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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-01728

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated.....Appellants,

v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

NOTICE OF APPEAL

Appellants Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy. G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated hereby appeal the Order (Exhibit 1) of the Honorable Tanya A. Gee, Circuit Court Judge, filed on November 2, 2015 and received on November 9, 2015, granting Respondents' motion to dismiss for failure to state a claim.

On November 19, 2015, Appellants moved the Circuit Court to reconsider that decision (Exhibit 2). On December 7, 2015, the motion was denied. On December 14, 2015, the undersigned received notice of that Order (Exhibit 3).

This appeal is filed within thirty (30) days of receipt of that order, as required by Rule 203, SCACR.

Respectfully submitted by,

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Other Counsel of Record:

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Columbia, South Carolina 29201

ATTORNEYS FOR THE RESPONDENTS

January 6, 2016
Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

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v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to Richard A. Harpootlian, hereby certify that on January 6, 2015, I did serve, via HAND DELIVERY, the following document to the below mentioned counsel:

Documents: **Notice of Appeal.**

Counsel:
Robert E. Stepp
Tina M. Cundari
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Columbia, South Carolina 29201

Heather Hardy

THE STATE OF SOUTH CAROLINA
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v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority..... .....Respondents.

AMENDED CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to Richard A. Harpootlian, hereby certify that on **January 6, 2016**, I did serve, via HAND DELIVERY, the following document to the below mentioned counsel:

Documents: **Notice of Appeal.**

Counsel:
Robert E. Stepp
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
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Columbia, South Carolina 29201

Heather Hardy

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMEI .N A CIVIL CASE

CASE NUMBER: 2015CP4001728

Gail M Hutto	S C Retirement System
Debra J Andrews	Police Officers Retirement System
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

RICHLAND COUNTY FILED NOV -3 AM 11:14 JEAN H. TOAL C.C.P. & G.S.

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 November 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian James Mixon Griffin Robert E. Stepp

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated,	)	Civil Action No.: 2015-CP-40-1728
Plaintiffs,	)	**ORDER**
v.	)	
South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority,	)	
Defendants.	)	

This matter came before the Court on a motion to dismiss filed by Defendants pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was conducted on September 28, 2015. James M. Griffin of Lewis Babcock & Griffin, LLP, and Christopher P. Kenney of Richard A. Harpootlian, P.A., appeared on behalf of Plaintiffs. Tina Cundari and Roland Franklin of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendants. Stephen R. Van Camp, General Counsel for the South Carolina Public Employee Benefit Authority, was also present. After considering the motion, memoranda, oral presentations of counsel, matters of public record, and applicable law, the Court grants the motion to dismiss.

FACTS

This case challenges the constitutionality of two state statutes, Sections 9-1-1790(C) and 9-11-90(4)(c), requiring retired members of the state retirement systems who are re-employed in

positions covered by the retirement system to make the same contributions to the system that a non-retired employee occupying that same position would make. Plaintiffs contend the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution.

The statutes have been the subject of litigation in this state since 2005, the year they were enacted. Effective July 1, 2005, the statutes were enacted as part of the State Retirement Systems Preservation and Investment Reform Act (Act 153). (Compl. ¶ 28.) Just days before the statutes went into effect, a group of plaintiffs represented by the same counsel as Plaintiffs in this case filed a class action alleging that Act 153 was unlawful in several respects, including that it violated the Takings Clause of the state and federal constitutions. *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). The plaintiffs in *Layman* were people who retired and returned to work before July 1, 2005, some of whom participated in the Teacher and Employee Retention Incentive (TERI) program. The South Carolina Supreme Court decided the case in its original jurisdiction.

The supreme court held that Act 153 breached a contract between the State and the TERI participants who retired and returned to work before July 1, 2005. *Id.* at 644, 630 S.E.2d at 272. In doing so, the supreme court stated: "The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants . . . ." *Id.* The supreme court further stated: "[O]ur holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute." *Id.* at 641, 630 S.E.2d at 270.

As to the remaining, non-TERI working retirees, the supreme court held that the statutes governing the working retirees did not contain the same contractually significant language as the statutes in the TERI program. *Id.* at 643, 630 S.E.2d at 271. Accordingly, the supreme court did not grant any relief to those plaintiffs and instead remanded only the breach of contract claim because the Court found that the record contained evidence that some of the working retirees may have had written contracts detailing the terms of their employment. *Id.* The Court did not remand the constitutional claims, nor did the Court grant relief to the remaining plaintiffs on any other basis. Therefore, following *Layman*, the statutes remained in full force and effect, and the State was permitted to continue collecting contributions from working retirees.

