THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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

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

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

v.

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

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

REPLY BRIEF OF PETITIONER

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STATEMENT

Petitioner SLED submits the following Reply Brief in response to certain issues raised in the Brief of Respondents. For those matters not referenced herein, SLED relies on its Brief of Petitioner.

ARGUMENT

In the Brief of Respondents, Plaintiffs have made virtually no effort to support the decision of the Court of Appeals under review. Instead, they repeatedly make the factually-unfounded claim that the applicable Appropriations Acts contained appropriations for the specific salaries of each employee. Specifically, they assert that SLED "receiv[ed] from the General Assembly salaries appropriated to SLED employees" or that SLED "was appropriated, as salaries for the Respondents, the amount Respondents had been paid prior to retirement." Br. of Respondents at 5, 1. As discussed in more detail herein, however, Appropriations Acts do not contain specific salary amounts for specific employees. As a result, this most recent revision of Plaintiffs' claim is founded entirely on the nonexistent fact of there being a specific salary (and specific salary amount) appropriated for each SLED employee.

Plaintiffs, far from being disadvantaged victims, were offered, and freely accepted, an optional retirement package that was to their great benefit, and that SLED did not need to offer them at all. The Court should not countenance their present attempt to supplement their already-generous package with an unplanned windfall.

This case is actually very simple. Plaintiffs retired, and when they did, their retirement terminated any rights they had while previously employed, including rights to

their former salaries. They were rehired, although they had no right to be rehired. Their salaries upon rehire were new and lower, but they not only had no right to be rehired, they also had no right to any specific salary once they were rehired. Their new salaries were not reduced after their rehire. SLED at all times paid the employer contribution on the salaries of the rehired employees, using funds appropriated for that purpose. Plaintiffs simply have nothing to complain about.

1. Plaintiffs have cited no evidence that would create a triable issue of fact that they were rehired at their old salaries.

As SLED has contended on certiorari, the Court of Appeals should not have reversed a grant of summary judgment for SLED when there was nothing in the record suggesting that Plaintiffs were rehired at their original salaries and when Plaintiffs had never even argued that they were rehired at their original salaries. Br. of Pet. at 20-25. A careful reading of the Brief of Respondents indicates that they cite no evidence that they were rehired at their original salaries. This issue, the linchpin of the decision of the Court of Appeals, is mentioned only in conclusory fashion on p. 4 of the Brief of Respondents, but without a citation to any evidence of a rehire at the old salaries.[1]

Plaintiffs have offered nothing to rebut the detailed evidence cited by SLED to the effect that the new salaries upon rehire were stated in specific figures showing their lower

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[1] Plaintiffs simply quote (twice) a phrase from the decision of the Court of Appeals, Br. of Respondent at 4, 12, but that phrase cites only to a document that provides no evidence that Plaintiffs were rehired at their old salaries. 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, and the Court of Appeals did not base its opinion on the holding of *Grimsley I*.

amount, and that Plaintiffs accordingly were rehired "at a brand new salary." R. 294-295.[2] The record contains an abundance of uncontradicted evidence that their salaries upon rehire were "brand new" or "different" salaries." R. 299, 300. Plaintiffs were advised prior to being rehired of the specific dollar amounts of their new salaries upon rehire. R. 181, 189. 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. Those salaries were lower than their pre-retirement salaries. The Court of Appeals appeared to believe that there was an issue about what was meant by the term "your salary" in some of the forms, App. at 2, but the forms cited above stated quite clearly that "Your salary will be $45,702" (Grimsley), or "Your salary will be $39,828" (Jowers). *Id.* (Emphases added.) Those new salaries were the ones transmitted to the Comptroller General's Office when Plaintiffs were rehired. R. 368. There is no evidence that the old salaries were ever reinstated after Plaintiffs retired and were rehired.

