THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2008-CP-40-8854

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

v.

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

INITIAL BRIEF OF RESPONDENT
(South Carolina Law Enforcement Division)

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DAVIDSON & LINDEMANN, P.A

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON

1611 Devonshire Drive, 2nd Floor
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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

2. Whether any property interest of Plaintiffs was affected by the terms of their retirement and voluntary return to employment.

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

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

5. Whether the court below correctly held that Plaintiffs are now estopped from asserting their present claims.

6. Whether the statute of limitations bars Plaintiffs' claims.

7. Whether the doctrine of laches also bars Plaintiffs' claims.

STATEMENT OF THE CASE

This action was filed on December 16, 2008, by Plaintiffs Grimsley and Jowers against the South Carolina Law Enforcement Division (SLED) and the State of South Carolina. Plaintiffs, both of whom retired unconditionally from SLED in 2004 and then agreed to be rehired at slightly reduced salaries, have claimed that S.C. Code § 9-11-90(4)(b) created certain rights in them with respect to the employer contribution to be paid by SLED on their salary upon their rehire.[1] SLED denied the material allegations of the Complaint, and raised a number of affirmative defenses, including waiver and estoppel, consent, the statute of limitations and laches.[2]

After the case was remanded in early 2012 by the Supreme Court for further proceedings, discovery was completed. Both sides filed cross motions for summary judgment pursuant to a scheduling order. Both sides then filed affidavits and legal memoranda in support of their respective positions. The motions for summary

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

[2] The State of South Carolina was originally a co-defendant in this case. The State initially moved to dismiss this action on various grounds. That motion was granted by Judge Thomas Cooper by order filed December 29, 2009. Plaintiffs appealed, and by opinion date January 3, 2012, the Supreme Court reversed the order of Judge Cooper and remanded the case for further proceedings. *Grimsley v. South Carolina Law Enforcement Div.* 396 S.C. 276, 721 S.E.2d 423 (2012). The Supreme Court held that exhaustion of remedies was not required under the South Carolina Retirement Contribution Procedures Act, *S.C. Code Ann.* §§ 9-21-10, et seq. The Court also held that the Complaint "asserted a cognizable property interest rooted in state law sufficient to survive the motion to dismiss," 396 S.C. at 285, 721 S.E.2d at 428. After the case was remanded, the State was dismissed without objection.

judgment were heard by Judge Kinard on June 7, 2012. By order dated July 20, 2012 and filed August 7, 2012, Judge Kinard denied Plaintiff's motion for summary judgment and instead granted summary judgment for SLED, dismissing this action with prejudice in all respects. R. __. Plaintiffs filed a Notice of Appeal on August 22, 2012. Plaintiffs contend on appeal, Br. of Appellants 13, that SLED's motion for summary judgment should have been denied, but they do not contend that the court below erred in denying their motion for summary judgment.

STATEMENT OF FACTS

A. Introduction and summary.

Both of the Plaintiffs retired unconditionally from SLED in 2004 and then agreed to be rehired on an at-will basis shortly thereafter at slightly reduced salaries, but while drawing full retirement benefits as well. Their respective retirements occurred pursuant to an optional "working retiree" arrangement that was authorized by S.C. Code Ann. §9-11-90 and that had been offered by Chief Robert Stewart of SLED starting in 2002 to agents who had enough service credit to be able to retire. As Chief Stewart stated in an affidavit in this case, this arrangement served at least three beneficial purposes:

> 1. It "served the important purpose of permitting more experienced employees to remain in service after they were eligible to retire, working alongside those agents with less experience. This in turn benefitted SLED and the public as well, because it offered the opportunity for the newer agents to continue to learn from the more experienced agents." R. __ [Stewart Affidavit, ¶10]

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

3. "During that time of substantial budget cuts, such a program would also benefit SLED by cost savings, mostly in the area of salaries. This assisted SLED in avoiding layoffs of any agents and in maintaining a basic level of law enforcement services to the citizens of South Carolina." R. __ [Stewart affidavit, ¶ 6.]

Present SLED Chief Keel also submitted an affidavit, confirming the facts as stated by Chief Steward and noting that "[t]he need to rehire SLED employees who have retired continues to this day." R. __ [Keel Aff. ¶ 6]

From the agents' standpoint, there was a substantial benefit to be derived from participating in this program. For example, the undisputed facts show that the pre-retirement salary of Plaintiff Grimsley had been $52,896. In 2005, the first full year after his retirement, his SLED salary was $48,318, and his retirement benefit was $33,158, for a total of $81,472 (compared to his salary of $52,896 prior to retirement). R. __ [Order at 8], citing Stewart Affidavit, R. ___, Paragraph 20 and Exhibit 9. His combined income as a working retiree was therefore more than half again the amount of his preretirement income.

