in reversing summary judgment on a ground that was not argued by Plaintiffs-Appellants.
3. 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 lower salaries, have 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.¹ 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.²

After the case was remanded in 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, followed by 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

¹ Plaintiffs filed a motion for class certification on December 1, 2009, but that motion was not before the circuit court at the June 7, 2012 summary judgment hearing.

² 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 in 2009. Plaintiffs appealed, and by opinion dated 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 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 with the consent of the Plaintiffs and SLED.

denied Plaintiff's motion for summary judgment and instead granted summary judgment for SLED, dismissing this action with prejudice in all respects. R.1-22.

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. R. 14. 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. The circuit court further held that since the factual predicate for a due process claim did not occur, no due process 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 additionally held that Plaintiffs' claims were barred both 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. Plaintiffs contended on appeal, Brief of Appellants at 13, that SLED's motion for summary judgment should have

been denied, but they did not contend that the court below erred in denying their motion for summary judgment.

The Court of Appeals reversed and remanded the case by an opinion issued on February 26, 2014. App. 1-3. The court 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. *Id.* Plaintiffs themselves had not contended that there was a disputed question of fact on that issue. The Court of Appeals did not address any of SLED's affirmative 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 filed a Petition for Certiorari, which was granted by this Court on February 20, 2015.

STATEMENT OF FACTS

A. Introduction and summary.

Both of the Plaintiffs retired unconditionally from SLED in 2004 and then agreed to be rehired on an at-will basis shortly thereafter at slightly lower salaries, but while drawing full retirement benefits as well. Their respective retirements occurred pursuant to an optional "working retiree" arrangement that was authorized by S.C. Code Ann. § 9-11-90 and that had been offered by Chief Robert Stewart of SLED starting in 2002 to agents

who had enough service credit to be able to retire. As Chief Stewart stated in an affidavit in this case, this arrangement served at least three beneficial purposes:

1. It “served the important purpose of permitting more experienced employees to remain in service after they were eligible to retire, working alongside those agents with less experience. This in turn benefitted SLED and the public as well, because it offered the opportunity for the newer agents to continue to learn from the more experienced agents.” R. 172.

2. “At the same time, the retired agents also benefitted from having the ability to retire and return to work at salaries that were close to their pre-retirement salaries while collecting their retirement benefits at the same time.” *Id.*

3. “During that time of substantial budget cuts, such a program would also benefit SLED by cost savings, mostly in the area of salaries. This assisted SLED in avoiding layoffs of any agents and in maintaining a basic level of law enforcement services to the citizens of South Carolina.” R. 171.

Present SLED Chief Keel also submitted an affidavit, confirming the facts as stated by Chief Stewart and noting that “[t]he need to rehire SLED employees who have retired continues to this day.” R. 169.

From the agents’ standpoint, there was a substantial benefit to be derived from participating in this program. For example, the undisputed facts show that the pre-retirement salary of Plaintiff Grimsley had been \$52,896. However, in 2005, the first full year after his retirement, his total income was \$81,472, over half again as much as prior to his retirement.³

³ Of this \$81,472, his SLED “rehire” salary was \$48,318, and his retirement benefit was \$33,158. Order, R. 9, citing Stewart Affidavit, R. 174, 193.

Plaintiffs' terms of at-will employment upon their rehire were for a term not to exceed 48 months. R. 7, 27, 72, 122, 124, 126, 154, 156, 179, 181, 187, 189. Both of the Plaintiffs remained employed by SLED for the full 48-month period, that is, until 2008. At the end of that period, then-Director Lloyd advised each Plaintiff of the date that their 48-month period would end. R. 202, 204. Director Lloyd suggested that each Plaintiff contact SLED with respect to their availability to work on an hourly basis in certain areas. R. 204. Neither Plaintiff requested to be considered for such employment. Some months later, however, in late 2008, and after their four years as working retirees had concluded, Plaintiffs filed this action claiming that the employer contribution had been "deducted" from their salaries.

In their Court of Appeals brief, Plaintiffs made several statements that might be read to suggest that there was something imperative, i.e., not optional, about Plaintiffs' decision to retire and be rehired. *See, e.g.*, Brief of Appellants at 2 ("program required Appellants to retire from SLED. . . . Appellants had to complete certain forms")(emphases added). In fact, however, the decision to retire and be rehired was entirely optional for any employee who had enough years of service to be able to retire. R. 174 (Stewart Affidavit, ¶ 24). Neither Plaintiffs nor any other agents were ever required to take advantage of this offer to retire and be rehired at a slightly lower salary while collecting retirement benefits. *Id.* They did so entirely voluntarily, and they do not actually allege that they were forced to retire. They could have instead continued indefinitely in their original term of employment (subject only to the usual conditions of state employment) and could have continued to receive total incomes that were substantially less annually (about \$30,000 less in the case

of Grimsley, for example) than they could have made by electing to retire and be rehired.⁴

As will be set forth in more detail below, the sole basis for Plaintiffs' claim is the factually-erroneous premise that that SLED "had the amount it cost SLED to pay the employer portion of retirement deducted [sic] from their [post-retirement] salaries," R. 24 (Complaint, ¶ 8)(emphasis added). However, and as the court below 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 and R. 197-198. Instead, Plaintiffs were simply rehired at lower salaries, following a complete break in the employment relationship. R. 173 at ¶ 16. To this they voluntarily and readily agreed, as might be expected in light of the financial benefit illustrated above. At the same time, SLED continued to make the employer contribution to the PORS for the positions occupied by Plaintiffs, as SLED had always done, and used only funds appropriated to it for that purpose.

B. Background.

The background leading up to Chief Stewart's creation of the Retirement/Rehire program is discussed in detail in the order below. R. 3-6. Essentially, in the period from 1999 through 2002, the General Assembly steadily increased, and then eliminated, the salary cap for retired persons who returned to work. R. 3-6. Until 1999, that cap had

⁴ The program was not necessarily advantageous to every agent with the requisite 25 years of service necessary under S.C. Code Ann. § 9-11-60 to retire under the PORS. Some agents could have accrued 25 years or more of service while still in their forties. Such individuals might have regarded themselves as too young to change from a job that had grievance protection to a job that was in the form of at-will employment. There has been no suggestion, however, that anyone was forced to retire earlier than they wanted to.

been very low; for instance, during the period 1989 to 1999, it was \$9,500 for a retired PORS member.⁵ However, the cap was raised to \$25,000 in 1999,⁶ raised again to \$50,000 in 2001,⁷ and then eliminated completely in the following year, 2002.⁸

The statutory changes referenced above made it not only possible, but also very desirable, for many persons such as Plaintiffs to retire and then return to work as “working retirees,” a term used in such cases as *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). As the court below noted, this removal of the salary caps meant that for the first time ever, it was possible for state employees and PORS members to take full retirement, collect full retirement benefits, and also return to their former state jobs at salaries that could have been (but were not required to be) as high as their former salaries at the time of retirement. R. 3-4. Still, however, the return of a retired employee to the employment from which he or she retired “was conditioned on whether an employer in the system chose to hire that employee.” *Ahrens, supra*, 392 S.C. at 351-352, 709 S.E.2d at 60.