No deductions for retirement were taken from those new salaries. Plaintiff Jowers' first pay stub upon rehire is in the record. *See* Br. of Petitioner at 23, n.19, citing R. 200. It reflects the same lower salary amount which Plaintiff Jowers agreed to accept prior to his rehire. The pay stub shows no deduction for retirement of any kind. Other similar evidence, all unaddressed by the Brief of Respondents, is discussed at pp. 20-25 of the Brief of Petitioner. In light of all of this uncontradicted evidence, the Court of Appeals

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[2] Plaintiffs refer to this statement from a deposition as if it were the only evidence SLED had cited on this issue. Br. of Respondents at 4. However, SLED's Brief of Petitioner at pp. 20-25 cites that testimony and an abundance of other evidence (summarized herein as well), including documents, to the same effect.

erred in concluding that there was a disputed issue of fact that required a remand. Plaintiffs have not been able to cite anything in support of the decision of the Court of Appeals, which accordingly should be reversed.[3]

2. Plaintiffs cite nothing that would indicate they have ever argued that they were rehired at the old salaries.

SLED has pointed out that Plaintiffs never claimed at any point in this case that the rehire salaries were the same as the pre-retirement salaries. Br. of Petitioner at 36. The Brief of Respondents is pointedly devoid of any citation to the record showing that they have previously put forth such a claim. All they show is that they argued something else, i.e., that "SLED could not reduce their salaries by the percentage of the employer retirement contribution." Br. of Respondents at 11. 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. Plaintiffs have never made a claim that this is what happened. Nor do they now cite evidence to support such a claim or to show that they previously asserted the claim that they were rehired at the old salaries.

3. Plaintiffs have not controverted SLED's contention that the Court of Appeals reversed the circuit court on a ground not raised by Plaintiffs.

By reversing on a ground not raised by Plaintiffs either in the trial court or on

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[3] Plaintiffs' Question II states that the Court of Appeals "properly recognized that SLED had improperly reduced Respondent Retirees' salaries." Br. of Respondent at 11. This is an inaccurate characterization of the decision of the Court of Appeals, which merely held (erroneously, SLED submits) that there was a question of fact as to the amount of the post-retirement salaries. If the Court of Appeals had held as Plaintiffs claim, there would have been no need for a remand for a trial.

appeal, the decision of the Court of Appeals was in conflict 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 Brief of Petitioner at 38-39. The Brief of Respondents contains no discussion of this issue. Plaintiffs appear not to be contesting that the Court of Appeals improperly reversed on a ground that it had raised *sua sponte.*

4. In arguing that they had rights to certain salaries, Plaintiffs are attempting to reverse a concession they made to the contrary in *Grimsley I,* and their remaining contentions are without merit.

Plaintiffs' primary argument now appears to be that they had a right to certain salaries (which they erroneously claim were appropriated specifically for them), and that that right survived even upon their return to employment as working retirees. Br. of Respondents at 4-7. 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 (I),* 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012).

Plaintiffs assert that they did not argue, as SLED has characterized it, that "monies were wrongly 'deducted' from their salaries. . . ." Br. of Respondents at 11 n.4, But this is exactly what Plaintiffs themselves claimed in the Complaint, which alleges that "SLED violated [§ 9-11-90] by having the employer contribution deducted from SLED Retiree Plaintiffs' salaries." R. 27. In any event, there was simply no diminution of the new, postretirement, salaries. As shown above and in more detail in the Brief of Petitioner at

12-14 and 20-25, the new salaries were amounts that represented reduced amounts, in comparison with the amounts of the old salaries. The new salaries were not the same as the old salaries and then subjected to a deduction after rehire.

Plaintiffs' assertion, made repeatedly in conclusory statements, is that certain dollar amounts were appropriated to SLED as specific salaries for specific employees. *See, e.g.,* Br. of Respondents at 1, 3, 5, 7, 9, 12, 13. Plaintiffs erroneously state that SLED "was appropriated, as salaries for the Respondents, the amount Respondents had been paid prior to retirement." Br. of Respondents at 1. This is manifestly not the way salaries are handled in appropriations acts, except in some cases for agency heads. Appropriations for salaries do not purport to represent precise salary amounts for each position or employee. Those acts set forth the number of classified positions in various subdivisions of agencies, as well as the total dollar amount appropriated for that number of positions, but the acts do not list specific salaries for specific positions or for the persons who hold those positions. This is illustrated by the 2002 Act, R. 209, which shows only the number of positions and the number of dollars appropriated for those positions. Plaintiff has not shown anything in the appropriations acts that would indicate a reference to specific positions or employees, and no such evidence exists.

