THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge



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Appellate Case No.: 2016-000021

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Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Wells, 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.

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# INITIAL BRIEF OF RESPONDENTS

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II. Did the circuit court correctly dismiss the complaint for failure to state a claim when Working Retirees do not have a constitutionally protected property interest?

III. Did the circuit court correctly dismiss the complaint as time barred when this case involves a facial challenge to the constitutionality of statutes enacted in 2005?

[1] As discussed further in Section IV of this brief, Appellants' fourth issue on appeal regarding whether Act 153 violates the Takings Clause is not preserved for review.

## STATEMENT OF THE CASE

This is an appeal from an order granting a motion to dismiss the complaint for failure to state a claim. (Order.) The complaint was filed on March 20, 2015, as a putative class action. (Compl.) Appellants are individuals who retired and returned to work for an employer covered by the state retirement system ("Working Retirees") after July 1, 2005. Working Retirees seek an order declaring statutes enacted on July 1, 2005, requiring Working Retirees to contribute a portion of their salary to the state retirement system to be unconstitutional in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. (Compl.) Working Retirees seek an order requiring Respondents to return all funds contributed by them to the retirement system since July 1, 2005. *Id.*

On April 23, 2015, Respondents moved to dismiss the complaint on the grounds of res judicata and collateral estoppel, failure to state a claim, and the statute of limitations and doctrine of laches.[2] (Mot.) On September 28, 2015, the circuit court conducted a hearing. (Tr.) On November 2, 2015, the circuit court issued an order granting the motion to dismiss on the grounds stated above. (Order.) Working Retirees moved for reconsideration, which by order dated December 7, 2015, was denied. (Mot. and Order.) On January 6, 2016, the Notice of Appeal was served and filed in this Court. (Notice.)

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[2] Respondents also argued the case should be dismissed based on Working Retirees' failure to exhaust their administrative remedies, but ultimately chose not to pursue that ground at the hearing.

## FACTS

This case challenges the constitutionality of two state statutes, sections 9-1-1790(C) and 9-11-90(4)(c), requiring people who retire and return to work for an employer covered by the state retirement system to contribute a percentage of their salary to the state retirement system just as non-retired employees do. Appellants are people who retired and returned to work ("Working Retirees") sometime after July 1, 2005, the date the statutes went into effect. Working Retirees argue that the statutes are unconstitutional because they unconstitutionally redistribute and take private property without paying just compensation. (Compl.)

The statutes state, in part:

> A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required . . . .

S.C. Code Ann. §§ 9-1-1970(C)[3] and 9-11-90(4)(c) (Supp. 2009).[4]

The statutes were passed as part of the State Retirement Systems Preservation and Investment Reform Act ("Act 153"). (Compl. ¶ 28.) Act 153 amended several statutes relating to the operation of the South Carolina Retirement System, including the two statutes challenged in this case. Under prior law, a person could retire, begin drawing a retirement check, and then return to work for a covered employer (with a salary cap) without having to make any further contributions to the system. Under the new law, a

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[3] This statute appears in Chapter 1 of Title 9, which governs the South Carolina Retirement System.

[4] This statute appears in Chapter 11 of Title 9, which governs the South Carolina Police Officers Retirement System.

person may still retire and begin drawing retirement, and then return to work for a covered employer (without a salary cap), but would have to contribute to the system just as active members do, regardless of the fact that he or she had previously retired.

This change in the law spawned extensive litigation in both state and federal court.

## State Court Litigation

In June 2005, just days before Act 153 went into effect, a group of plaintiffs represented by the same counsel as Working Retirees in this case filed a class action alleging that Act 153 was unlawful in several respects, including that the provision requiring working retirees to contribute to the retirement system violated the Takings Clause of the South Carolina and United States 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.

In 2006, the South Carolina Supreme Court decided *Layman* in the original jurisdiction. In its written opinion, the Court outlined the legal issues presented as follows:

I. Do the statutory provisions of the former version of the TERI and working retiree programs create contracts?

II. Is the State estopped from requiring Petitioners to make contributions to the retirement system?

*III. Does the enactment of Act 153 constitute an unconstitutional taking under either the State or Federal Constitution?*

IV. Does Act 153 violate the Due Process Clause of the State or Federal Constitution?

*Id.* (emphasis added).