On remand, the working retirees filed amended complaints alleging multiple causes of action, including that the statutes violated the Takings Clause of the state and federal constitutions.[1] Following discovery, the parties filed cross-motions for summary judgment addressing all causes of action. After a hearing, the trial court granted relief to the working retirees on the ground of equitable estoppel. The defendants moved for reconsideration, arguing that the trial court erred in granting relief and failing to dispose of all the issues in the case,

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[1] Although this Court must generally limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, the Court may take judicial notice of matters of public record in considering a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice"); *Sec'y of State for Defence v. Tremble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record."); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that court may take judicial notice of public records). Here, the parties provided the Court with pleadings, motions, memoranda, and orders filed in prior cases, all of which were matters of public record, and all of which the Court is permitted to consider in deciding the motion to dismiss. Additionally, the Court is guided by the doctrine of *stare decisis*, which "enjoys particular efficacy in the context of challenges concerning construction of statutes and determination of legislative intent." *Wehle v. S.C. Retirement Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005).

including the allegation that the statutes are unconstitutional. After a hearing, the trial court issued an order declining to alter or amend the judgment on the equitable estoppel ground, but amending the order to expressly deny relief on all other grounds. The working retirees moved for reconsideration, but the motion was denied.

Both parties appealed the issues they lost at the trial court level, and after briefing and oral argument, the supreme court reversed the trial court on the equitable estoppel ground and affirmed the granting of summary judgment on the constitutional and remaining grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In reaching its decision, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 60. The supreme court further stated: "Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer." *Id.* Accordingly, the supreme court found that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions received from the working retirees. *Id.* at 357, 709 S.E.2d at 63.

In addition to finding that the working retirees did not have a contractual or equitable basis for relief, the supreme court unanimously affirmed the trial court's order granting summary judgment in favor of the defendants on the constitutional grounds. *Id.* at 357, 709 S.E.2d at 63. The opinion twice recites that the supreme court was affirming the grant of summary judgment on the constitutional issues. The first time, the Court explained that the plaintiffs' claims of unconstitutional taking and violations of due process were "founded on the presumption that a contractual right has been unfairly taken away," and because the plaintiffs "did not have a

contractual right to the terms of their employment," the Court affirmed the granting of summary judgment on those issues. *Id.* The second time, the Court stated: "[W]e conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract." *Id.* at 358, 709 S.E.2d at 63.

The plaintiffs petitioned for rehearing, arguing that the cause of action for unconstitutional taking was valid regardless of the existence of a contract and that the plaintiffs had "vested rights or entitlements that are constitutionally protected against a taking." The supreme court denied the petition.

On August 2, 2010, while the *Ahrens* case was pending on appeal, Plaintiffs filed a class action in federal district court alleging that the statutes requiring them to contribute to the retirement system violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.). The defendants moved to dismiss the complaint on multiple grounds, including res judicata, collateral estoppel, sovereign immunity, and lack of a protected property interest. The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014).

After losing the federal court case, Plaintiffs filed the present case. Like the federal court case, this is a putative class action seeking an order declaring that the statutes requiring working retirees to contribute to the retirement system are unconstitutional in violation of the Takings Clause of the Fifth Amendment.[2] (Compl. ¶¶ 47 - 54.) Plaintiffs have sued several of the same

[2] In this case, Plaintiffs do not allege that the statutes violate the Due Process Clause of the Fourteenth Amendment.

defendants[3] that they sued in the federal court case, and seek the same relief as they did in the federal court case, which is the return of all contributions made to the retirement system since July 1, 2005.[4]

LEGAL STANDARD

A defendant may move to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

Dismissal may be appropriate when a case presents only questions of law and there are no factual issues requiring further development. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) ("Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (same). A motion to dismiss should be granted if the facts and inferences therefrom

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[3] In the federal court case, Plaintiffs sued a number of individual defendants, including the governor, the state treasurer, the state comptroller general, the chair of the South Carolina Senate Finance Committee, the chair of the House Ways and Means Committee, and the executive director of the Budget and Control Board, all in their official capacities.

[4] Plaintiffs presumably do not seek the return of contributions that they made before they retired.

would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court concludes that this case is barred by the doctrines of res judicata and collateral estoppel.