Plaintiffs' terms of at-will employment upon their rehire were for a term not to exceed 48 months. R. ___. Both of the Plaintiffs remained employed by SLED for the full 48-month period, that is, until 2008. At the end of that period, then-Director Lloyd advised each Plaintiff of the date that their 48 \-month period would

end. R. ___. Director Lloyd suggested that each Plaintiff contact SLED with respect to their availability to work on an hourly basis in certain areas. R. ___. Neither Plaintiff requested to be considered for such employment. Some months later, however, in late 2008, Plaintiffs filed this action claiming that the employer contribution had been "deducted" from their salaries.

In Appellants' Statement of Facts, there are several statements that might be read to suggest that there was something imperative, i.e., not optional, about Appellants' decision to retire and be rehired. *See, e.g.,* Brief of Appellants at 2 ("program required Appellants to retire from SLED"); *Id.* at 3 ("Appellants had to complete certain forms")(emphases added). In fact, however, the decision to retire and be rehired was entirely optional for any employee who had enough years of service to be able to retire. R. __ [Stewart Aff. ¶ 24]. Neither Plaintiffs nor any other agents were ever required to take advantage of this offer to retire and be rehired at a slightly reduced salary. *Id.* They did so entirely voluntarily, and they do not actually allege that they were forced to retire. They could have instead continued indefinitely in their original term of employment (subject only to the usual conditions of state employment) and to have continued to receive total

income that was about $30,000 less annually (in the case of Grimsley, for example) than they could have made by electing to retire and be rehired.[3]

As will be set forth in more detail below, the sole basis for Plaintiffs' claim is the factually-erroneous premise that that SLED "had the amount it cost SLED to pay the employer portion of retirement deducted [sic] from their [post-retirement] salaries," R. __. [Complaint, Par. 8](Emphasis added). However, and as the court below held, there is simply no such thing as a deduction of the employer contribution from the salary of an individual. R. __ [Order at 10], citing R. __ (Royal Aff. Par. 8 & 9) and R. __ (Kitchens Aff. Par. 6 & 7). Instead, Plaintiffs were simply rehired at lower salaries, following a complete break in the employment relationship. R. __Stewart Aff. Par. 16. To this they voluntarily and readily agreed, as might be expected in light of the total financial benefit illustrated above. At the same time, SLED continued to make the employer contribution to the PORS for the positions occupied by Plaintiffs, and used only funds appropriated to it for that purpose.

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

B. Background.

The background leading up to Chief Stewart's creation of the Retirement/Rehire program is discussed in detail in the order below. R. __ [Order 2-5]. Essentially, in the period from 1999 through 2002, the General Assembly steadily increased, and then eliminated, the salary cap for retired persons who returned to work. R. __ [Order at 2-4] Until 1999, that cap had been very low; for instance, during the period 1989 to 1999, it was $9,500 for a retired PORS member.[4] However, the cap was raised to $25,000 in 1999,[5]raised again to $50,000 in 2001,[6] and then eliminated completely in the following year, 2002.[7]

The statutory changes referenced above made it not only possible, but also very desirable, for many persons such as Plaintiffs to retire and then return to work as "working retirees," a term used in such cases as *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). As the court below noted, this removal of the salary caps meant that for the first time ever, it was possible for state employees and PORS members to take full retirement, collect full retirement benefits, and also return to their former state jobs at salaries that could have been (but were not required to be)

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[4] *See* Act No. 189 of 1989, Part II, §50B.

[5] Act No. 100, of 1999, Part II, § 27.

[6] , Act No. 25 of 2001, § 2.

[7] *See* Act No. 356 of 2002, § 12, which is captioned "Earnings limitation removed under certain conditions."

as high as their former salaries at the time of retirement. R. ___ [Order 2-3]. Still however, the return of a retired employee to the employment from which he or she retired "was conditioned on whether an employer in the system chose to hire that employee." *Ahrens, supra,* 392 S.C. at 351-352, 709 S.E.2d at 60.

Once the salary cap was raised from $9,500 to $25,000 in 1999, the amount of salary earnable by a working retiree had started to become high enough to cover the salaries of at least some fulltime positions. R. ___ [Order at 4] The General Assembly at that time added provisions in § 9-11-90(4)(b)(PORS) and § 9-1-1790(B)(State system) explicitly stating that employers must pay an employer contribution to the Retirement System on the salaries of working retirees who returned to employment. Act No. 100, of 1999, Part II, § 27. Without this requirement for payment of an employer contribution (by the employer, as will be shown) on the salaries of working retirees, there might soon have been a fairly sizable number of fulltime positions, or at least positions with substantial salaries, occupied by working retirees, but with no employer contribution being paid to the PORS or the State Retirement System on the salaries for those positions. R. __ [Order at 4] Such a development would have been detrimental to those two Systems, and to state retirees generally. It would have created a class of positions, including many fulltime positions, for which the Retirement Systems would have received no employer contribution.