The 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. With regard to those who retired and returned to work after July 1, 2005, the 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 Court also 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 those working retirees who were not part of the TERI program, the Court held that the statutes governing their employment did not contain the same contractually significant language as used in the TERI statutes, and therefore did not grant relief on the basis of a legislative contract, as the Court did for the TERI participants. *Id.* at 643, 630 S.E.2d at 271. Moreover, the Court did not grant relief to the working retirees on any other basis, including the constitutional grounds that had been briefed and argued. Instead, the Court remanded the issue of whether the working retirees had written contracts with the state. *Id.*

On remand, the case became known as *Ahrens v. State*. Although the Supreme Court remanded the breach of contract issue only, the working retirees in *Ahrens* filed amended complaints alleging multiple causes of action, including a cause of action that

the statutes were unconstitutional in violation of the Takings Clause of the state and federal constitutions. (Amend. Compls.) After discovery, the parties filed cross-motions for summary judgment addressing all causes of action. Following a hearing, the trial court granted judgment in favor of the working retirees on the ground of equitable estoppel. (Order.) The defendants moved for reconsideration, arguing in part that the trial court failed to rule on all the issues raised in the case, including the constitutional claims. (Mot.) The trial court conducted another hearing, and this time issued an order denying relief to the working retirees on all grounds other than equitable estoppel. (Order.) The working retirees filed a motion for reconsideration, and the motion was denied. (Mot., Order.)

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 determined that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions. *Id.* at 357, 709 S.E.2d at 63.

In addition to concluding 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 Court explained that the working retirees' 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 working retirees "did not have a contractual right to the terms of their employment," summary judgment was affirmed. *Id.* Additionally, 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 working retirees 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." (Pet. Rehear'g.) The Supreme Court denied the petition. (Order.)

**Federal Court Litigation**

On August 2, 2010, while the *Ahrens* case was pending on appeal, the same working retirees who filed the present case (Working Retirees) filed a putative 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. (Compl.) The retirement system 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).

**The Present Case**

After losing the federal court case, Working Retirees 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.[5] (Compl. ¶¶ 47 - 54.) Working Retirees have sued several of the same defendants[6] 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 by them to the retirement system since July 1, 2005.[7]

**STANDARD OF REVIEW**

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). "The Court is required to view the

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[5] Working Retirees do not allege the statutes violate the Due Process Clause of the Fourteenth Amendment.

[6] In the federal court case, Working Retirees 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.

[7] Working Retirees presumably do not seek a return of contributions that they made before they retired.

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." *Id.* "The Court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law." *Id.* (internal quotations omitted).

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).

## ARGUMENT

The circuit court order dismissing the complaint should be affirmed. The circuit court correctly determined this case is the same case that has been litigated in state and federal court on multiple occasions, and the issue in this case has already been decided. The circuit court also correctly found Working Retirees do not have a constitutionally protected property interest and therefore cannot state a claim for relief. Further, the circuit court correctly determined this case is time barred. The statutes being challenged were enacted in 2005. A lawsuit filed in 2015 is late.

For these reasons, and those set forth more fully below, the circuit court decision should be affirmed.

## I. The circuit court correctly determined this case is barred by the doctrines of res judicata and collateral estoppel.

This is the fourth time that Working Retirees or their privies have sued the state retirement system or its privies over whether statutes requiring working retirees to contribute to the retirement system as a term and condition of their employment are constitutional. The first time was in *Layman*, a case filed in 2005 that was litigated in the original jurisdiction of the Supreme Court. The second time was on remand in *Ahrens*. The third time was in *Hutto* case, the federal counterpart of this case. At every turn, the courts have denied relief. It is time for this repeat litigation to end. The circuit court order dismissing the case should be affirmed.

### A. This case is the same case that has been litigated in state and federal court in South Carolina since 2005.

This case is barred by the doctrine of res judicata because this is the fourth time that Working Retirees or their privies have filed a lawsuit challenging the constitutionality of Act 153 and the statutes requiring working retirees to contribute to the retirement system.

"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.

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.*

Here, all three elements of res judicata have been met. First, the parties in this case are identical to or in privity with the parties in the other three cases. Working Retirees are the same people who filed the case in federal court and are in privity with the working retirees in *Layman* and *Ahrens*. Although not the same people as the working retirees in *Layman* and *Ahrens*, Working Retirees stand in exactly the same relationship to Act 153 as the working retirees in those cases with respect to the subject matter of this case. The date someone retired and returned to work makes no difference with regard to the question of whether the statutes are facially constitutional. The Supreme Court confirmed this in *Ahrens* when it denied relief to working retirees who retired before the statutes were enacted. The only significance to the date is that it shows that Working Retirees returned to work *knowing* that they would have to contribute to the retirement system, and accepted their jobs anyway. The fact that Working Retirees were not part of the class of working retirees in *Layman* and *Ahrens* is inconsequential. Their legal rights were litigated by working retirees who stood in the same position, and they are bound by this Court's decision in *Ahrens*.