The Court concludes as a matter of law that this case is barred by the doctrine of res judicata and collateral estoppel. The Court finds that this is the fourth time that Plaintiffs or their privies have sued Defendants or their privies over whether the statutes requiring working retirees to contribute to the retirement systems are constitutional. The Court finds that the South Carolina Supreme Court and a South Carolina trial court have decided the issue presented in this case. Accordingly, the Court grants Defendants' motion to dismiss the complaint on the grounds of res judicata and collateral estoppel.

Res Judicata

"Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)). "Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.*

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (internal quotation marks omitted). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been raised in the former suit.*" *Plum Creek Dev. Corp.*, 334 S.C. at 34, 512 S.E.2d at 109 (emphasis added).

The following elements must be shown in order to establish res judicata: "(1) The parties must be the same or their privies; (2) the subject matter must be the same; (3) while generally the precise point must be ruled [upon], yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but *what might have been decided.*" *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (quoting *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147 (1944) (emphasis added)). "It is apodictic that the doctrine of res judicata has been elongated to include 'privies.'" *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). *See also First Nat. Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945) (applying res judicata to the parties and their privies); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984) (same).

"There is no bright line test which can be applied to determine whether one is in privity with another." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). "The term 'privy', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.* "One in privity is one whose legal interests were litigated in the former proceeding." *Id.* "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Id.*

Further, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings,

but also all matters which might have been litigated therein." *Id.* (internal quotations omitted). "For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identity of the subject matter." *Id.*

Here, the Court finds that all three elements of res judicata have been satisfied. First, the parties in this case are identical to or in privity with the parties in the other three cases. This is the fourth time that Plaintiffs or their privies have sued Defendants or their privies regarding the constitutionality of these statutes. The first time was in the *Layman* case filed in 2005. The second time was on remand in the *Ahrens* case. The third time was in the *Hutto* case filed in federal court. The Court finds that in these prior cases, Plaintiffs or their privies sued Defendants or their privies over whether statutes requiring working retirees to contribute to the retirement systems are constitutional. The parties in the prior cases are identically situated to the subject matter of this case. The statutes requiring working retirees to contribute to the retirement system affect all the parties in the same way. Likewise, the Defendants in this case are either the same as or in privity with the defendants in the other cases. All Defendants are required to follow the law as enacted by the General Assembly.

Plaintiffs contend that they are not the same people as the plaintiffs in *Layman* and *Ahrens* and therefore those prior cases are not binding. Although the Court acknowledges that the plaintiffs in *Layman* and *Ahrens* are not the same people as the plaintiffs in this case, the Court finds that the plaintiffs in this case are in privity with the plaintiffs in those cases. The plaintiffs in all three cases are identically situated in relationship to the statutes. The statutes affect all the plaintiffs in the same way. The Court finds that the only difference between the plaintiffs in *Layman* and *Ahrens* and the plaintiffs in this case is that the plaintiffs in *Layman* and *Ahrens* retired and returned to work before July 1, 2005, and some enrolled in the TERI program.

These differences are not legally significant for purposes of determining whether the statutes are constitutional. The statutes make no distinction between people who retired and returned to work before July 1, 2005. Whether someone retired and returned to work before the statutes were enacted makes no difference for purposes of analyzing whether the statutes are constitutional. This is particularly so given that Plaintiffs are attacking the constitutionality of the statutes on their face.

Second, the Court finds that the subject matter of all four cases is the same. In each of the prior cases, the plaintiffs alleged that statutes requiring working retirees to contribute to the retirement system violated the Takings Clause of the Fifth Amendment of the state and federal constitutions. Plaintiffs are making the same allegation here. They allege that Sections 9-1-1790(C) and 9-11-90(4)(c) violate the Takings Clause of the Fifth Amendment of the United States Constitution. This same issue has been raised and litigated in the prior cases.

Third, the Court finds that the issue raised in this case was either decided or might have been decided in the prior cases. In *Layman*, the issue regarding the constitutionality of statutes requiring working retirees to contribute to the retirement system was squarely before the Court, and although the Court did not address the issue, the Court might have done so given that the issue was raised and litigated. In *Ahrens*, the issue was litigated once again, and the issue was expressly decided by the trial court and affirmed by the appellate court. In *Hutto*, the issue was litigated once again, and although the district court dismissed the complaint based on sovereign immunity and the Fourth Circuit affirmed, the federal courts might have decided the issue of whether the statutes are constitutional given that the issue was raised and argued in the district court and again on appeal.