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

The amendments to § 9-11-90 between 1999 and 2002 had the effect of authorizing agency heads such as Chief Stewart to rehire, if they so chose, any employees who chose to retire and return to covered employment. There was nothing in the statute that would have prevented such post-retirement rehiring to occur simply on an ad hoc basis, with each working retiree's terms of re-employment and rehire salary to be decided on an individualized basis, after negotiations between the agency head and each such employee. Instead of using that approach, however, Chief Stewart elected to make the terms of re-employment uniform for anyone rehired by him after retirement. (This is not to say that any agent who elected to retire voluntarily was guaranteed to be rehired. As Chief Stewart has noted, he advised persons considering retirement and possible rehire not to participate in the program "unless they were ready to retire immediately and permanently." R. ___ [Order 6], quoting Stewart Aff. Par. 15].) Chief Stewart's affidavit provides additional details of the program, as follows:

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

R. __ [Stewart Affidavit ¶ 24]

Plaintiffs complain that the uniform percentage salary reduction for retirees was equivalent to the amount of the employer contribution paid by SLED to the PORS, that is, 13.6% at the time in 2004 when Plaintiffs Grimsley and Jowers retired. However, as Chief Stewart has stated, and as the court below held, "SLED simply decided to use the percentage figure of the preretirement employer contribution as a uniform measure of the salary reduction and of the amount of cost savings as a result of the rehire process." R. ___ [Order at 10-11], citing R. __ (Stewart Aff., Par. 18). There was nothing in §9-11-90 that spoke in any way to the amount of the salary for working retirees.

The remainder of this section of this Statement of Facts is essentially the same as portions of the lower court's statement of undisputed facts, R. __ [Order 5-8], but is set forth below for convenience of reference.

The Affidavit of former SLED Chief Robert M. Stewart sets forth in detail the entire process under which Plaintiffs retired and rehired. R. ___. [Stewart Aff. Par. 13.] In summary, what happened was that starting in the late summer or fall of 2002 (shortly after the salary caps were eliminated), if a SLED agent wished to retire and seek to become a working retiree, he would first advise Chief Stewart that would be retiring on a date specified in the retirement notice form. R. __ [

Exhibit 1 to Stewart Affidavit.][8] The individual, in signing the form, noted the existence of certain conditions "if I wish to apply to be rehired," and "if I am selected to be rehired. . . ." *Id.* (Emphases added). At that point, the individual was completely retired and separated from employment with SLED, which had no obligation to rehire the individual. *Ahrens, supra,* 392 S.C. at 351-352, 709 S.E.2d at 60; R. __ [Stewart Aff. Par. 22.] Indeed, as already noted, Chief Stewart advised each person considering retirement and rehire not to do so "unless they were ready to retire immediately and permanently." R. ___. [Stewart Aff. Par. 15.]

If a retired employee sought to be rehired, he would then would fill out a form in which he requested Chief Stewart to rehire him. Exhibit 2 to Stewart Affidavit. The form expressed the agent's understanding that that if rehired,

> . . . . the following provisions apply and I agree to them:
>
> **Status: FTE (full time employee) with no grievance or RIF (reduction-in-force) rights (at-will employee).**[9]
>
> Accrual of annual and sick leave at current rate.
>
> **Salary:** **13.6% less than previous base salary** (no longevity pay), reduction of health insurance cost to agency if utilized.

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[8] Exhibits 1 through 4 to the Stewart Affidavit, R. __ - ___, are the forms for Plaintiff Grimsley. Exhibits 5 through 8 are the corresponding forms for Plaintiff Jowers. R. __-__.

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

> Employment not to exceed 48 months.
>
> No lump sum payment for annual leave upon second separation.
>
> Review date: twelve months after· date of rehire.
>
> No probationary period.
>
> Must apply to this agency and receive permission to reenter retirement system as an active member.

R. __ [Exhibit 2 to Stewart Affidavit] (emphases added).[10]

The third step in the process for persons who were rehired was that the SLED Director of Human Resources advised the employee that his request to return to employment had been approved, "based on your written acceptance of the following provisions." R. __ [Exhibit 3 to Stewart Affidavit.] Among the conditions stated in the form for Plaintiff Grimsley, for example, was the following:

> Your salary will be **$45,702 (previous base salary less 13.6%)**, no longevity pay, additional reduction by cost of health insurance to agency if elected.[11]

(Emphasis added.) As the then-Director of Human Resources, Lynn Hutto, testified at her deposition, "They came back at a brand new salary. . . ." Hutto deposition, 43: 12.

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

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

The fourth and final form was informational. It was labeled "Employee Orientation for Re-Employment under the PORS Retirement Provisions." R. ___ [Exhibit 4 to Stewart Affidavit.] This form contained a statement by SLED to the employee that

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

Plaintiffs each signed this form at the bottom. *Id.* The form there stated "My signature below indicates that the above checked items were discussed with me during orientation." *Id.* This sentence was followed by a signature line.