Similarly, the defendants in this case are either the same as or in privity with the defendants in the other three cases. All defendants are in the same position in relation to the statutes being challenged. All defendants are tasked with following and carrying out the laws of this State as enacted by the General Assembly.

Second, the subject matter in this case is the same as the subject matter in the prior cases. In each case, Working Retirees (or their privies) allege that the statutes are unconstitutional and violate the Takings Clause of the Fifth Amendment of the United States Constitution. (Opinion, Compls.) The fact that the working retirees in *Layman*

and *Ahrens* made an as-applied versus a facial challenge to the constitutionality of the statutes does not make the subject matter of those cases any different than the subject matter of this case. Because the cases arise out of the same set of facts – the enactment of Act 153 – and make the same allegation that the statutes are unconstitutional, the subject matter is the same. *See Judy v. Judy*, 383 S.C. 1, 10, 677 S.E.2d 213, 218 (Ct. App. 2009) (explaining that identity of subject matter between suits "rests not in their forms of action of the relief sought, but rather, in the combination of the facts and law that give ise to the claim for relief").

Third, the issue of whether Act 153 effects an unconstitutional taking was either decided or might have been decided in both *Layman* and *Ahrens*. In *Layman*, the issue regarding whether the statutes are constitutional 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, briefed, and argued. The issue was litigated again in *Ahrens*, but this time the issue was decided. On remand, the trial court granted summary judgment in favor of the retirement system on the constitutional claims and denied the working retirees' motion for reconsideration. (Orders.) On appeal, the Supreme Court affirmed the granting of summary judgment and denied the working retirees' petition for rehearing. (Opinion and Order.)

The circuit court's characterization of the dismissal in *Hutto* as "with prejudice" did not play into the court's res judicata analysis. The circuit court concluded this case was barred because the elements of res judicata had been satisfied even without *Hutto*. Further, the circuit court was persuaded that this case represents precisely what res judicata was designed to prevent—a defendant being sued multiple times for the same

cause of action. The retirement system should not have to continue defending the same statutes on the same grounds, particularly when this Court and a South Carolina trial court have decided the issue presented in this case.

**B. The issue raised has already been decided.**

"'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 circuit court correctly concluded that this case is barred by the doctrine of collateral estoppel. As explained above, the constitutionality of Act 153 has been actually litigated numerous times. It was litigated in *Layman*, *Ahrens*, and *Hutto*. At every stage of the litigation, Working Retirees or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, the court decided against them.

Second, 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 working retirees' motion to reconsider. (Orders.) On appeal, the Supreme Court unanimously affirmed summary judgment in favor of the defendants' on the constitutional grounds and denied the working retirees' petition for rehearing. (Opinion and Order.)

Third, 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 cause of action was left undecided. 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.

Working Retirees have had their day in court numerous times. Their legal interests have been litigated in the highest court in this State (twice), in a state trial court,

in a federal district court, and in the Fourth Circuit. This repeat litigation is precisely what the doctrines of res judicata and collateral estoppel were designed to prevent. The retirement system should not have to continue defending the same statutes on the same grounds over and over again. The circuit court decision dismissing this case should be affirmed.

## II. The circuit court correctly determined that Working Retirees do not have a constitutionally protected property interest.

Working Retirees' claim is based on the erroneous premise that Working Retirees have not only a constitutionally protected right to employment, but a protected interest in employment on specific terms. Because Working Retirees do not have a constitutionally protected property interest, the circuit court properly dismissed the complaint for failure to state a claim.

"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 circuit court properly determined that Working Retirees did not have a legitimate property interest. First, Working Retirees have not and cannot argue that they have a constitutionally protected right to employment. Second, even if their right to employment were somehow constitutionally guaranteed, Working Retirees have not

identified any statute (state or federal) guaranteeing that they do not have to contribute to the retirement system upon their return to work. Working Retirees are required to make the same contributions to the retirement system as all other employees. They are not given a special status because they retired. Working Retirees choose to return to work in a position covered by the state retirement system, and have no right to their employment or to any term or condition thereof. Working Retirees' failure to identify a protected property interest is fatal to the cause of action for unconstitutional taking.