Finally, contrary to what Plaintiffs argue, the Fourth Circuit did not authorize the present case to be filed. In analyzing whether the Fifth Amendment trumps the Eleventh Amendment, the Fourth Circuit concluded that "[b]ecause the plaintiffs can have their takings claim heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014). The Court finds that this statement was part of the Fourth Circuit's analysis of whether the Fifth Amendment trumped the Eleventh Amendment and was not a directive authorizing the present case to be filed irrespective of any defenses that may be raised by the defendants. The Fourth Circuit recognized that because South Carolina state courts remain open to takings claims, Plaintiffs could have initiated the present case in state court. Instead, Plaintiffs chose to initiate this case in federal court, where the District Court dismissed this case with prejudice and the Fourth Circuit affirmed the dismissal.

In sum, the Court concludes that this case represents precisely what res judicata was designed to prevent—a defendant being sued multiple times for the same cause of action. Plaintiffs have had their day in court, both through the federal court case and through their privies in *Layman* and *Ahrens*. Defendants should not have to continue defending the same statutes on the same grounds, particularly when the South Carolina Supreme Court and a South Carolina trial court have determined that the statutes are constitutional.

Collateral Estoppel

"'Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.'" *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (quoting *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d

779, 782 (Ct. App. 2009)). "'The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'" *Id.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821 (quotations and citation omitted).

Accordingly, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).

The policy reasons for collateral estoppel are similar to those of res judicata. "The public interest demands an end to the litigation of the same issue." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). "Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Id.*

Here, the Court concludes that this case is barred by the doctrine of collateral estoppel. First, as explained above, the issue presented in this case has been actually litigated numerous times. It was litigated in the *Layman* case, the *Ahrens* case, and the federal counterpart of this case. At every stage of the litigation, Plaintiffs or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, the request for relief was denied.

Second, the Court finds that the issue in this case was directly decided in *Ahrens*. The trial court granted summary judgment in favor of the defendants on the constitutional grounds and denied the plaintiffs' motion to reconsider. On appeal, the supreme court unanimously affirmed summary judgment in favor of the defendants' on the constitutional grounds and denied the plaintiffs' petition for rehearing.

Third, the Court finds that a ruling on the issue was necessary to support the judgment in *Ahrens*. The parties in *Ahrens* filed cross-motions for summary judgment addressing all causes of action in the complaint. In ruling on the motions, it was necessary for the trial court to address each cause of action so that no argument was left open on appeal. On appeal, it was necessary for the supreme court to address all rulings made by the trial court, again so that there was no question regarding the validity of the statutes. Further, the Court finds that the supreme court would not have denied relief to the working retirees and at the same time left open the issue of whether the statutes were constitutional. By denying relief to the plaintiffs in *Ahrens*, the supreme court made it clear that the statutes were valid and enforceable in every respect, even as to working retirees who retired and returned to work before the statutes went into effect.

Because the issue presented in this case has been raised, litigated, and decided time and again, the Court concludes that the case is barred by the doctrine of collateral estoppel.

2. The Court concludes that Plaintiffs do not have a protected property interest.

In addition to concluding that this case is barred by the doctrines of res judicata and collateral estoppel, the Court concludes that the complaint fails to state a claim because Plaintiffs do not have a protected property interest entitled to constitutional protection.

"The Takings Clause provides that private property shall not be taken for public use without just compensation." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721

S.E.2d 423, 427 (2012). Parties claiming a violation of the Takings Clause must "first show they have a legitimate property interest." *Id.* at 283-84, 721 S.E.2d at 427. "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 or entitlement to those benefits." *Id.* at 284, 721 S.E.2d at 427.

Here, the Court finds that Plaintiffs have failed to identify any legitimate property interest rooted in state law. There is no statute or case law protecting Plaintiffs from having to contribute to the retirement system as working retirees. Not only does no such authority exist, the South Carolina Supreme Court expressly determined in *Ahrens* that working retirees did not have a constitutionally protected property interest. In *Ahrens*, the plaintiffs argued that they had "vested rights or entitlements that are constitutionally protected against a taking," irrespective of the existence of a contract. But the supreme court rejected this argument by affirming summary judgment on the constitutional grounds and denying the petition for rehearing. Additionally, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 351.