Plaintiffs go so far at one point as to say that there were funds "appropriate to them [Plaintiffs] as salaries," but this unsupported statement is completely in error. Plaintiffs' claim about the way salaries are handled in the appropriations acts would put the General Assembly in charge of enacting a specific salary for every state employee. But there are no personal service appropriations with employees' names on them, so to

speak, as Plaintiffs' claim would imply. Agencies are free to increase or reduce the salaries of employees during the budget year, and likewise are free, for example, to replace departed high-paid employees with newly-hired employees in the same positions, but at lower salaries.[4] Nothing in the appropriations act requires otherwise. In fact, the General Assembly has mandated that the aggregate cost of replacing retired employees should be 25% less than those employees were paid. *See* Br. of Petitioner at 41-42.

Given that the appropriations acts do not set forth specific salaries for specific employees, it follows that neither is there an employer contribution figure in an agency's appropriation that corresponds to the salaries of individual employees. As shown by an uncontroverted affidavit submitted by SLED,

> The amounts appropriated for fringe benefits are based on estimates by the agencies as to the agencies' needs for the next fiscal year. Those estimates do not attempt to be so precise as to try to make the amount appropriated for the employer contribution to the PORS equal to the employer contribution percentage (13.6% in 2004) of the salary base for the next year.

R. 206 (Royal Affidavit, ¶ 11). For all of these reasons, Plaintiffs' claim, which in its more recent versions asserts in effect that there is a specific salary appropriation with each employee's name on it, is therefore without factual foundation. The absence of such

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[4] By way of illustration, if the personal service appropriation for an agency was $5 million for 100 positions, the appropriations acts contain nothing at all that would mandate how the agency would allocate those dollars among the positions. The agency could pay $50,000 for each of the 100 positions, or it could fund the positions at widely differing amounts. It could decide to replace a retiring $60,000 employee with a $40,000 employee, and it could even decide not to fund some of the positions at all. The point is that contrary to Plaintiffs' assertion, the appropriations acts are completely silent as to the agencies' choices about the way funds are distributed among positions.

factual foundation is fatal to Plaintiffs' claim as they currently are couching it. Even if there had been specific appropriations of salaries for each agent, those salaries would not remain in effect after the agents retired.

Plaintiffs repeatedly assert that SLED's generous retire/rehire program was a "scheme," but this is a complete mischaracterization of the actual events. SLED voluntarily offered Plaintiffs the attractive option to retire, collecting full retirement pay, and then to return to work at nearly full salary. The arrangement was to the great benefit of Plaintiffs. To view it as a "scheme" that somehow harmed them is completely at odds with the facts. SLED was not required to offer Plaintiffs this generous option, and Plaintiffs were not required to accept it.

Plaintiffs also attempt to contend that 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* made it clear that the General Assembly did not intend for employees who retired outside the TERI program (a category that includes Plaintiffs) to have a right, contractual or otherwise, to return to work. 392 S.C. at 351-352, 709 S.E.2d at 60. 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.[5]

5. Plaintiffs cannot show that they had standing to complain of the disposition of their former salaries.

The primary argument made by Plaintiff with regard to standing is no different from their claim on the merits. Br. of Respondents at 8. They also assert that they were improperly being made to pay the employer contribution when only other PORS retirees would benefit, but again, it is simply not factually correct to state that they paid the employer contribution. As the circuit court held on the issue of standing, "once [Plaintiffs] left their SLED employment, their departure eliminated any legal standing they may have had to make claims pertaining to the appropriations process as applied to the disposition of the funds that in the past had paid their salaries and benefits." R. 15.[6]

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[5] Plaintiffs also assert, Br. of Respondents at 6-7, that the 1999 amendment to § 9-11-90 added a requirement that the employer must pay an employer contribution for working retirees. However, as SLED has shown, Br. of Petitioner at 26-33, it is undisputed that SLED complied with this provision (whether it was a new requirement or not) by paying the employer contribution for the rehired employees. The employer contribution was paid from the "Employee Benefits" appropriation, and not from the appropriation for salaries. Plaintiffs also make the conclusory statement that "SLED, in effect, misappropriates monies due the Retirement System. . . ." Br. of Respondents at 3, but for the same reasons referenced above in this footnote, this is simply not the case. As the circuit court held,

> [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 offer no suggestion as to how SLED "misappropriates monies due the Retirement System. . . ."