Once the salary cap was raised from \$9,500 to \$25,000 in 1999, the amount of salary earnable by a working retiree had started to become high enough to cover the salaries of at least some fulltime positions. R. 5. The General Assembly at that time added provisions in § 9-11-90(4)(b)(PORS) and § 9-1-1790(B)(State system) explicitly

⁵ See Act No. 189 of 1989, Part II, §50B.

⁶ Act No. 100, of 1999, Part II, § 27.

⁷ Act No. 25 of 2001, § 2.

⁸ See Act No. 356 of 2002, § 12, which is captioned “Earnings limitation removed under certain conditions.”

stating that employers must pay an employer contribution to the Retirement System on the salaries of working retirees who returned to employment. Act No. 100, of 1999, Part II, § 27. Without this requirement for payment of an employer contribution (by the employer, as will be shown) on the salaries of working retirees, there might soon have been a fairly sizable number of fulltime positions, or at least positions with substantial salaries, occupied by working retirees, but with no employer contribution being paid to the PORS or the State Retirement System on the salaries for those positions. R. 5. Such a development would have been detrimental to those two Systems, and to state retirees generally. It would have created a class of positions, including many fulltime positions, for which the Retirement Systems would have received no employer contribution.

C. The Retirement/Rehire program for SLED working retirees, starting after July 1, 2002.

The amendments to § 9-11-90 between 1999 and 2002 had the effect of authorizing heads of agencies covered by the PORS, such as Chief Stewart, to rehire, if they so chose, any employees who chose to retire and return to covered employment. There was nothing in the statute that would have prevented such post-retirement rehiring to occur simply on an ad hoc basis, with each working retiree's terms of re-employment and rehire salary to be decided on an individualized basis, after negotiations between the agency head and each such employee. Instead of using that approach, however, Chief Stewart elected to make the terms of re-employment uniform for anyone rehired by him after retirement. (This is not to say that any agent who elected to retire voluntarily was guaranteed to be rehired. As Chief Stewart has noted, he advised persons considering retirement and possible rehire not to participate in the program "unless they were ready to

retire immediately and permanently.” R. 7, (quoting R. 171, Stewart Aff. ¶ 15.) Chief Stewart’s affidavit provides additional details of the program, as follows:

I did not require any employee who participated in the Retirement/Rehire program to retire. In other words, had any of those employees decided not to retire and be rehired, but instead chosen simply to continue as regular, non-retired, employees, they were permitted to do so. However, non-retired employees obviously did not obtain the benefit of drawing retirement and at the same time collecting a salary as a working retiree.

R. 17 at ¶ 24 (emphasis in original).

Plaintiffs complain that the uniform percentage used to compute the lower salaries for retirees was equivalent to the amount of the employer contribution paid by SLED to the PORS, that is, 13.6% at the time in 2004 when Plaintiffs Grimsley and Jowers retired. However, as Chief Stewart has stated, and as the court below held, “SLED simply decided to use the percentage figure of the preretirement employer contribution as a uniform measure of the salary reduction and of the amount of cost savings as a result of the rehire process.” R. 11-12, citing R. 173-174 at ¶ 18. There was nothing in § 9-11-90 that spoke in any way to the amount of the rehire salary for working retirees.

(The remainder of this section of this Statement of Facts is essentially the same as portions of the circuit court’s statement of undisputed facts, R. 6-9, but is set forth below for convenience of reference.)

The Affidavit of former SLED Chief Robert M. Stewart sets forth in detail the entire process under which Plaintiffs retired and rehired. R. 172-173 at ¶ 13. In summary, what happened was that starting in the late summer or fall of 2002 (shortly after the salary caps were eliminated), if a SLED agent wished to retire and seek to

become a working retiree, the agent would first advise Chief Stewart that he or she would be retiring on a date specified in the retirement notice form. R. 177.⁹ The individual, in signing the form, noted the existence of certain conditions “if I wish to apply to be rehired,” and “if I am selected to be rehired. . . .” *Id.* (Emphases added). At that point, the individual was completely retired and separated from employment with SLED, which had no obligation to rehire the individual. *Ahrens, supra*, 392 S.C. at 351-352, 709 S.E.2d at 60; R. 174, ¶ 22. Indeed, as already noted, Chief Stewart advised each person considering retirement and rehire not to do so “unless they were ready to retire immediately and permanently.” R. 173, ¶ 15.

If a retired employee sought to be rehired, he would then would fill out a form in which he requested Chief Stewart to rehire him. R. 179. The form expressed the agent’s understanding that that if rehired,

. . . . the following provisions apply and I agree to them:

Status: FTE (full time employee) with no grievance or RIF (reduction-in-force) rights (at-will employee).¹⁰

Accrual of annual and sick leave at current rate.

Salary: 13.6% less than previous base salary (no longevity pay), reduction of health insurance cost to agency if utilized.

⁹ Exhibits 1 through 4 to the Stewart Affidavit, R. 176 - 183, are the forms for Plaintiff Grimsley. Exhibits 5 through 8 are the corresponding forms for Plaintiff Jowers. R. 187-191.

¹⁰ S.C. Code Ann. § 8-17-370(16) exempts PORS working retirees such as Plaintiffs from coverage under the state personnel grievance process. That section was enacted as part of Act No. 356 of 2002, the same statute that removed the earnings limitation for PORS working retirees.

Employment not to exceed 48 months.

No lump sum payment for annual leave upon second separation.

Review date: twelve months after date of rehire.

No probationary period.

Must apply to this agency and receive permission to reenter retirement system as an active member.