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

employee, as a retiree, was no longer required at the time to pay the employee contribution.[12]

After all four forms had been executed, the employees returned to work, collecting their both their new salaries (13.6% less than before retiring) from SLED and their full retirement benefit from the PORS. As already noted, the positive financial impact of this is illustrated by the case of Plaintiff Grimsley, who in his first full year after his retirement, collected a total of $81,472, more than half again the amount of his preretirement income of $52,896. R. ___ [Stewart Affidavit, Paragraph 20 and Exhibit 9.]

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

The information set forth in this this section of this Statement of Facts is similar to portions of the order below, R. __ [Order-8-11], but is set forth below for convenience of reference.

Because Plaintiffs' claims pertain to the employer contribution, it is appropriate to provide some brief amount of background concerning the nature of

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

the employer contribution and the mechanics of how it operates. This information is found primarily at R. ___ [Affidavit of Donald R. Royal.]

It cannot be disputed that SLED, and not the Plaintiffs, at all times paid the employer contribution for Plaintiffs, just as it has done for all of its employees at all times. R. ___ [Stewart Aff. Par. 17; Royal Aff. Par. 16; Kitchens Aff. Par. 6 & 7.] Plaintiffs have not contend otherwise.

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

> (1) Commencing as of July 1, 1974, each employer shall contribute to the System seven and one-half percent of the compensation of Class One members in its employ and ten percent of compensation of Class Two members in its employ. Such rates of contribution shall be subject to adjustment from time to time on the basis of the annual actuarial valuations of the System.[13]

(Emphasis added.)

The employer contribution is paid by employers periodically in a lump sum that is equal to the appropriate percentage (13.6% in 2004) of the total salary amount actually paid. The remittance is a periodic lump sum payment of the appropriate employer contribution percentage (13.6% in 2004) of that total salary

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

amount. It is not itemized on an employee-by-employee basis.[14] R. __ [Royal Aff. Par. 12.]

In addition, as set forth in more detail in the Royal Affidavit, the employer contribution to the Police Officers' Retirement System, like all fringe benefits in state government, is not included within the salary of the employee, and therefore is not deducted from the salary of the employee. R. ____[Royal Aff. Par. 8.] Instead, it is paid from the fringe benefit category of funds appropriated to the agency. R. ___. Royal Aff. Par. 8.

For SLED, the fringe benefit amount for the employees is approximately 35% over and above the employees' salary amounts. *Id.*, Par. 7. The employees never see this amount reflected in their salary information, because it is not part of their salaries. In addition to the employer contribution to the Retirement System, the total amount of fringe benefits includes such things as employer contributions for workers' compensation, health insurance, and for other similar fringe benefits. *Id.*, Par. 9. Most state employees probably have no idea how much is paid by their employers for these various employer contributions, nor are these specific amounts really a matter of concern for the employees, because these amounts are governed

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[14] At the time of the Hutto deposition in 2009, and earlier, SLED made this lump sum remittance on a quarterly basis. *See* R. __ [Exhibit 20 to Hutto Dep.] Beginning in 2010, the lump sum payment of the employer contribution was made automatically at each semimonthly pay period. There was no change in the nature of the lump sum payment as a specific percentage of payroll, which was over and above the amount paid as salary to the employees.

by law and are over and above the figure that actually is of concern to the employees, that is, their salaries.

As might be expected from the nature of the employer contribution and the manner in which it is remitted by the employer, there is simply no such thing as "having the employer contribution deducted from [employees'] salaries," as Plaintiffs allege. *See* R. ___ [Royal Aff. Par. 8.] In fact, it is uncontested that the postretirement pay stubs of the Plaintiffs reflect no deduction at all for retirement, given that (a) in 2004, retirees did not pay an employee contribution, and (b) the pay stub would never reflect a deduction for the employer contribution, since that amount was never deducted from salary, but rather was paid by the employer as part of benefits over and above salary. *See* R. ___ [Kitchens Aff. Par. 6 and 7.] In other words, if an employee's salary as a working retiree was $45,000, for example, the postretirement employee contribution of about $6,000 was not deducted from that amount. If that had happened, the net postretirement salary would have been about $39,000. But that did not happen. The employee received the full $45,000, and the $6,000 employer contribution was paid by SLED from the fringe benefit appropriation, as is always the case. R. ___ [Royal Aff. Par. 8.] The amount SLED saved by reducing salaries remained in the appropriation category for personal services. R. __ [Hutto Dep. 71:9-12] While SLED did use the percentage figure of the preretirement employer contribution as a uniform measure

of the salary reduction for the postretirement salary, this was simply a way to compute the amount of the reduction and the amount of cost savings as a result of the rehire process. *See* R. ___Stewart Aff., Par. 18. It did not reflect a transfer of funds within SLED's budget.[15]

SUMMARY OF ARGUMENT

The fundamental reason why Plaintiff's claims were correctly dismissed is simply that SLED never at any time deducted the employer contribution from the salaries of the Plaintiffs. The Complaint alleges otherwise, but no such deductions from salaries ever occurred. Plaintiffs retired and made a complete break with their former salaries. They then agreed to be rehired as working retirees at lower salaries. The employer contribution was not deducted from the reduced salary paid to Plaintiffs as working retirees. Instead, it was paid by SLED from funds appropriated for that purpose, just as had been the case for the preretirement salaries.