The circuit court's determination that the protected property interest must be rooted in state law is consistent with *Grimsley* and the cases cited therein. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 636 S.E.2d 598 (2006) (holding that in order to prove a denial of due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest *rooted in state law*); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978) (stating that because property interests are creatures of state law, one is required to demonstrate the alleged deprivation is a property interest *recognized by state law* in order to invoke due process protection); *Scott v. Greenville Cnty.*, 716 F.2d 1409 (4th Cir.1983) (declaring that the starting point for a due process inquiry is to determine whether *state or local law* afforded plaintiff a protected property interest sufficient to trigger due process guarantees); *cf. Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (finding plaintiff failed to establish a property interest in a teaching contract within the meaning of due process because she pointed to no *state law or regulation* that would require her employment contract to be renewed).

The working retirees in *Grimsley* were able to identify a state statute requiring the employer to make the employer contribution as the source of their right to not have to make the contributions themselves. 396 S.C. at 285, 721 S.E.2d at 428. Accordingly, the Court held that the working retirees "have asserted a cognizable property interest rooted in state law sufficient to survive the motion to dismiss."[8] *Id.*

Even if federal law could provide the source of the right, Working Retirees' claims still fail. Working Retirees have not identified any federal law guaranteeing their employment or protecting them from having to contribute to the retirement system upon their return to work. The circuit court addressed Working Retirees' argument that the source of their right was in the IRS 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.) After reviewing the Code, the circuit court correctly found that the IRS Code does not contain any language protecting Working Retirees from having to contribute to the retirement systems upon their return to work. 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. Further, 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.

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[8] When the case came back up on appeal, the Supreme Court reinstated judgment in favor of SLED (the employer) because it had been determined that SLED made the employer contributions after all (and therefore was not violating the statute previously relied upon). 415 S.C. 33, __, 780 S.E.2d 897, 900 (2015). The Court found that in agreeing to a 13.6% reduction in salary, the working retirees "received exactly what they bargained for." *Id.* SLED argued that the working retirees agreed to be rehired at a reduced salary and had no unconditional right to be rehired, much less a right to a particular salary. *Id.*

In any event, *Layman* and *Ahrens* make it clear that Working Retirees do not have a protected property interest. In *Layman*, this Court found that there was nothing in the terms of the working retiree statute that created a binding contract or that "evidence[d] an intent by the legislature to be bound to any terms related to the old working retiree program." 368 S.C. 631, 643, 630 S.E.2d 265, 271 (2006). Further, the Court declined to address the constitutional claims that were before it. *Id.* at 644-45, 630 S.E.2d at 272. Additionally, the Court found that the TERI statutes "continue[] to be valid and those participants joining after July 1, 2015 are subject to the entirety of the requirements outlining the new TERI program in Act 153." *Id.* at 644, 630 S.E.2d at 272.

In *Ahrens*, the Court found that "[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 Retiree statutes as providing a mere option to retirees, rather than an offer." 392 S.C. 340, 352, 709 S.E.2d 54, 61 (2011). Further, the 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.* The Court then concluded that "[c]laims of unconstitutional taking, violation of due process, and impairment of contract are founded on the presumption that a contractual right has been unfairly taken away." *Id.* at 358, 709 S.E.2d at 63. Accordingly, "summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract." *Id.*

The working retirees argued in their petition for rehearing that the Court failed to recognize that the action for unconstitutional taking was "valid regardless of the existence of a contract." (Pet. for Rehear'g.) They argued that "even if there is no contract," they

had "vested rights or entitlements that are constitutionally protected against a taking." *Id.* The Supreme Court rejected this argument by denying the petition for rehearing. (Order.)

In addition to correctly finding that Working Retirees do not have a protected property interest, the circuit court correctly analyzed the issue in this case as relating to terms and conditions of employment rather than wages. This is not a case about how much money Working Retirees make or whether they receive the money they earn. Working Retirees receive the money they earn, less the statutorily required contributions. The issue is not whether there is any benefit provided in exchange for the contribution. That issue is pertinent to whether there has been just compensation if there has been a taking in the first place. Here, because there is no taking, the issue of a "quid pro quo" is irrelevant.