R. 179. (emphases added).¹¹

The third step in the process for persons who were rehired was that the SLED Director of Human Resources advised the employee that his request to return to employment had been approved, “based on your written acceptance of the following provisions.” R. 181. Among the conditions stated in the form for Plaintiff Grimsley, for example, was the following:

Your salary will be **\$45,702 (previous base salary less 13.6%)**, no longevity pay, additional reduction by cost of health insurance to agency if elected.¹²

(Emphasis added.) As the then-Director of Human Resources, Lynn Hutto, testified at her deposition, “They came back at a brand new salary. . . .” R. 294 (emphasis added).

The fourth and final form was informational. It was labeled “Employee Orientation for Re-Employment under the PORS Retirement Provisions.” R. 183. This form contained a statement by SLED to the employee that

¹¹ The employer contribution for PORS members had been 10.3% of salary prior to July 1, 2004, at which time it increased to 13.6%.

¹² The salary figure in the quoted exhibit is the specific number applicable to Plaintiff Grimsley. This figure varied by employee.

As a retiree being re-employed by SLED, items listed below are being discussed with you so you will be informed of your benefits and employment status.

Plaintiffs each signed this form at the bottom. *Id.* The form there stated “My signature below indicates that the above checked items were discussed with me during orientation.”

Id. This sentence was followed by a signature line.

The items listed in the informational form were essentially the same as those quoted above. The “Salary” bullet point referenced the same “reduction of 13.6% in your salary,” noting that that reduction was “to cover the amount it will cost SLED to pay the employer portion of retirement.” (This recitation did not appear in the previous two forms that referenced the lower salaries on rehire, instead only appearing in the fourth form, an informational document.) The employees had already agreed, by executing the second form, to accept a rehire salary that was 13.6% lower than the pre-retirement salary, with no reason given by SLED for that specific percentage (nor any need for one). Finally, the fourth form mentioned that the employee contribution of 6.5% would no longer be deducted from the salary check. The reason for this was that the employee, as a retiree, was no longer required at the time to pay the employee contribution.¹³

After all four forms had been executed, the employees returned to work, collecting both their new salaries (which were 13.6% less than their preretirement salaries) from

¹³ As an aside, this changed effective July 1, 2005, when the General Assembly amended § 9-11-90(4)(c) to require working retirees to pay the employee contribution even though they were retired. This amendment was upheld in *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006) as to employees generally, and in *Ahrens, supra*, as to certain employees who claimed that the State had created rights in them by contract or estoppel.

SLED and their full retirement benefit from the PORS. As already noted, the positive financial impact of this is illustrated by the case of Plaintiff Grimsley, who in his first full year after his retirement, collected a total of \$81,472, more than half again the amount of his preretirement income of \$52,896. R. 174 at ¶ 20, 193.

D. Payment Of The Employer Contribution By SLED And Absence Of A Deduction Of The Employer Contribution From The Employees' Salaries.

The information set forth in this this section of this Statement of Facts is similar to portions of the order below, R. 9-12, but is set forth below for convenience of reference.

Because Plaintiffs' claims pertain to the employer contribution, it is appropriate to provide some brief amount of background concerning the nature of the employer contribution and the mechanics of how it operates. This information is found primarily at R. 205-215.

It cannot be disputed that SLED, and not the Plaintiffs, at all times paid the employer contribution for Plaintiffs, just as it has done for all of its employees at all times. R. 173 at ¶ 17, 207 at ¶ 16, 197-198 at ¶¶ 6-7. Plaintiffs have not contended otherwise.

The employer contribution, as its name would indicate, is paid by the employer, not by the employee. In fact, the PORS statute requires that it be paid by the employer. Section 9-11-220(1) provides that

(1) Commencing as of July 1, 1974, each employer shall contribute to the System seven and one-half percent of the compensation of Class One members in its employ and ten percent of compensation

of Class Two members in its employ. Such rates of contribution shall be subject to adjustment from time to time on the basis of the annual actuarial valuations of the System.¹⁴

(Emphasis added.)

The employer contribution is paid by employers periodically in a lump sum that is equal to the appropriate percentage (13.6% in 2004) of the total salary amount actually paid. The remittance is a periodic lump sum payment of the appropriate employer contribution percentage (13.6% in 2004) of that total salary amount. It is not itemized on an employee-by-employee basis.¹⁵ R. 206 at ¶ 12.

In addition, as set forth in more detail in the affidavit of Donald Royal, SLED's Director of Administration, the employer contribution to the Police Officers' Retirement System, like all fringe benefits in state government, is not included within the salary of the employee, and therefore is not deducted from the salary of the employee. R. 206, ¶ 8. Instead, it is paid from the fringe benefit category of funds appropriated to the agency. *Id.*

For SLED, the fringe benefit amount for the employees is approximately 35% over and above the employees' salary amounts. R. 205-206, ¶ 7. The employees never see this amount reflected in their salary information, because it is not part of their

¹⁴ In 2004, when Plaintiffs retired, the rate for the employer contribution had been adjusted upward from the 7.5% in the statute to the 13.6% referenced earlier. As noted earlier, the 13.6% figure took effect on July 1, 2004. Immediately prior to that it had been 10.3%.

¹⁵ At the time of the Hutto deposition in 2009, and earlier, SLED made this lump sum remittance on a quarterly basis. *See* R. 376-387. Beginning in 2010, the lump sum payment of the employer contribution was made automatically at each semimonthly pay period. There was no change in the nature of the lump sum payment as a specific percentage of payroll, which was over and above the amount paid as salary to the employees. R. 206 n.1 (Royal Affidavit).

salaries. In addition to the employer contribution to the Retirement System, the total amount of fringe benefits includes such things as employer contributions for workers' compensation, health insurance, and for other similar fringe benefits. R. 206, ¶ 9. Most state employees probably have no idea how much is paid by their employers for these various employer contributions, nor are these specific amounts really a matter of concern for the employees, because these amounts are governed by law and are over and above the figure that actually is of concern to the employees, that is, their salaries.