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[15] By way of illustration, the employer contribution for Plaintiff Grimsley of 13.6% of his preretirement salary of $52,896 at the time of his retirement had been approximately $7,200. The salary reduction upon rehire was also about $7,200. This $7,200 in salary savings was therefore available for salaries for other employees, to be paid from the personal service appropriation. R. ___ [Hutto Dep. 71:9-12]. The employer contribution on his reduced salary upon rehire (13.6% of $45,702) was about $6,215, about $1,000 less than it had been for the preretirement salary. SLED therefore saved all of the salary reduction of $7,200. In addition, there was a savings of about $1,000 in fringe benefits. *See* [Royal Aff. Par. 8; Stewart Aff. Par. 21] (**NOTE:** Footnote 13 on p. 11 of the Order, which was taken from n.13 of SLED's brief in the lower court, contains calculation errors because the numbers in that footnote were inadvertently based on Plaintiff Grimsley's rehire salary in 2004 being $48,318, when in fact the 2004 rehire salary figure was $45,702, as shown on Exhibit 3 to the Stewart Affidavit, R. __ .)

As a result, Plaintiffs' claims are without factual support. SLED took no action inconsistent with the requirements of the retirement statutes, nor did SLED "take" property of the Plaintiffs. In addition, Plaintiffs voluntarily agreed to return to work at the lower salaries, although again, there was no deduction from those salaries for the employer contribution. Finally, and alternatively, Plaintiffs' claims are time-barred by the statute of limitations and by laches, having been brought more than four years after Plaintiffs were fully aware of the arrangement of which they now complain.

ARGUMENT

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

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

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

> unquestionably paid the employer contribution. *See, e.g.*, Royal Aff. Par. 16.

R. __ [Order at 12].

On appeal, Plaintiffs do not directly challenge these conclusions. They concede, as they must, that they are not entitled to a particular salary level upon rehire. They likewise concede, as they must, the fact undisputed that SLED indeed did pay the employer contribution on their rehire salaries.

Instead, Plaintiffs claim only that rehiring a retired employee at a reduced salary would "eviscerate[ ]" the "spirit of the statute." Br. of Appellants 5. Plaintiffs do not specify what that "spirit" might be, but the only thing required by § 9-11-90 is that the employer must make the employer contribution on the salaries of working retirees, which is precisely what happened in this case.[16] That employer contribution is based solely on the rehire salary, not on some other salary from the retiree's past employment or on any other figure. A working retiree returns to work at the choice of the employer and on such terms and conditions as the employer offers, and nothing in §9-11-90 provides otherwise. By the time of the employee's return to work as working retirees, the former employment, and with it the former

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[16] Plaintiffs may be trying to imply that the "spirit" of § 9-11-90 is that the rehire salary should be the same as the preretirement salary, but they have already conceded that they are not "entitled to a particular salary level." *Grimsley, supra,* 396 S.C. at 284, 721 S.E.2d at 427.

salary, had terminated completely. The former salary had no relevance to subsequent events.

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

In light of Plaintiffs' contentions, it is worth noting that when working retirees are rehired after their complete retirement, the situation is significantly different from another program created in the early 2000's, the Teacher and Employee Retention Incentive Program (TERI). That program was created in 2001. It is generally described in *Layman v. State*, 368 S.C. 631, 634-635, 630 S.E.2d 265, 267 (2006). Under the TERI program, there was no termination of employment followed by a separate rehire. Instead, the employee retired, but continued in employment without a break in service. S.C. Code § 9-1-2210(A).[17] The Supreme Court in both *Layman, supra,* 368 S.C. at 643, 630 S.E.2d at 271, and *Ahrens, supra,* 392 S.C. at 351-352, 709 S.E.2d at 60, has made it clear that the General Assembly did not intend for employees who employees who retired

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

outside the TERI program to have a right, contractual or otherwise, to return to work.[18] Plaintiffs' claims might have been more factually apposite if they had been TERI employees whose salaries for what was supposed to be continuing employment had been reduced immediately upon their election to retire and continue working. That scenario, however, simply does not apply in a situation involving working retirees. (The TERI program would never have applied in this case in any event, because it was never made available by statute to PORS members such as Plaintiffs.)

Another unspoken but erroneous aspect of Plaintiffs' argument is Plaintiffs' apparent attempt to imply that the 1999 amendments that added § 9-11-90(4)(b) were intended to make a change in the law with respect to who should pay the employer contribution to the Retirement System for positions occupied by working retirees, as opposed to whether an employer contribution should be made at all. This, however, is not the most accurate way to view that statute. It has always been the case that if a position is covered by a retirement system, the statutes have required that the employer pay the employer contribution. *See, e.g.* § 9-11-220 ("Contributions of employers"). which provides generally for employer contributions. The only change made in 1999 to § 9-11-90, assuming that it was a

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

change at all, merely made it clear that an employer contribution must be made for positions occupied by working retirees. 1999 Act No. 100, Part II, Section 27.[19] In other words, the 1999 addition of § 9-11-90(4)(b) had no relevance to the amount of the rehire salary of a working retiree. It merely confirmed that employers were required to make employer contributions for positions of working retirees, in case that was not already clear.