Nonetheless, Working Retirees do receive a benefit in exchange for their contributions and the retirement system has never conceded otherwise. At the hearing on the motion to dismiss in the federal court case, the following colloquy occurred:

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|---|---|
| The Court: | But they agree that there's no benefit coming back in return. |
| Mr. Harpootlian: | Well, I'm not sure I heard that. Are they on the record stating that there's no benefit, that we get no additional retirement benefit from this money? |
| Mr. Stepp: | The benefit is their job. |
| Mr. Harpootlian: | Okay. |
| The Court: | Okay. |
| Mr. Stepp: | That's the benefit they get under the terms of which they have to make the contribution. |
| The Court: | Okay. |

Mr. Stepp: They don't have to make the contribution and they don't have to take the job. But if they take the job, they have to make the contribution and that's the benefit.[9]

(Tr. 65:5-20.)

Because Working Retirees do not have a protected property interest exempting them from having to make the contribution, the circuit court correctly dismissed this case.

## III. The circuit court properly dismissed the complaint as time barred.

### A. The statute of limitations has expired.

The circuit court properly dismissed the complaint based on the statute of limitations.

"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.

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[9] This Court recognized in *Grimsley* the benefit of being able to draw retirement benefits while still working and earning a salary. The Court stated: "This [is] no minor benefit." 415 S.C. at __, 780 S.E.2d at 901 n.2.

Here, Working Retirees have known since at least July 1, 2005, that a cause of action might exist. It was at that time that the statutes were enacted, and that Working Retirees could have and should have challenged the constitutionality of the statutes. Because Working Retirees are challenging the constitutionality of the statutes on their face, Working Retirees would likely have had standing under the public importance exception to the standing doctrine. *See S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013) (explaining that "standing may be conferred where the issue is one of public importance"). Rather than file a lawsuit within three years of the date the statutes were enacted, Working Retirees waited nearly ten years to file the present case. The circuit court properly concluded the lawsuit was late.

Even assuming Working Retirees did not have standing to challenge the constitutionality of the statutes until they retired and returned to work, Working Retirees alleged in *Hutto* that they retired and returned to work before August 2, 2010, the date the federal court complaint was filed. Throughout the complaint, Working Retirees alleged that "[s]ince [his or her] return to work" each of the named plaintiffs have been required to contribute to the retirement system. (Compl.) Here, the circuit court was permitted to rely on the allegations in the federal complaint to find that Working Retirees retired and returned to work before August 2, 2010. *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"). A complaint filed on March 20, 2015, nearly five years later, is late. Working Retirees

should not be permitted to avoid the statute of limitations by omitting the date they retired and returned to work from the complaint filed in this case.

Contrary to what Working Retirees argue, the alleged constitutional violation is not continuing and the statute of limitations does not start again every time a contribution is made. A similar argument was made in *Anonymous Taxpayer* and rejected. In that case, this 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 on notice that he had a cause of action at the time the law was passed. *Anonymous Taxpayer*, 377 S.C. at 439-40, 661 S.E.2d at 80.

Working Retirees contend *Anonymous Taxpayer* is distinguishable because the plaintiffs in that case had a vested right to the funds in question whereas Working Retirees do not have a vested right to the funds in question until the wages were earned and paid. This argument misconstrues the issue in this case. The issue in this case is not whether Working Retirees have a vested right to receive a certain salary level. The issue is whether it is lawful to require Working Retires to contribute to the retirement system as a term and condition of employment. Accordingly, the statute of limitations began to run the date the statutes became the law of this State.

Finally, the statute of limitations was not tolled during the pending of the federal court. The case of *Jinks v. Richland Cnty*, 538 U.S. 456 (2003), is distinguishable because it involves the federal supplemental jurisdiction statute, which expressly provides that the statute of limitations is tolled on supplemental claims. No such statute applies here. Working Retirees chose to initiate this case in federal court, and in doing

so, ran the risk that the statute of limitations would expire while the federal court case was pending.

Because Working Retirees challenge the constitutionality of the statutes on their face, the cause of action for unconstitutional taking accrued the date the statutes became the law of this State. The alleged constitutional injury, if any, occurred at that time. A cause of action filed nearly ten years later is late.

**B. The case is barred by the doctrine of laches.**

In addition to being barred under the statute of limitations, this case is barred by the doctrine of laches.

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, Working Retirees filed this lawsuit nearly ten years after the statutes they allege were unconstitutional were passed. 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. Working Retirees knew or should have known since at least July

1, 2005, they had a claim. Rather than act diligently, Working Retirees waited almost ten years to file this case.

