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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee
Circuit Court Judge

Appellate Case No. 2023-001663
Circuit Court Case No. 2014-CP-40-02496

South Carolina Workers' Compensation Commission, ... Respondent,

v.

WestPoint Home, LLC..... Appellant.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Workers' Compensation Commission wrongly took WestPoint Home's money and spent years hiding what it did with those funds. Now, it is trying to sidestep accountability for its behavior by making empty legal arguments and misleading factual assertions, all while remaining silent about the dispositive points of this appeal.

The Court need not look any further to resolve this case than the agency's Executive Director's testimony at trial, where he ***conceded*** that the statute of repose has now expired for all potential claims that could arise from former WestPoint Stevens employees. (R. pp. 118–119; Trial Tr. 40:15–41:4.) This dispositive concession is never addressed, explained, or even acknowledged in the agency's return brief. That concession—and the crush of case law that supports it, including numerous panel decisions from the Commission itself—fully reveals why the agency must immediately divest itself of WestPoint Home's money as a matter of law, and nothing in the agency's brief overcomes it.

ARGUMENT

I. The statute of repose blocks all potential claims by former WestPoint Stevens employees, a restriction imposed by law that the agency ignores in its brief.

In its opening brief, WestPoint Home argued that it is entitled to a full return of the remainder of its deposit because the statute of repose for workers' compensation claims expired in 2007. If there are no potential new claims by former WestPoint Stevens employees as a matter of law, there is no reason at all for WestPoint Home to post any security against such claims, much less for the Commission to retain any of WestPoint Home's funds.

The law on this point is well-settled and clear. A worker's compensation claim for a latent "pulmonary disease arising out of the inhalation of organic or inorganic dusts" is barred unless the

disease "was contracted within [two years] after the last exposure to the hazard peculiar to his employment which caused the disease." S.C. Code Ann. § 42-11-70 (cleaned up).

WestPoint Home cited over a half-dozen cases from the federal court, this Court, and ***even the Workers' Compensation Commission itself*** holding that this statute bars a claim unless the injury manifests itself and the worker brings the claim within two years of his or her last exposure at the worksite. *See generally Matthews v. E.I. du Pont de Nemours & Co.*, Case No. 4:16-cv-2934-RBH, 2018 U.S. Dist. LEXIS 193735 (D.S.C. Nov. 13, 2018); *Parker v. Asbestos Processing, LLC*, Case No. 0:11-1800-JFA, 2015 U.S. Dist. LEXIS 115094 (D.S.C. June 30, 2015), *aff'd sub nom. Southern v. Bishoff*, 675 F. App'x 239 (4th Cir. 2017); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999); *Bethea v. City of Myrtle Beach*, No. 1802724, 2019 SC Wrk. Comp. LEXIS 208 (2019); *Truax v. Daniel Const./Fluor Daniel*, No. 0411701, 2009 SC Wrk. Comp. LEXIS 30 (2009); *Gibson v. Westinghouse Elec. Corp.*, No. 0319071, 2006 SC Wrk. Comp. LEXIS 895 (2007); *Bishop v. Westinghouse Elec. Corp.*, No. 0318085, 2006 SC Wrk. Comp. LEXIS 1015 (2007) (all enforcing South Carolina Code § 42-11-70 exactly as WestPoint Home argues here).

The agency has no response to this argument. Instead, it tries to distract the Court from the statute of repose and its dispositive effect on this case by presenting arguments on unrelated points or by taking positions contrary to its own prior rulings. The Court should not be misled.

Irrelevant Actuarial Testimony: First, the agency devotes numerous pages of its return to citing its actuarial expert's opinion that former WestPoint Stevens employees may eventually contract an occupational disease several years in the future. (Op. Br. at 7, 12–19.) It repeatedly argues that this testimony is "uncontroverted," but that boast should fall on deaf ears, as that "uncontroverted" testimony is irrelevant to whether the statute of repose bars those claims.

The legal effect of the statute of repose controls whether there is any lawful basis for the Commission to retain a single penny of WestPoint Home's money, but the agency's expert conceded he did not account for it in his analysis:

> Q: Mr. Burkhalter, you don't have an opinion on whether any future claims are barred by the statute of repose, do you?
>
> A: I do not.

(R. pp. 190–191; Trial Tr. 112:25–113:2.)

The lack of an opinion from the Commission's expert stands in stark contrast to the testimony from its Executive Director, who conclusively (and correctly) testified that the statute of repose for claims by former WestPoint Stevens employees has already closed:

> Q: The company WestPoint Stevens went out of business on August 8th, 2005, right?
>
> A: That's right.
>
> Q: The statute of repose for any latent injury claim closed on August 8th, 2007, right?
>
> A: Any latent claims is two years from the date of diagnosis.
>
> Q: No, sir, that's the statute of limitations. I'm talking about the statute of repose.
>
> A: Repose.
>
> Q: ***The statute of repose is two years from the last exposure, correct?***
>
> A: ***Yes.***
>
> Q: ***So that would have been August 8th of 2007, correct?***
>
> A: ***Right.***

(R. pp. 118–119; Trial Tr. 40:15–41:4 (emphasis added).)