In light of the concessions that Plaintiff have been required by necessity to make, the only argument left for Plaintiffs regarding § 9-11-90 is that SLED in some sense "misappropriated" the funds that would have constituted their former salaries if they had not retired. Brief of Appellants at 4-8. As the court below held, Plaintiffs have no standing to raise this argument, and even if they did have standing, the argument is without factual or legal merit. R. __ [Order 12-16]. These conclusions of the court below will be summarized and discussed below.

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

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

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

The record establishes that employer contributions are paid only from the appropriation for fringe benefits, i.e., "Employee Benefits." R. ___ [Order at 15, citing Royal Aff. ¶ 8. It is uncontested that salaries, on the other hand, are paid from the appropriations for personal services, and that the salary savings from the retirement/rehire process "remained in the pot for other personal services." R. __ [Hutto Dep. 71:9-12].

Plaintiffs' argument on this point is not very specific, but it appears to be nothing more than a factually-unsupported claim that SLED used funds appropriated for salaries to pay the employer contributions for retirement. However, the court below held that

> [M]oney appropriated for benefits was used at all times to pay benefits, including the employer contribution, and money appropriated for salaries was used at all times to pay salaries. Plaintiffs have not provided any evidence to the contrary.

R. ___. [Order at 15] Plaintiffs have not pointed to any evidence that either type of appropriations (personal service or employee benefits) was expended on anything

other than its stated purpose. Indeed, the Hutto deposition quoted above and the Royal affidavit confirm otherwise. Plaintiffs accordingly cannot now claim, as they do (Br. of Appellants 8), that there is an unresolved question of fact about appropriations. To the contrary, the facts have been established. Plaintiffs, despite having had an opportunity to show otherwise in the lower court, did not do so. As a result, there is no merit to Plaintiffs' claims based on matters related to appropriations.[20]

In addition, in light of this complete break with their former salaries, Plaintiffs do not now have standing to make any claims about the disposition made by SLED of their former salaries, and the court below so held. R. __ [Order 14-15] Once they retired, that had no more standing to challenge the use of funds by SLED than any other citizen of South Carolina. *Id.*, citing *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012).

On appeal, Plaintiffs cite *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993), but that case is a taxpayer standing case permitting taxpayers to challenge an alleged wrongful diversion of public funds paid by them. 315 S.C. at 251, 433

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[20] The lower court also held that even if there had been some kind of factual showing for Plaintiffs' claim of a transfer of salary money to the fringe benefit account, which there was not, such transfers would not have been contrary to appropriations statutes, which permit certain funding transfers. R. __ [Order at 15-16]. Plaintiffs mischaracterize this part of the order below as holding that transfers of appropriation had actually occurred, Br. of Appellants 7-8, but in fact there was no showing by Plaintiffs that such transfers had occurred, and the lower court so noted. R. __ [Order at 15].

S.E.2d at 843. Plaintiffs claim to have such standing on the ground that as retirees, they have standing "as to what SLED does with the money it is appropriated for the retirement system." Br. of Appellants 6-7. However, the claim they actually make, although unfounded, is that money was wrongfully transferred to the fringe benefit account and from there to the PORS. Obviously, even if that allegation had been true, the claimed action would have not have resulted in any decrease in the amount that was paid to the PORS. As a result, Plaintiffs, who are presently retirees who have not been employed by SLED since 2008, can show no harm to themselves from the "misappropriation" they claim. All of the funds due to the PORS were in fact paid to the PORS by SLED. Those were the only funds in which Plaintiffs could even conceivably claim an interest, but those funds were not affected by any action of SLED. Plaintiffs claim standing to complain about the disposition of the money formerly used to pay their salaries, but after they retired, they no longer had "a legally protected right or interest with regard to what SLED did with the money that had funded their former salaries during their original period of employment." R. __ [Order at 14]. As the court below additionally held,

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

> from any SLED actions pertaining to their former salaries after they had retired and then voluntarily returned to work with different salaries.

R. __ [Order at 14].

In summary, the only way that Plaintiffs might arguably have been able to present a valid cause of action based on §9-11-90 would have been to show that a deduction was actually made from their postretirement salaries, and that such deduction was contrary to law. For instance, Plaintiffs might have had a viable claim if they could have shown that after they were rehired: (a) SLED simply decided not to pay the employer contribution from the benefits appropriation and instead (b) advised the employees that their new, working retiree, salaries would be docked by the percentage of the employer contribution (13.6% in 2004), (c) accordingly deducted the employer contribution from Plaintiffs' rehire salaries, and (d) in the process moved funds from the personal services account and used them to pay the employer contribution. This was the claim as indicated by the Complaint. As the record has been developed, however, it has become clear that none of the four events set forth above actually took place. As a result, the claim suggested by the Complaint not founded in fact. R. __ [Order at 16].