As might be expected from the nature of the employer contribution and the manner in which it is remitted by the employer, there is simply no such thing as "having the employer contribution deducted from [employees'] salaries," as Plaintiffs allege. *See* R. 206 at ¶ 8. In fact, it is uncontested that the postretirement pay stubs of the Plaintiffs reflect no deduction at all for retirement, given that (a) in 2004, retirees did not pay an employee contribution, and (b) the pay stub would never reflect a deduction for the employer contribution, since that amount was never deducted from salary, but rather was paid by the employer as part of benefits over and above salary. *See* R. 197-198 at ¶¶ 6-7. In other words, if an employee's rehire salary as a working retiree was \$45,000, for example, the postretirement employee contribution of about \$6,000 was not deducted from that amount. If that had happened, the net postretirement salary would have been about \$39,000. But that did not happen. The employee received the full \$45,000, and the \$6,000 employer contribution was paid by SLED from the fringe benefit appropriation, as is always the case. R. 206 at ¶ 8. The amount SLED saved by paying lower salaries remained in the appropriation category for personal services. R. 322. While SLED did

use the percentage figure of the preretirement employer contribution as a uniform means of computing the amount of the postretirement salary, this was simply a way to make a uniform measure of the amount of the new salary and the amount of cost savings as a result of the rehire process. *See* R. 173-174 at ¶ 18. It did not reflect a transfer of funds within SLED's budget.¹⁶

SUMMARY OF ARGUMENT

As indicated in the Statement of Facts, Plaintiffs voluntarily agreed to be rehired at lower salaries than they had earned prior to retirement. The new salaries upon rehire were 13.6% lower than their preretirement salaries, but Plaintiffs also received their full retirement benefits upon rehire as working retirees. This resulted in a total income upon retirement and rehire of more than 150% of the preretirement salary.

The Court of Appeals decided to reverse and remand on a ground never raised or argued by Plaintiffs, either in the circuit court or in the Court of Appeals. That ground, raised only by the Court of Appeals itself on its own motion, was the Court's belief that

¹⁶ By way of illustration, the employer contribution for Plaintiff Grimsley of 13.6% of his preretirement salary of \$52,896 at the time of his retirement had been approximately \$7,200. The new salary upon rehire was about \$7,200 than the old salary. This \$7,200 in salary savings was therefore available for salaries for other employees, to be paid from the personal service appropriation. R. 322. The employer contribution on his lower salary upon rehire (13.6% of \$45,702) was about \$6,215, to be paid from the fringe benefit appropriation. This was about \$1,000 less than the employer contribution had been for the preretirement salary. SLED therefore saved the entire \$7,200 of the difference between the old and new salaries.. In addition, there was a savings of about \$1,000 in fringe benefits. *See* R. 206 at ¶8, 174 at ¶21. (NOTE: Footnote 13 on p. 11 of the Order, which was taken from n.13 of SLED's brief in the lower court, contains calculation errors because the numbers in that footnote were inadvertently based on Plaintiff Grimsley's rehire salary in 2004 being \$48,318, when in fact the 2004 rehire salary figure was \$45,702, as shown on Exhibit 3 to the Stewart Affidavit, R. 181.)

there was a question of fact as to whether Plaintiffs had been rehired at their old, preretirement salaries, which were then reduced, under the scenario that the Court of Appeals believed to be a possibility. However, the written records and the deposition of SLED's Director of Human Resources make it clear that this simply did not happen. There is no evidence whatsoever that the new, rehire salaries were the same as the old, preretirement salaries. To the contrary, there is an abundance of undisputed evidence that the rehire salaries were lower and never the same as the preretirement salaries.

Plaintiffs claimed that the employer contribution had been "deducted" from their salaries. Again, however, the documents in the record make it indisputably clear that the employer contribution was never deducted from either the old salaries or the new salaries; nor did the law and the actual practice even contemplate a deduction of the employer contribution from the Plaintiffs' salaries: such deductions are simply never made. This fact alone, i.e., the undisputed absence of a deduction from the rehire salary, renders immaterial the conclusion of the Court of Appeals that there was a triable issue of fact as to whether the old salaries were paid upon rehire.

Plaintiffs continued, after the remand from this Court in 2012, to claim that they had a property interest, but on remand, they never showed precisely what that interest was, or how it had been adversely affected.

Plaintiffs also claimed that there was a misappropriation by SLED of funds allocation to pay their salaries. Once again, the evidence shows, painstakingly and without contradiction, that funds appropriated for salaries were never used for the payment of the employer contributions.

In addition, the Court of Appeals erred in declining to affirm the Order of the circuit court on the simple basis that even if every contention made above regarding “liability” is erroneous, Plaintiffs could and did validly waive any rights they allegedly had, and could and did consent to be rehired at the lower salaries at which they were rehired. The circuit court also applied the related doctrine of estoppel as another basis for dismissal. While the circuit court declined to dismiss on two other grounds raised by SLED, laches and the statute of limitations, those defenses provided a fourth and fifth reason to dismiss Plaintiff’s claim, even if they established their liability claims. The Court of Appeals therefore erred in not considering SLED’s affirmative defenses and affirming the circuit court order on one or more of those defenses.

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. The undisputed evidence shows, however, that the retire/rehire program offered to them by SLED was greatly to their benefit, was completely voluntarily on their part and was the subject of their clear consent. Plaintiffs appear to be trying to identify themselves with TERI retirees, who unlike Plaintiffs are not PORS members. TERI retirees do have statutory rights to retire and be retained (not rehired) at their preretirement salaries, but there has never been legislation offering a comparable program to PORS retirees. Plaintiffs cannot now be heard to complain that a program offered to them as an optional matter of grace, and to which they freely consented, was somehow violative of any rights of theirs.

ARGUMENT

1. 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.

A. The undisputed evidence shows that the salaries at which Plaintiffs were rehired were new, lower salaries.

The Court of Appeals held that a trier of fact could find that “SLED agreed to pay each rehired employee the same salary it paid before retirement. . . .” App. 2. However, and as discussed in Issue 2 below, Plaintiffs never even 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 this unraised point specifically. However, the record 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. The record shows that it is impossible for the scenario envisioned by the Court of Appeals to have occurred.

The Court of Appeals based its holding on language in a form which identified the reduced figure as “a reduction . . . in your salary.” App. 2 (emphasis in Court of Appeals opinion). The Court of Appeals 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.* This tortuous conclusion is completely without support in the record.

The fact that the rehire salaries were new, lower, salaries 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). 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 (emphasis added).

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.” That column listed the amounts of the new, lower salaries. 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 preretirement 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 was simply no reason for SLED to have taken the unnecessary action of rehiring Plaintiffs at their old salaries and then immediately reducing the rehire salaries. Plaintiffs have expressly agreed that SLED could have rehired the Plaintiffs at

any salary that was mutually agreed on.¹⁷ 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 percentage cut to those salaries. As shown by the undisputed facts in the record, SLED did not take any such action.¹⁸

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 salaries were lower than the preretirement salaries. Plaintiff Jowers’ first pay stub after his rehire confirms beyond any dispute that the rehire salaries were lower at the very outset.¹⁹ It is

¹⁷ 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, supra*, 396 S.C. at 284, 721 S.E.2d at 427.