Plaintiffs argue that the source of their property interest can be found in the Internal Revenue Code, and specifically 26 U.S.C. § 401(a), which states that "contributions to a tax qualified trust must be non-forfeitable and cannot be diverted for purposes other than the exclusive use of the employee and his or her beneficiaries." (Compl. ¶¶ 41-42.) The Court concludes that the IRS Code does not provide the source for Plaintiffs' right. First, the language in the Code does not say anything about whether it is permissible for the State to require working retirees to contribute to the retirement system as a term and condition of employment. The

language cited in the IRS Code relates to how funds are used once they are contributed and not with the contribution of the funds in the first instance. Second, the IRS Code does not provide the necessary state law source of Plaintiffs' right. *See Grimsley*, 396 S.C. at 283-84, 721 S.E.2d at 427 (requiring parties that allege a violation of the takings clause to show they have a legitimate property interest rooted in state law).

Plaintiffs also contend that they have a constitutionally protected property interest in their wages. But the Court finds that this case is not about wages. It is about the terms and conditions of employment. The terms and conditions of employment are a matter of state statutory law, and Plaintiffs are on notice of those terms and conditions prior to returning to work. Further, as the supreme court noted in *Ahrens*, "[b]ecause there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." 392 S.C. at 352, 709 S.E.2d at 60. The Court finds that with no guarantee of being rehired, working retirees do not have any right to any term or condition of their employment.

Accordingly, because Plaintiffs do not have a protected property interest rooted in state law, the Court concludes that Plaintiffs cannot state a claim for relief.

3. The Court concludes that Plaintiffs' claims are time barred.

Finally, the Court concludes that Plaintiffs' claims are barred by the statute of limitations and the doctrine of laches.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Anonymous Taxpayer v. S.C. Dept. of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008). "A constitutional claim can become time-barred just as any other claim can."

Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983). Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property" must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530(4) (2005). Similarly, an action brought upon a liability created by statute must be brought within three years. S.C. Code Ann. § 15-3-530(2). "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*, 377 S.C. at 439, 661 S.E.2d at 80.

Additionally, the equitable doctrine of laches bars an action when there has been "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Robinson v. Estate of Harris*, 388 S.C. 645, 656, 698 S.E.2d 229, 236 (2010). "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." *Id.* at 656-57, 698 S.E.2d at 236. "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Id.* at 657, 698 S.E.2d at 236.

Here, the Court finds and concludes that the Plaintiffs' claims are are time barred. Plaintiffs have been on notice since at least July 1, 2005, when the statutes were enacted, that they would have to contribute to the retirement system upon their return to work post-retirement. *See Ahrens v. State*, 392 S.C. at 355, 709 S.E.2d at 62 (recognizing "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests"). A case filed on March 20, 2015, challenging the constitutionality of these statutes on

their face is late. Plaintiffs had three years from the date the statutes were enacted to file the present case. Plaintiffs' failure to do so bars the present case.

Even assuming that Plaintiffs did not have standing to bring a claim until they actually retired and returned to work, Plaintiffs should have brought this case within three years of the date they returned to work. Although the complaint does not allege when Plaintiffs retired and returned to work, Plaintiffs presumably retired and returned to work before August 2, 2010, when they filed this same case in federal court. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that they had a claim. Rather than act diligently, Plaintiffs waited almost ten years to file the present case. The prejudice to Defendants as a result of this delay is obvious. Plaintiffs and other working retirees have been permitted to occupy positions covered by the state retirement system with the understanding that a percentage of their salary would be contributed to the retirement system, when those positions could have been filled by non-retired members for all these years. Defendants have relied upon the receipt of contributions from all employees in covered positions and not just non-retired employees.

At the hearing, Plaintiffs argued that the constitutional violation is continuing and that each time funds are contributed to the retirement system, a new limitations period begins. The Court disagrees. The Court finds that a similar argument was made in *Anonymous Taxpayer* and was rejected by the Supreme Court. In that case, the supreme court held that the defendant's failure to impose a pre-Act 189 tax exemption to retirement benefits each year did not amount to

a continuing breach because the plaintiff was put on notice that he had a cause of action when Act 189 was passed. *Anonymous Taxpayer*, 377 S.C. at 439-40, 661 S.E.2d at 80.