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

For the same reasons already discussed, Plaintiffs' "takings" claim fails because in fact there was no deduction of the employer contribution from their salaries as working retirees. As the court below held, once rehired, they "came back at a brand new salary. . . ." R. __ [Order at 14], quoting R. ___, Hutto deposition, 43: 12. Those new salaries, while reduced, did not have the employer contribution deducted from them. In other words, assuming without conceding that Plaintiffs had some kind of property interest in their "brand new" salaries upon being rehired, their "takings" claim still fails, because nothing was deducted from those salaries for the employer contribution, as has already been discussed at length above. Again, Plaintiffs cannot dispute that the only deductions taken from their paychecks upon their return to employment following retirement were not related to the PORS in any way. R. __ [Order 10], citing R. __, Kitchens Aff. Par. 6 and 7. As a result, even if Plaintiffs could show a property interest under the actual facts of this case (as opposed to the facts as alleged in the Complaint), SLED took no action that affected any such interest.[21]

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[21] The court below held not only that there was no property interest, but also that factually, there was no deduction that would amount to a taking of such interest, although the word "taking" was not used. R. __ [Order 16] The "no taking" contention set forth above might therefore constitute an additional sustaining ground.

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

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

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

While the absence of action adverse to a property right is fatal to Plaintiffs' "taking" claim, it is difficult, in light of the facts shown by the record, to see what could serve as the source of Plaintiffs' claim of a property right to anything that happened after their retirement. The documents that refer to postretirement salaries also make clear that once Plaintiffs were rehired after retirement, they were at-will employees who lacked grievance rights.

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

In fact, once Plaintiffs came back to work as at-will employees, there was no provision of statute or contract that required SLED to continue to employ them at all. After returning to work as at-will employees, their salaries could have been reduced by any amount. *Alston v. City of Camden*, 322 S.C. 38, 49, 471 S.E.2d 174, 179 (1996)("[a]n employer privileged to terminate an employee at any time necessarily enjoys the lesser privilege of imposing prospective changes in the

conditions of employment"); *see also, e.g., Massachusetts State Police Commissioned Officers Ass'n v. Com.*, 462 Mass. 219, 226, 967 N.E.2d 626, 632 (2012)("at-will employees do[ ] not have a property interest in future wages (for future services) for which the Commonwealth has decided not to pay; rather, they have a mere expectation as to payment from the Commonwealth for future services"). In the end, however, there still was no taking, even if a property interest had existed.

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

Even if Plaintiffs possessed all of the rights they claim under their first two argument points, which SLED denies, the court below still correctly held that such claims could be, and were, waived by their voluntary agreement to return to work at the slightly reduced salaries to which they agreed. The court below noted that constitutional rights may be waived in contexts far more serious than this one. R. __[Order at 17]. Rights created by statute are also subject to waiver. *See, e.g., Spoone v. State,* 379 S.C. 138, 142, 665 S.E.2d 605, 607 (2008). In one sense, there was nothing for Plaintiffs to waive in the first place, since no rights of theirs were affected by any action of SLED. However, they did clearly agree to return to work at reduced salaries.

Plaintiffs' only response to this is that § 9-11-90 created rights that could not, as a matter of public policy, be waived. Br. of Appellants at 10-11. However, the only public policies that pertain to the issue of salaries to be paid by rehired working retirees is that they have no right to be rehired at all, *Ahrens, supra,* 392 S.C. at 351-352, 709 S.E.2d at 60, and that once rehired, the employer was required to pay the employer contribution, as SLED clearly did. To the extent that §9-11-40 embodies a public policy regarding the employer contribution, that policy is only that an employer cannot rehire a retiree and then not make a contribution to the PORS for the salary paid for that position. Again, however, that did not happen, because SLED did in fact make the employer contribution.

Moreover, as the Order below states, the general concept of reducing the new salaries of working retirees is not only not contrary to public policy, it is something that the General Assembly has endorsed in recent years, R.__ [Order 18]. See, for instance, Act No. 291 of 2010, Part 1B, Section 89.144 (GP: Cost Savings When Filling Vacancies Created by Retirements). The most recent reiteration of this proviso is found in the 2012-2013 Appropriations Act, Part 1B, Section 89.89. In those annual provisos, the General Assembly has mandated that whenever classified FTE positions become vacant because of employee retirements, the vacant positions must be managed so that in the aggregate, there should be a cost savings of 25% when managing those positions. This is the same

general cost savings approach that was part of the Retirement/Rehire program, except that now, the mandated percentage reduction for managing the filling of the vacancies is 25%, instead of the 13.6% reduction that was applied to Plaintiffs Grimsley and Jowers.[22]