¹⁸ 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.

¹⁹ 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 IB, 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 preretirement 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.

therefore clear that those specific dollar figures, and not the former salaries that were higher, were the 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, that is, at specific salaries that were lower than their old pre-retirement salaries.

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 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 amounted 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, a party cannot rely on such metaphysical doubts, but instead, as Rule 56(e) itself provides, "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, which again is not surprising since they never claimed to have been rehired at the old salaries.

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.

Finally, 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.”

B. The circuit court decision was correct in all other respects.

The Court of Appeals did not consider the holdings of the circuit court on the merits of Plaintiffs’ claims, but as shown below, those holdings were clearly correct.

1. **Plaintiffs' claims based on § 9-11-90 are unmeritorious, because SLED (a) did not deduct the employer contribution on Plaintiffs' salaries upon retirement and rehire, and (b) because SLED indisputably paid the employer contributions itself.**

The short and simple answer to Plaintiff's primary claim, the claim based on § 9-11-90, is set forth in the lower court's order:

In light of the undisputed facts set forth above, it is clear that Plaintiffs' claims are lacking in merit. Their claim that SLED violated § 9-11-90 by "having the employer contribution deducted from [their post-retirement] salaries," Complaint, Par. 27, is simply not factual. There can be no reasonable dispute that there was no salary DEduction for the employer contribution. Plaintiffs instead agreed to a salary REduction. This claim as stated in the Complaint is therefore incorrect as a matter of fact.

The claim of Plaintiffs that SLED violated § 9-11-90 by "having the [Plaintiffs] pay the employer contribution" is also not factual. SLED, and not the Plaintiffs, unquestionably paid the employer contribution. *See, e.g.,* Royal Aff. Par. 16.

R. 13.

On appeal, Plaintiffs did not directly challenge these conclusions. They did not claim that they were entitled to a particular salary level upon rehire. *Grimsley, supra*, 396 S.C. at 284, 721 S.E.2d at 427. They also did not contest the undisputed fact that SLED did indeed pay the employer contribution on their rehire salaries.

Instead, Plaintiffs claimed only that rehiring a retired employee at a lower salary would "eviscerate[]" the "spirit of the statute." Br. of Appellants 5. Plaintiffs did not specify what that "spirit" might be, but the only thing required by § 9-11-90 is that the employer must make the employer contribution on the salaries of working retirees, which

is precisely what happened in this case.²⁰ That employer contribution is based solely on the rehire salary, not on some other salary from the retiree's past employment or on any other figure. A working retiree returns to work at the choice of the employer and on such terms and conditions as the employer offers.²¹ Nothing in §9-11-90 provides otherwise. For any employees who returned to work as working retirees, the former employment, and with it the former salary, had terminated completely. The former salary had no relevance to subsequent events.

Plaintiffs' contentions appear to be driven by an unspoken claim that they had a right to have the old salary continue into the new hiring that occurred after their complete retirement. This implicit assertion permeates their brief on appeal, even though they "do not claim they are entitled to a particular salary level." *Grimsley, supra*, 396 S.C. at 284, 721 S.E.2d at 427.

In light of Plaintiffs' contentions, it is worth noting that when working retirees are rehired after their complete retirement, the situation is significantly different from another program created in the early 2000's, the Teacher and Employee Retention Incentive Program (TERI). That program was created in 2001. It is generally described in *Layman v. State*, 368 S.C. 631, 634-635, 630 S.E.2d 265, 267 (2006). Under the TERI program,

²⁰ Plaintiffs may be trying to imply that the "spirit" of § 9-11-90 is that the rehire salary should be the same as the preretirement salary, but they have already conceded that they are not "entitled to a particular salary level." *Grimsley, supra*, 396 S.C. at 284, 721 S.E.2d at 427. Also, as noted elsewhere, § 9-11-90, at times pertinent to this case, was silent on the issue of what the rehire salary might be.

²¹ As noted elsewhere herein, § 9-11-90(4) was amended in 2012 to limit the rehire salary to \$10,000 in some instances.

there was no termination of employment followed by a separate rehire. Instead, the employee retired, but continued in employment without a break in service. S.C. Code § 9-1-2210(A).²² This Court in both *Layman, supra*, 368 S.C. at 643, 630 S.E.2d at 271, and *Ahrens, supra*, 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 to have a right, contractual or otherwise, to return to work.²³ Plaintiffs' claims might have been more factually apposite if they had been TERI employees whose salaries had been reduced immediately upon their election to retire and continue working. That scenario, however, simply does not apply in a situation involving working retirees. The TERI program would never have applied in this case in any event, because it was never made available by statute to PORS members such as Plaintiffs.

Another unspoken but erroneous aspect of Plaintiffs' argument is Plaintiffs' apparent attempt to imply that the 1999 amendments that added § 9-11-90(4)(b) were intended to make a change in the law with respect to who should pay the employer contribution to the Retirement System for positions occupied by working retirees, as opposed to whether an employer contribution should be made at all. This, however, is not an accurate view of that statute. It has always been the case that if a position is covered by a retirement system, the statutes have required that the employer pay the employer

²² See also, S.C. Op. Atty. Gen. (September 26, 2011), 2011 WL 4592372 (employer has no power or authority to determine whether an employee may or may not participate in the TERI program).

²³ Other differences between the TERI program and the facts of the present case are set forth in n. 3 of the Order below. R. 3.

contribution. *See, e.g.* § 9-11-220 (“Contributions of employers”), which provides generally for employer contributions. The only change made in 1999 to § 9-11-90, assuming that it was a change at all, merely made it clear that an employer contribution must be made for positions occupied by working retirees. 1999 Act No. 100, Part II, Section 27.²⁴ In other words, the 1999 addition of § 9-11-90(4)(b) had no relevance to the amount of the rehire salary of a working retiree. It merely confirmed that employers were required to make employer contributions for positions of working retirees, in case that was not already clear.