The same reasoning applies here, where Plaintiffs challenge the constitutionality of the statutes on their face. (Mem. in Opp'n to Mot. to Dismiss 18, n.1) (stating "whereas Plaintiffs in this case are challenging the facial validity of the statutory provisions in question (rather than the manner of their application) . . . .") Because Plaintiffs challenge the constitutionality of the statutes on their face, the cause of action for unconstitutional taking accrued the date the statutes were enacted. In other words, the alleged constitutional injury occurred at the time the statutes became the law of this State. Accordingly, Plaintiffs should have filed the present case within three years of July 1, 2005. The Court finds and concludes that a cause of action filed nearly ten years later is late.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

Tanya A. Gee
Presiding Judge

Columbia, South Carolina

November 2, 2015

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Gail M. Hutto, et al., Plaintiff, vs. South Carolina Retirement System, et al. Defendant.	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT CASE NO.: 2015-CP-40-01728 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
James M. Griffin, Bar No. 9995 Address: P.O. Box 999 Columbia, SC 29202 Phone: 803-744-0800 Fax 803-744-0805 E-mail: jgriffin@griffindavislaw.com Other: ____ Richard A. Harpootlian Chris P. Kenney P.O. Box 1090 Columbia, SC 29202 Phone: 803-252-4848 Email: rah@harpootlianlaw.com cpk@harpootlianlaw.com	Robert E. Stepp, Bar No. 5335 Tina Cundari, Bar No. 71951 Sowell Gray Stepp & Laffitte, LLC Address: P.O. Box 11449 Columbia, SC 29211 Phone: 803-929-1400 Fax____ E-mail: rstepp@sowellgray.com Tcundari@sowellgray.com Other: RICHLAND COUNTY FILED 2015 NOV 19 PM 12:20 JEANNETTE W. McBRIDE C.C.P. & G.S.

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ 11-19-15
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

EXHIBIT
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JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by:_____ Date Filed: _____ ☐ MOTION FEE COLLECTED: $ _____ ☐ CONTESTED – AMOUNT DUE: $ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated, Plaintiffs, vs. South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority, Defendants.	Civil Action No.: 2015-CP-40-01728 **PLAINTIFFS' MOTION TO RECONSIDER**

Plaintiffs hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the Order entered November 3, 2015 and received by counsel on November 9, 2015. The Order fails to address arguments presented to the Court by Plaintiffs, includes rulings that the Court did not render when the Court announced the decision at the conclusion of the hearing, and is based upon erroneous factual and legal findings, to wit:

A. Res Judicata and Collateral Estoppel

The Court's opinion incorrectly concludes that Plaintiffs were litigants in the Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2006) and Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011) cases previously decided by the South Carolina Supreme Court. They were not.

The Court also incorrectly concludes that Plaintiffs are in privity with the litigants in Layman and Ahrens and fails to address the Supreme Court decision in Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) and Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994), which Plaintiffs cited during oral argument. In Carrigg, the Court explained:

> To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

Carrigg, 347 S.C. at 80-81, 552 S.E.2d 767, 770 (quoting Wade v. Berkeley Cnty., 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998)). "Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position." Id. (citing Richburg v. Baughman, 290 S.C. 431, 434-35, 351 S.E.2d 164, 166 (1986)). Here, the Plaintiffs legal interests were not litigated in the prior actions.

A conclusion that Plaintiffs' claims are *similar* to those of earlier litigants[1] is insufficient grounds to bar them here. In Roberts, the Court ruled that "One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him." Roberts, 316 S.C. at 496, 450 S.E.2d at 619 (citing 50 C.J.S. Judgments § 788 at 327 (1947)). Likewise, the Roberts Court reasoned a contrary conclusion raised due process concerns by "estopping some litigants who never had a chance to present their evidence and arguments on a claim[.]" Id. (citing Richburg, supra).

[1] They are not. They are factually and legally distinct for reasons previously explained.

In addition, the Court incorrectly concluded that the federal court's dismissal of Plaintiffs' claims on the basis of Eleventh Amendment immunity bars Plaintiffs from litigating these issues in state court. The ruling in federal court was not a decision on the merits. Rather, the ruling was simply that the Court did not have jurisdiction over the Defendants. The same *res judicata* and collateral estoppel arguments Defendants advance here were presented to the District Court and the United States Court of Appeals and rejected as each court instead based its ruling on Defendants' constitutional argument that this case must first be brought in federal court. See Hutto v. S. Carolina Ret. Sys., 773 F.3d 536 (4th Cir. 2014); see also, Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457 (D.S.C. 2012). Had either federal court ascribed any merit to Defendants' *res judicata* and collateral estoppel arguments, those cases would have been dismissed on those state law grounds because the constitutional avoidance doctrine required the federal courts to avoid the constitutional question Defendants presented if possible. See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 467 U.S. 138, 158 (1984) (doctrine requires where possible deciding on state law grounds to avoid unnecessary constitutional conflicts). The facts that it was necessary for the federal courts to reach the constitutional question is strong evidence they concluded that accepting Defendants' *res judicata* and collateral estoppel arguments would constitute a denial of due process. Respectfully, this Court should reconsider its decision in light of this same concern and this Court's finding that "the federal courts might have decided the issue of whether the statutes are constitutional" is simply incorrect.