[6] Plaintiffs make a passing reference to the concept of "public importance" standing, citing *Sloan v. Dep't. of Transp.,* 379 S.C. 160, 666 S.E. 2d 236 (2008). Br. of

6. Plaintiffs' arguments pertaining to affirmative defenses are without merit.

Finally, 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. Br. of Petitioner at 40. Plaintiffs' primary response has been to cite *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990). Br. of Respondents at 13. However, *Bramlette* 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.'").

With regard to the affirmative defenses themselves, Plaintiffs argue that there could be no consent or waiver to an arrangement they contend to have been "illegal." They claim, citing the opinion of the Court of Appeals, that if SLED had agreed to pay each rehired employee the same salary it paid before retirement and then reduced that amount, a factfinder could then conclude that the reduction amounted to an illegal requirement that the employee pay the employer contribution. Br. of Respondents at 14. However, as has already been pointed out many times, even if the rehire salaries had been

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Respondents at 8 n.5. However, that principle has no application to this case involving fewer than 100 SLED employees under a program that is no longer in effect. Under these circumstances, there is no "issue . . . of such public importance as to require its resolution for future guidance. . . ." 379 S.C. at , 170, 666 S.E.2d at 241.

the same as the pre-retirement salaries, which they were not, the employer contribution was still paid by SLED and not by the employees, so there would have been no "illegality." The public policy expressed in § 9-11-90, which was that employers must pay the employer contribution for working retirees, would have been followed even in this non-factual scenario of the rehire salaries being reduced after rehire.[7] Given that that occurred, there was no policy reason why Plaintiffs could not agree to the arrangement. Finally, as pointed out in the Brief of Petitioner at 41-42, replacing retirees with new employees who are paid less is a concept now embodied in appropriations acts, and therefore is in accord with public policy rather than otherwise.

Plaintiffs argue in connection with the estoppel defense that SLED did not change its position to its detriment. However, the comparison is not, as Plaintiffs argue, one between what actually happened and what would have happened if Plaintiffs had continued their existing employment at their old salaries. Br. of Respondents at 14. Instead, the proper comparison is between the cost of rehiring them at their new, lower salaries and being required by court order (if Plaintiffs were to succeed) to pay the unexpected cost of rehiring them at their old salaries, which were higher. As Chief Stewart averred, if he had known that Plaintiffs were going to claim their old salaries upon being rehired, he "would not have offered them the opportunity to participate in the

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[7] Plaintiffs have cited two cases on the unenforceability of contracts that require violations of law or public policy, but neither applies here, because SLED, and not the employees, made the payments required by statute. In the two cases cited by Plaintiffs, *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004) and *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002), the contracts actually required actions that were contrary to public policy.

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.

In connection with the statute of limitations, which SLED has raised as an additional sustaining ground, Plaintiffs argue that *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998), a case that involved penalties for usury, applies here. Br. of Respondents at 15-16. *Tilley,* however, involved a statute that had the specific intention of penalizing usury. As the Court noted, "The statute of limitations for an action seeking the remedies recoverable for usury begins to run at the time each payment is made on the loan." 333 S.C. at 42, 508 S.E.2d at 20. In the present case, there is no such extraordinary intent to penalize the defendant by granting special privileges to the plaintiffs. As a result, the normal statute of limitations rule set forth in the cases cited by SLED (Br. of Petitioner at 45-46) governs. That principle is that a particular cause of action accrues 'at the moment when the plaintiff has a legal right to sue on it.'" *Harvey v. South Carolina Dep't of Corrections*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000). In this case, that moment occurred upon Plaintiffs' rehire in 2004. This action, filed in late 2008, was instituted well after the three-year statute, S.C. Code Ann. § 15-3-530(4), had run, and therefore is time-barred.

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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BY: /s/ _____

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Petitioner, does hereby certify that service of the **Reply 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 21st day of May 2015:

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