In light of the concessions that Plaintiff have been required by necessity to make, Plaintiffs’ main, if not only, argument before the circuit court regarding § 9-11-90 is that SLED in some sense “misappropriated” the funds that would have constituted their former salaries if they had not retired. Brief of Appellants at 4-8. As the court below held, Plaintiffs have no standing to raise this argument, and even if they did have standing, the argument is without factual or legal merit. R. 13-17. These conclusions of the circuit court will be summarized and discussed below.

It should be remembered once again that when Plaintiffs retired from SLED, they made a complete break with their former positions and their former salaries. It cannot be disputed that they, like all other working retirees, could only come back in such positions and on such terms, if any, as the former employer chose to offer them. Plaintiffs do not

²⁴ The pre-1999 version of § 9-11-90(4) did not explicitly state that an employer contribution was to be made when retirees returned to covered employment at the pre-1999 capped salaries of \$9,500 or less. *See* § 9-11-90 (1986 bound volume) and 1989 Act No. 189, Part II, Section 50B (capping working retirees’ salary at \$ 9,500).

and cannot claim that they had a right to rely on any action of SLED or Chief Stewart that might have indicated they would be rehired at 100% of their former salaries. In fact, the sequence of documents that each Plaintiff signed as part of the retirement/rehire process made it unmistakably clear that they would not be rehired at 100% of their former salaries.

The record establishes that employer contributions are paid only from the appropriation for fringe benefits, i.e., “Employee Benefits.” R. 16, citing Royal Affidavit, ¶8, R. 206. It is uncontested that salaries, on the other hand, are paid from the appropriations for personal services, and that the salary savings from the retirement/rehire process “remained in the pot for other personal services.” R. 322, Hutto Dep. 71:9-12.

Plaintiffs’ argument on this point is not very specific, but it appears to be nothing more than a factually-unsupported claim that SLED used funds appropriated for salaries to pay the employer contributions for retirement. However, the court below 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. Plaintiffs have not pointed to any evidence that either type of appropriations (personal service or employee benefits) was expended on anything other than its stated purpose. Indeed, the Hutto deposition quoted above and the Royal affidavit confirm otherwise. Plaintiffs accordingly cannot validly claim, as they did for the first time on appeal, Br. of Appellants 8, that there is an unresolved question of fact about appropriations. To the contrary, the facts have been established. Plaintiffs, despite having

had an opportunity to show otherwise in the lower court, did not do so. As a result, there is no merit to Plaintiffs' claims based on matters related to appropriations.²⁵

In addition, in light of this complete break with their former salaries, Plaintiffs do not now have standing to make any claims about the disposition made by SLED of their former salaries, and the court below so held. R. 15-16. Once they retired, they had no more standing to challenge the use of funds by SLED than any other citizen of South Carolina. *Id.*, citing *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012).

On appeal, Plaintiffs cited *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993), but that case is a taxpayer standing case permitting taxpayers to challenge an alleged wrongful diversion of public funds paid by them. 315 S.C. at 251, 433 S.E.2d at 843. Plaintiffs claim to have such standing on the ground that as retirees, they have standing "as to what SLED does with the money it is appropriated for the retirement system." Br. of Appellants 6-7. However, the claim they actually make, although unfounded, is that money was wrongfully transferred to the fringe benefit account and from there to the PORS. Obviously, even if that allegation had been true, the claimed action would have not have resulted in any decrease in the amount that was paid to the PORS. As a result, Plaintiffs, who are presently retirees who have not been employed by

²⁵ The lower court also held that even if there had been some kind of factual showing for Plaintiffs' claim of a transfer of salary money to the fringe benefit account, which there was not, such transfers would not have been contrary to appropriations statutes, which permit certain funding transfers. R. 16-17. Plaintiffs mischaracterize this part of the order below as holding that transfers of appropriation had actually occurred, Br. of Appellants 7-8, but in fact there was no showing by Plaintiffs that such transfers had occurred, and the lower court so noted. R. 16.

SLED since 2008, can show no harm to themselves from the “misappropriation” they claim. All of the funds due to the PORS were in fact paid to the PORS by SLED. Those were the only funds in which Plaintiffs could even conceivably claim an interest, but those funds were not affected by any action of SLED. Plaintiffs claim standing to complain about the disposition of the money formerly used to pay their salaries, but after they retired, they 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. As the court below additionally held,

When Plaintiffs retired, they completely separated themselves from state employment, with no right to be rehired at all. Under these circumstances, Plaintiffs simply no longer had any interest at all in the manner in which SLED spent the funds that had previously been part of their salaries or fringe benefits during their pre-retirement period of employment. In the language of *Freemantle, supra*, they “sustained . . . no prejudice” from any SLED actions pertaining to their former salaries after they had retired and then voluntarily returned to work with different salaries.

R. 15.

In summary, the only way that Plaintiffs might arguably have been able to present a valid cause of action based on § 9-11-90 would have been to show that a deduction was actually made from their postretirement salaries, and that such deduction was contrary to law. For instance, Plaintiffs might have had a viable claim if they could have shown that after they were rehired: (a) SLED simply decided not to pay the employer contribution from the benefits appropriation and instead (b) advised the employees that their new, lower working retiree salaries would be docked by the percentage of the employer contribution (13.6% in 2004), and then (c) actually deducted the employer contribution

from Plaintiffs' new, lower, rehire salaries, and (d) in the process moved funds from the personal services account and used them to pay the employer contribution. This was the claim as indicated by the Complaint. As the record has been developed, however, it has become clear that none of the four events set forth above actually took place. As a result, the claim suggested by the Complaint not founded in fact. R. 17.

2. No property interest of Plaintiffs was affected by the terms of their retirement and voluntary return to employment.

For the same reasons already discussed, Plaintiffs' "takings" claim fails because in fact there was no deduction of the employer contribution from their salaries as working retirees. As the court below held, once rehired, they "came back at a brand new salary. . . ." R. 15, quoting R. 294, Hutto deposition at 43: 12. Those new salaries, while lower than the old salaries, did not have the employer contribution deducted from them. In other words, assuming without conceding that Plaintiffs had some kind of property interest in their "brand new" salaries upon being rehired, their "takings" claim still fails, because nothing was deducted from those salaries for the employer contribution, as has already been discussed at length above. Again, Plaintiffs cannot dispute that the only deductions taken from their paychecks upon their return to employment following retirement were not related to the PORS in any way. R. 11, citing R. 197-98, Kitchens Aff. Par. 6 and 7. As a result, even if Plaintiffs could show a property interest under the

actual facts of this case (as opposed to the facts as alleged in the Complaint), SLED took no action that affected any such interest.²⁶

With respect to the existence of a property interest, this Court held in the prior appeal of this case that

Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”

Grimsley, supra, 396 S.C. at 284, 721 S.E.2d at 427. The Court also noted that Plaintiffs “contend that they have a cognizable property interest in the percentage of their salary that was deducted in violation of section 9–11–90. . . .” This assumed that, as the Complaint had alleged, there had in fact been a “deduction” from their working retiree salaries, although it is now clear that there was no such “deduction.” (The Complaint did not mention that Plaintiffs were at-will employees upon their return to work.) This Court further noted that “[Plaintiffs] do not claim they are entitled to a particular salary level.”