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

The lower court also unequivocally held that Plaintiffs consented to the arrangement of which they now complain. R. __ [Order 19-20] The order held that "consent can serve as a defense to numerous acts that might otherwise be held tortious, such as assault, trespass or invasion of privacy, among many others." R. __ [Order 20], citing *Hawkins By and Through Hawkins v. Multimedia, Inc.*, 288 S.C. 569, 571, 344 S.E.2d 145, 146 (1986)("Consent may be found where the evidence shows a voluntary agreement to do something proposed by another, and the party consenting possesses sufficient information and ability to make an intelligent choice"). For the same reasons as have been set forth above, the arrangement to which Plaintiffs agreed was greatly to their own interests, and in accordance with public policy as embodied in the pertinent statutes. They certainly could validly have to consented to return to work on the conditions that governed

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[22] More recently, the General Assembly by the enactment of Act No. 278 of 2012 has restored an earnings cap of $10,000 on most PORS members who retire prior to the age of fifty-seven. While this does not affect these plaintiffs, they would not even have been eligible to retire and be rehired at their former salaries if they were younger than 57 when they retired in 2004.

their working retiree status, and in fact they did so. Their voluntary consent is a reason complete in itself for dismissing their claims.

5. Plaintiffs are now estopped from asserting their present claims.

The court below held that since Plaintiffs had "accepted four years of benefits pursuant to the program that permitted them to retire and return to work," they should be estopped from asserting those claims. R. __ [Order 19] The order quoted a typical case on the subject as follows:

> The principle of estoppel in equity stands upon the very foundations of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect ... to their actions which ... justice dictate[s]." It arises when a person, in reliance on what another has done or said, changes position to his detriment and the other person then attempts to repudiate or evade the consequences of his action or speech.
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> *Russell v. Drivers Leasing Services, Inc.*, 282 S.C. 358, 361, 318 S.E.2d 579, 581 (Ct. App. 1984).

R. __ [Order 19] In this case, Plaintiffs' later challenge to the arrangement is inconsistent with their previous conduct indicating that the arrangement was satisfactory to them. Chief Stewart has stated that "If Plaintiffs, or either of them, had advised me in 2004 that they believed they had a legal claim for the amount of the difference between their old salaries and their new salaries, I would not have offered them the opportunity to participate in the Retirement/Rehire program in 2004, because I would not have wanted SLED to be subject to a later claim for the

cumulative amount of the difference." R. __ [Stewart Reply Aff., ¶ 14]. Plaintiffs have not controverted this statement. They waited until after SLED had paid out the full 48 months' salary before they raised their present claims. Having waited until SLED changed its position by rehiring them and then paying them four years' salaries without complaint from them, they are estopped from claiming that they should have been paid more throughout the entire four years of their time as working retirees.[23]

6. The statute of limitations bars Plaintiffs' claims.[24]

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

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[23] At pp. 11-12 of their brief, Plaintiffs quote a narrow definition of estoppel, citing *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000). However, that definition is incomplete, because estoppel can be based not only on a false representation or a concealment; estoppel can alternatively occur where, "at least, [the party's conduct] is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert. . . ." *Boyd v. Bellsouth Telephone Telegraph Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). That kind of inconsistency is clearly present here.

[24] This contention is offered by Respondent as an additional sustaining ground.

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

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

The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist. *Anonymous Taxpayer v. South Carolina Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) (citing *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 196, 644 S.E.2d 730, 733 (2007)). In the present case, the statute on which Plaintiffs rely, §9-11-90(4)(b), has not changed since its enactment in 1999. Moreover, the terms of Plaintiffs' rehire were set in mid-2004. They accordingly

knew or should have known that their causes of action existed at the time they were rehired.[25]

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

In the present case, the "moment when the plaintiff [had] a legal right to sue," *Harvey, supra,* occurred in mid-2004 when Plaintiffs executed all of the

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

documents of which they now complain. As a result, their claims are clearly barred by the applicable statutes of limitations.

7. The doctrine of laches also bars Plaintiffs' claims.[26]

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

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

Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Here, unreasonable delay is shown by the fact that this action was brought well beyond the expiration of the three-year statute of limitations. In addition, there can be no question as to the detriment to SLED that has resulted from the Plaintiffs' not filing this action until after they had obtained all of the benefits of four years of retirement salary plus retirement benefits. It is obvious that SLED would never have rehired Plaintiffs in 2004 at reduced salaries

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[26] This contention, like the previous one, is offered as an additional sustaining ground.

had SLED known at the time that Plaintiffs would later file suit claiming an entitlement to the difference between their old and new salaries. *See* R. __ [Stewart Reply Aff., ¶ 14]

CONCLUSION

For the foregoing reasons, SLED respectfully submits that the order and judgment of the Circuit Court should be affirmed.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202
TEL: (803) 806-8222
FAX: (803) 806-8855

Counsel for Respondent SLED

Columbia, South Carolina

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