Lastly, this Court's conclusion that the issue raised in this case was actually litigated in Layman and Ahrens is also incorrect. Plaintiffs' claim in this case is premised upon a constitutionally-protected property interest derived from the United States' Constitution and

federal statutes, not state statutory or common law. Specifically, Plaintiffs argue that Internal Revenue Code, 26 U.S.C. § 401(a), creates a constitutionally-protected property interest in all contributions to a qualified pension plan, such as those pertaining to this case. The Supreme Court has recognized that federal statutes may lead to constitutionally-protected property interests. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (observing "that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment."). This issue was never litigated in either Layman or Ahrens.

B. Constitutionally Protected Property Interest

This Court's ruling that Plaintiffs do not have a constitutionally protected property interest fails to address Plaintiffs' argument that federal statutes may create such a protected property interest. The Court does not address or attempt to distinguish Mathews, 424 U.S. at 332, relied upon by Plaintiffs.

The Court's decision is also inconsistent with the recognition of such a property interest protected by the United States' Constitution. See Washlefske v. Winston, 234 F.3d 179, 184 (4th Cir. 2000); Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983); McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539 (D.S.C. 1994).

C. Statute of Limitations

When the Court issued its decision at the close of oral argument, it did not rule upon the statute of limitations defense argued by Defendants. Instead, Defense counsel was instructed to prepare a proposed order ruling in Defendants' favor on the grounds of res judicata and collateral estoppel, with the alternative holding in Defendants' favor finding no protected property interest. Defense counsel ignored this instruction and submitted a proposed order, over the undersigned's

objection that took the liberty of adding additional rulings in Defendants' favor never cited by the Court when it issued its decision or during its instruction to counsel. The Court then entered Defendants' proposed order, without modification. The additional holdings inserted by Defendants' counsel improperly make factual findings at the motion to dismiss stage in furtherance of reaching a statute of limitations holding. For example, the Order states that Plaintiffs "presumably retired and returned to work before August 2, 2010." The Court may only dismiss a complaint based upon a defense of statute of limitations when it is apparent from the four corners of the pleadings that the case is time barred. Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). This is improper and highly objectionable.

In holding that Plaintiffs had to pursue their federal claim in state court, the Fourth Circuit "conclude[d] that the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims." Hutto, 773 F.3d at 551-52 (emphasis original). The Hutto Court reasoned further:

> Because the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise. But in concluding that the Fifth Amendment Takings Clause does not, in this case, trump the Eleventh Amendment, we do not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim.

Id. at 552.

The undersigned assume that this Court's decision to sign an order prepared by Defense counsel addressing matters not included in the Court's ruling is a mere oversight. This oversight should be corrected by granting this motion.

In addition, the Court relies exclusively upon the decision in Anonymous Taxpayer v. S. Carolina Dep't of Revenue, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) for the finding that

Plaintiffs' claims are time barred. However, this decision is not applicable. In Anonymous Taxpayer, plaintiff challenged a statutory change that removed state tax exemptions on plaintiff's state retirement benefits. The Supreme Court concluded that the plaintiff had a vested interest in his retirement benefits at the time of the statutory change and therefore plaintiff's cause of action accrued on the date the law changed. The Court reasoned:

> Although Appellant did not begin receiving retirement income until 1997, he had a vested interest in his retirement plan prior to Act 189. Similar to Harvey, Appellant's action accrued at the time of the 1989 change, not when he later retired and attempted to claim the prior tax exemption.

Id.