Id.

While the absence of action adverse to a property right is fatal to Plaintiffs’ “taking” claim, it is difficult, in light of the facts shown by the record, to see what could serve as the source of Plaintiffs’ claim of a property right to anything that happened after their retirement. The documents that refer to postretirement salaries also make clear that

²⁶ The court below held not only that there was no property interest, but also that factually, there was no deduction that would amount to a taking of such interest, although the word “taking” was not used. R. 17. The “no taking” contention set forth above might therefore constitute an additional sustaining ground.

once Plaintiffs were rehired after retirement, they were at-will employees who lacked grievance rights.

In support of their claim that they had a property interest, Plaintiffs cite several inapposite cases, including *Wicker v. South Carolina Dept. of Corrections*, 360 S.C. 421, 424, 602 S.E.2d 56, 57 (2004), Br. of Appellants at 9-10, and *Bell v. South Carolina Dept. of Corrections*, 397 S.C. 320, 724 S.E.2d 675, 678 (2012). *Id.* at 9. In *Wicker*, however, the inmate plaintiff was found to have a statutory right to the payment of a prevailing wage. In *Bell*, the employees who had been subject to a reduction in force had a statutory entitlement, lasting up to one year, to be recalled to positions for which they were eligible, if vacancies of that kind were to arise. Plaintiffs also cite *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969), Br. of Appellants at 10 n. 8, but that case involved garnishment of wages to which the garnishee's entitlement as property was not disputed. There is no corresponding statute in the present case that creates any similar property interests in Plaintiffs with regard to any aspect of postretirement employment.

In fact, once Plaintiffs retired and then came back to work as at-will employees, there was no provision of statute or contract that required SLED to continue to employ them at all. After returning to work as at-will employees, their salaries could have been set at any amount, either lower or higher. *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"); see also, e.g., *Massachusetts State Police Commissioned Officers Ass'n*

v. Com., 462 Mass. 219, 226, 967 N.E.2d 626, 632 (2012)(“at-will employees do[] not have a property interest in future wages (for future services) for which the Commonwealth has decided not to pay; rather, they have a mere expectation as to payment from the Commonwealth for future services”). In the end, however, there still was no taking, even if a property interest had existed.

2. The Court of Appeals erred in reversing summary judgment on a ground that was not argued by Plaintiffs-Appellants.

In addition to erring by concluding that an issue of fact was present, the Court of Appeals also erred in holding that plaintiffs had claimed that they were rehired at their old salaries. App. 2. Plaintiffs did not in fact make that 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.²⁷ 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

²⁷ If the claim had been raised by Plaintiffs but not addressed by the circuit court, Plaintiffs would have needed to a motion to reconsider under Rule 59(e), but no such motion was filed. This is not surprising, because Plaintiffs never made the argument in the first place.

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 of funds.²⁸ 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 argued 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

²⁸ 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 (emphasis added). The Court of Appeals, while deciding in favor of Plaintiffs, came to the polar opposite of Plaintiffs’ 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.

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.²⁹ 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 were concerned. The Court of Appeals' raising of this issue *sua sponte* and then using it as a basis for reversal violates well-settled appellate principles.

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

²⁹ SLED does not mean to suggest that Plaintiffs' counsel erred in not raising this issue. To the contrary, the issue is clearly without factual merit, and Plaintiffs' counsel were entirely correct in not seeking to make the claim that the rehire salaries were not the same as the former salaries.

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, 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, then 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.

3. 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 agreed to pay the rehired employees the same salaries as originally and then reduced those salaries immediately upon after rehire, the circuit court held that there were nevertheless three different reasons, consent, waiver, and estoppel, that would still bar Plaintiffs’ 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. Any one of these affirmative defenses provides a simple basis for affirming the circuit court and dismissing this case, regardless of the outcome of the liability issue.

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 support affirmance of the order of the circuit court and render immaterial the issue of liability. *See, e.g., Lawrence v. Southern Railway-Carolina Division*, 169 S.C. 1, 167 S.E. 839 (1933)(holding that an affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action). As a result, the Court of Appeals erred in not considering these defenses and in not affirming on the basis of one or more of them. Each of these five affirmative defenses is briefly discussed below.

A. Upon being rehired, Plaintiffs waived any claim they might have had to challenge their salaries upon rehire, which were disclosed to them in advance.

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. 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 voluntary and optional, as well as being to Plaintiffs’ benefit.

Plaintiffs also claimed that § 9-11-90 created rights that could not, as a matter of public policy, be waived. Br. of Appellants at 10-11. However, the only public policies that pertain to the issue of salaries to be paid by rehired working retirees is that they have no right to be rehired at all, *Ahrens, supra*, 392 S.C. at 351-352, 709 S.E.2d at 60, much less a right to be rehired at their former salaries. 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 not 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).

Moreover, as the Order of the circuit court noted, the general concept of paying lower salaries to working retirees is not only not contrary to public policy, it is something

that the General Assembly has endorsed in recent years, R.19. *See*, for instance, Act No. 291 of 2010, Part 1B, Section 89.144 (GP: Cost Savings When Filling Vacancies Created by Retirements). The most recent reiteration of this proviso is found in the 2014-2015 Appropriations Act, Part 1B, Section 117.82. In those annual provisos, the General Assembly has mandated that whenever classified FTE positions become vacant because of employee retirements, the vacant positions must be managed so that in the aggregate, there should be a cost savings of 25% when managing those positions. This is the same general cost savings approach that was part of the Retirement/Rehire program, except that now, the mandated percentage reduction for managing the filling of the vacancies is 25%, instead of the 13.6% reduction that was applied to Plaintiffs Grimsley and Jowers.³⁰

B. Plaintiffs' consent to the terms of the Retirement/Rehire program also bars their present claims.

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 new salaries they were actually

³⁰ More recently, the General Assembly by the enactment of Act No. 278 of 2012 has restored an earnings cap of \$10,000 on most PORS members who retire prior to the age of fifty-seven. S.C. Code Ann. § 9-11-90(4)(a)(Cum. Supp. 2014). While this does not affect these plaintiffs, they would not even have been eligible to retire and be rehired at their former salaries if they were younger than 57 when they retired in 2004.

paid upon rehire. Such consent occurred when they agreed to accept the new salaries 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 20 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 had agreed.