The circuit court did not go outside the scope of Rule 12(b) in reaching this conclusion. The circuit court relied upon the date the statutes were passed and the date the Working Retirees retired and returned to work, which was some time prior to August 2, 2010, the date they filed the federal court case. A complaint filed ten years after the statutes were passed and approximately five years after the federal court case was filed is late. The delay was inexcusable because Working Retirees have known or should have known since July 1, 2005, they had a claim. *See Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011) (recognizing "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests"). The circuit court was permitted to find that the delay prejudiced the retirement system because Working Retirees filled positions that could have been filled with non-retired employees who would not seek to have the contributions returned to them years after-the-fact.

Finally, although it is true that the circuit court judge did not rule on the statute of limitations and laches grounds from the bench, the judge was free to consider and address those issues later in the written order. The issues had been fully briefed and argued. At the hearing, Working Retirees' counsel handed up additional case law regarding the statute of limitations defense, which the court was free to consider and address in the written order rather than at the hearing. (Tr.) When counsel for the retirement system submitted the proposed order to the Court, counsel alerted both the court and opposing counsel to the fact that the order included rulings on the statute of limitations and laches

defenses and that counsel for Working Retirees objected. (Email.) The court was free to accept or reject any portion of the proposed order prior to signing and filing it.

Because the circuit court correctly concluded that this lawsuit is barred by the statute of limitations and the doctrine of laches, the order should be affirmed.

## IV. The issue of whether Act 153 violates the Taking Clause is not preserved for review.

The fourth issue on appeal raised by Working Retirees is not preserved for review.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 302, 641 S.E.2d at 907. "An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." *Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317, 339 (Ct. App. 2006).

Here, although raised, the issue of whether the statutes are unconstitutional was not ruled upon, and Working Retirees did not ask the court to rule on the issue in the Rule 59(e) motion to alter or amend the judgment. Accordingly, the issue is not preserved for review.

Even if the issue were preserved for review, Act 153 does not effect a taking because Working Retirees do not have a constitutionally protected property interest to the contributions. *See Rivers v. State*, 327 S.C. 271, 275, 490 S.E.2d 261, 263 (1997)

("Under ordinary takings law, in order for Act 171 to have effected a taking, Taxpayers would have to have had a vested right to the money at issue."). Moreover, in *Ahrens v. State*, this Court and a South Carolina trial court expressly denied relief on the constitutional grounds.

This is not an "unconstitutional extortionate demand" as Working Retirees argue in their brief. Working Retirees are free to work for other employers. They do not have to work for positions covered by the state retirement system. They choose to accept their jobs under the terms and conditions outlined in the statutes, knowing that they will have to make the contributions. They also know that they will have the benefit of receiving a retirement check and a paycheck.

The notion that the money contributed is being used to pay the cost associated with future retirees or is redistributed from one private party to another is not supported by the record and is incorrect. There is no evidence that Act 153 "reduces the funding burden that would otherwise be borne by pre-retirement employees and their employers."

To the contrary, in an exhibit attached to the complaint, on a retirement system form entitled "Notification of Employed Retiree," it states:

> As a retired member returned to covered employment, I understand that I am required to pay contributions at the same rate as active members. I also understand I will not accrue any additional service credit. However, *the contributions will be credited to my account and upon my death, any remaining contributions that have not been exhausted through benefit payments will be paid directly to my beneficiary.*

(Compl., Ex. C.) Accordingly, there is no evidence in this record to support the contention that the funds contributed are redistributed.

Finally, the fact that the working retirees in *Layman* and *Ahrens* were not able to show that the statutes were unconstitutional as applied to them means the facial challenge

raised here fails as a matter of law. *See Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 543, 737 S.E.2d 830, 843 (2012) ("Thus, if the moving party fails to show that the statute is unconstitutional as applied to him, any facial challenge must necessarily fail because there is at least one circumstance where the statute would constitutionally apply.").

## CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed. It is time for this repeat litigation to end. Working Retirees and their privies have had their day in court numerous times, and this Court conclusively decided in *Ahrens v. State* that the statutes challenged here are constitutional.

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March 11, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge



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Appellate Case No.: 2016-000021

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Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Wells, 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.

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**PROOF OF SERVICE**

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The undersigned certify they have caused the Respondents' Initial Brief and Designation of Matter to be included in the Record on Appeal to be served on Appellants by hand delivery and electronic mail on March 11, 2016, addressed to their counsel of record as follows:

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March 11, 2016