Here, Plaintiffs did not have a vested interest in wages that they might earn in the future when Act 153 was passed, requiring the working retirees to begin making contributions to the Retirement Systems on July 1, 2005. As a result, Plaintiffs' claims did not accrue when Act 153 was passed. Instead, Plaintiffs' claims accrued once they earn the wages from which the State illegally deducted a portion. This is an ongoing violation and a new cause of action accrues each time Plaintiffs' wages are confiscated. See Estate of Livingston v. Livingston, 404 S.C. 137, 147–48, 744 S.E.2d 203, 209 (Ct. App. 2013) (finding a new statute of limitations begins to run after each separate injury, and therefore statute of limitations barred only claims falling outside the three-year time period and did not bar claims occurring within that time), cert. granted, No. 2013–001505 (S.C. S. Ct. filed Oct. 24, 2014); see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n of Escondido, 110 Cal. App.4th 1288, 2 Cal. Rptr.3d 497, 502 (2003) ("When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (citation omitted)); State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 777 S.E.2d 176, 200 (S.C. 2015), reh'g granted (July 8, 2015).

Additionally, any limitations period on Plaintiffs claims was tolled by the pendency of the federal action while in the District Court and Court of Appeals. See Jinks v. Richland Cnty., S.C., 538 U.S. 456 (2003) (reversing the South Carolina Supreme Court's decision a claim was time barred due to the passage of time while the claim was pending in federal court).

D. Laches

Lastly, this Courts' ruling that Plaintiffs' claim is barred by the doctrine of laches is improper for the reasons explained in § C, supra. It also fails to address Plaintiffs' argument that this defense is fact intensive and should not be ruled upon at the motion to dismiss stage.

Affirmative defenses are not properly considered in evaluating a motion to dismiss unless the defense is established in the allegations of the complaint. Spence, 368 S.C. at 123, 628 S.E.2d at 878. This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. Id.

Defendants' appeal to laches also rests upon factual assumptions that stretch beyond the four corners of the pleadings. More specifically, Defendants assert that "plaintiffs could have and should have brought this lawsuit within three years of their return to work." Of course, there is no evidence before the court as to when the plaintiffs returned to work—only that they did so after the enactment of South Carolina Code Sections 9-1-1790(C) and 9-11-90(4)(c). Without evidence of the date of Plaintiffs' return to work, Defendants are unable to prove the first element of laches: lack of diligence. "An inexcusable or unreasonable delay may occur only after

the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action." White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). There are no facts before the Court as to this element.

As to the second element of laches—prejudice to the defendant—Defendants have produced no evidence whatsoever. "The second element—prejudice to the defendant—is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct." White, 909 F.2d at 102 (citing Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 844 (D.C. Cir. 1982)). The Court's conclusion that Defendants have been prejudiced because "the retirement system has continued to rely upon the receipt of the funds" is without factual support from the pleadings. Even assuming *arguendo* that these factual allegations are correct, Defendants' reliance upon Plaintiffs "continuing receipt of funds" in no way prejudices Defendants' ability to defend this case. Barring such proof, laches is inappropriate.

Based upon the foregoing, Plaintiffs request the Court reconsider its Order granting Defendant's Motion to Dismiss and deny the same.

[signature page follows]

Respectfully submitted,

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Attorneys for the Plaintiffs

November 19, 2015
Columbia, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated,

Plaintiff,

vs.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority,

Defendants.

Civil Action No.: 2015-CP-40-01728

CERTIFICATE OF SERVICE

I, Jaime Harmon, the undersigned employee of Griffin Davis, LLC, attorneys for Plaintiffs do hereby certify that I have served a copy of the foregoing **Plaintiffs' Motion to Reconsider** in connection with the above-referenced case via U.S. Mail, postage prepaid, to the following address:

Robert E. Stepp
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, SC 29201

Jaime Harmon

Columbia, South Carolina
November 19, 2015

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

RECEIVED
DEC 14 2015
Richard A. Harpootlian, P.A.

CASE NUMBER: 2015-CP-40-1728

Gail M. Hutto, Debra J. Andrews, et al
PLAINTIFF(S)

SC Retirement Systems, Police Officers Retirement System, et al
DEFENDANT(S)

Submitted by: _____ | Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

2015 DEC -7 PM 4:04
JEANETTE W. GRIFFITH, C.C.P. & G.S.
RICHLAND COUNTY, SC
FILED

ORDER INFORMATION

After careful consideration, the Plaintiff's Motion to Reconsider is respectfully denied.

This order ☒ ends ☐ does not end the case.
Additional information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Jamyca L. G. **Judge Code** 2756 **Date** 12/7/2015

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Dec, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

EXHIBIT
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