C. Plaintiffs are also estopped from asserting their present claims.

Another alternative reason why relief should be denied to Plaintiffs is the ground of estoppel, the circuit court held. R. 20. The order quoted a typical case on the subject as follows:

The principle of estoppel in equity stands upon the very foundations of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect ... to their actions which ... justice dictate[s].” It arises when a person, in reliance on what another has done or said, changes position to his detriment and the other person then attempts to repudiate or evade the consequences of his action or speech.

Russell v. Drivers Leasing Services, Inc., 282 S.C. 358, 361, 318 S.E.2d 579, 581 (Ct. App. 1984).

R. 20. Plaintiffs’ later challenge to the arrangement is inconsistent with their previous conduct indicating that the arrangement was satisfactory to them. Chief Stewart has stated that “If Plaintiffs, or either of them, had advised me in 2004 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 at ¶ 14.

Plaintiffs, having accepted the benefits of the retire/rehire arrangement for four years without ever raising their present claim, are 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.

D. The statute of limitations bars Plaintiffs' claims.

As discussed above, by July and August 2004, when the two Plaintiffs returned to work as working retirees, they had agreed to all of the terms on which their rehiring was based and by which it was to be governed in the future. This action was filed in December 2008, four and a half years later. This was well outside the applicable three-year statute of limitations. Plaintiffs' claims are therefore time-barred.

Plaintiff's first cause of action, which is based upon an alleged violation of § 9-11-90, is governed by S.C. Code Ann. § 15-3-530(2), which provides that "an action upon a liability created by statute other than a penalty or forfeiture" must be brought within three years. Even assuming that Plaintiffs had a meritorious claim based upon § 9-11-90, which SLED denies, the claim is barred by the three year statute of limitations period.

Plaintiff's second cause of action, the alleged "takings" claim, is based upon an alleged unlawful taking or unconstitutional taxing, is subject to the separate three year statute of limitations set forth in S.C. Code Ann. § 15-3-530(4). That section provides that "an action for taking, detaining, or injuring any goods or chattels" must be brought within three years. Its counterpart for real property takings is S.C. Code Ann. § 15-3-530(3).

The limitations period begins to run when a party knows or should know, 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)). In the present case, the statute on which Plaintiffs rely, § 9-11-90(4)(b), has not changed

since its enactment in 1999. Moreover, the terms of Plaintiffs' rehire were set in mid-2004. They accordingly knew or should have known that their causes of action existed at the time they were rehired.³¹

In *Harvey v. South Carolina Dep't of Corrections*, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000), a 1993 lawsuit by certain state employees was held to be time-barred because the acts of which they complained occurred in 1983. The fact that the effects of those actions would not have been felt by the plaintiffs until much later was held not to matter, because it was in 1983 that the employees knew of their claim. *Id.* at 508, 527 S.E.2d at 769–70. Quoting *Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct.App.1991), the Court in *Harvey* held that “a particular cause of action accrues ‘at the moment when the plaintiff has a legal right to sue on it.’” 338 S.C. at 508, 527 S.E.2d at 769. *Accord*, *Anonymous Taxpayer v. South Carolina Dep't of Revenue*, 377 S.C. 425, 661 S.E.2d 73(2008) (1997 action challenging 1989 changes in state tax exemptions for retired state employees was time-barred even though plaintiff did not retire until 1997).

In the present case, the “moment when the plaintiff [had] a legal right to sue,” *Harvey, supra*, occurred in mid-2004 when Plaintiffs executed all of the documents of which they now complain. As a result, their claims are clearly barred by the applicable statutes of limitations.

³¹ Since all acts alleged in the Complaint occurred well over three years before this action was brought, the specific dates relating to each Plaintiff or each act in 2004 are not material to this issue.

E. The doctrine of laches bars Plaintiffs' claims.

Laches is the fifth and last affirmative defense raised by SLED. Plaintiffs have sought disgorgement of “the wages wrongfully withheld.” Complaint, p. 7 (prayer for relief). Disgorgement is an equitable remedy. *Verenes v. Alvanos*, 387 S.C. 11, 18, 690 S.E.2d 771, 774 (2010). As a result, the doctrine of laches applies to this case as well. It adds the element of detrimental change of position by the other party, in this case, SLED:

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.


Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Here, unreasonable delay is shown by the fact that this action was brought well beyond the expiration of the three-year statute of limitations. In addition, there can be no question as to the detriment to SLED that has resulted from the Plaintiffs' not filing this action until after they had obtained all of the benefits of four years of retirement salary plus retirement benefits. It is obvious that SLED would never have rehired Plaintiffs in 2004 at lower salaries had SLED known at the time that Plaintiffs would later file suit claiming an entitlement to the difference between their old and new salaries. *See* R. 217 at ¶ 14.

CONCLUSION

For the foregoing reasons, Petitioner SLED respectfully submits that this Court should reverse the decision of the Court of Appeals and affirm the decision of the Circuit Court, thereby dismissing this case.

Respectfully submitted,

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March 19, 2015

CERTIFICATE OF SERVICE

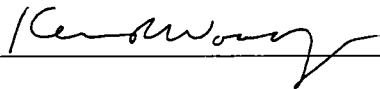
The undersigned employee of Davidson & Lindemann, P.A., counsel for the Petitioner, does hereby certify that service of the **Brief of Petitioner** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 19th day of March 2015:

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Hand Delivered

The Honorable Daniel E. Shearouse
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RECEIVED

MAR 19 2015

S.C. Supreme Court

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: 2014-001059
Civil Action Number: 2008-CP-40-8854
Our File Number: 79.8022

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen copies of the **Brief of Petitioner** as well as fourteen additional copies of the **Appendix** with regard to the above referenced matter. Please file the original brief and return a clocked-in copy of the brief and appendix 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.



Kenneth P. Woodington

KPW/jmb
Enclosures

The Honorable Daniel E. Shearouse
March 19, 2015
Page Two

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