Director Cannon's concession of this dispositive point moots the entirety of the agency's appellate argument regarding its actuary's testimony. The Court should disregard the Commission's repeated reliance on irrelevant testimony accordingly.

Consistent with the Workers' Compensation Act: Next, the Commission argues that enforcing the statute of repose here would be "antipathetic" to the agency's view of the overall "scheme" of the workers' compensation law. (Op. Br. at 14–19.) But rather than indefinitely providing a blank check for workers, as the agency's brief suggests, the Workers' Compensation Act contains procedural safeguards for employers as well, including the statute of repose.

In fact, the agency's argument to this Court is exactly the opposite of how the Commission itself has repeatedly enforced the statute of repose to block claims. When enforcing the statute of repose precisely as WestPoint Home argues here, the Commission has recognized that "the purpose of [South Carolina Code §] 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended." *E.g.*, *Gibson*, 2006 SC Wkr. Comp. LEXIS 895, at *20–21; *Bishop*, 2006 SC Wrk. Comp. LEXIS 1015, at *20–21.

It has recognized that Section 42-11-70 requires a disease to "manifest itself and/or disable[] the claimant" within two years of the last exposure in order for the injury to be compensable. *Gibson*, 2006 SC Wkr. Comp. LEXIS 895, at *20–21; *Bishop*, 2006 SC Wrk. Comp. LEXIS 1015, at *20–21.

And it has recognized that it would be "impossible to reconcile" an argument that a claimant is entitled to compensation for a pulmonary disease decades after he or she last worked for an employer with the plain language of Section 42-11-70 barring such claims unless the injury manifests itself or the worker becomes disabled within two years of the last exposure. *Truax*, 2009 SC Wrk. Comp. LEXIS 30, at *7.

In short, the Commission itself has already considered and rejected the very arguments it is making here. The Court should likewise reject the agency's about-face appellate arguments, as enforcing the statute of repose is fully consistent with the Workers' Compensation Act and with how the agency has repeatedly enforced the repose period to block expired claims.

Policy Arguments are for the Legislature, Not the Court: The Commission also argues that the agency should not be required to return the remainder of WestPoint Home's deposit because there will be no funding source for future claims by former WestPoint Stevens employees. (Op. Br. at 16–18.) This is a policy argument, not a legal one, and it fails from the outset because there will be no future claims due to the expiration of the statute of repose. Not only has the Commission itself previously acknowledged that the statute of repose blocks such claims, it has held that any perceived injustice of the law is for the General Assembly alone to fix:

> Under the "plain meaning" rule, it is not the court's place to change the meaning of a clear and unambiguous statute. S.C. Code Ann. § 42-11-70 is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that is not contracted within two years of the date of the last injurious exposure. ***Notwithstanding the latency period of asbestos related diseases, such as asbestosis, the legislature has never amended this provision and its intent is abundantly explicit.*** Any doubt as to the intent of the legislature to exclude pulmonary related diseases from compensation unless contracted within two years of the Claimant's last exposure is removed when looking at the lone exception to this rule, that being for ionizing radiation.

Truax, 2009 SC Wrk. Comp. LEXIS 30, at *5–6 (internal citations omitted and emphasis added).[1]

[1] WestPoint Home strongly disputes whether following the law as written would even be considered unjust here. In fact, Director Cannon testified in both his deposition and at trial that there have never been any asbestos-based claims from any former WestPoint Stevens employees that would implicate the deposit at issue in this case. (R. p. 144; Trial Tr. 66:10–24; R. pp. 892, 895; Johnson Report at 2, 5 (reciting Director Cannon's deposition testimony).) It is illusory to argue to this Court that it would be unfair to former WestPoint Stevens workers if the agency isn't allowed to keep WestPoint Home's money when there has never been an asbestos-based claim and the statute of repose has closed on any such claims going forward.

The agency's *Truax* ruling echoes a similar observation from the District of South Carolina when it, too, enforced the statute of repose exactly as the Commission has in the past and exactly as WestPoint Home argues here. The federal court's analysis is on all-fours and deserves to be reproduced in full so that the Court can see how far afield the agency's appellate arguments are:

> Statutes of repose serve to relieve potential defendants from liability for acts committed long ago and ***reflect a legislative judgment*** that after a period of time, a defendant should be free from liability. Where a statute of repose is enacted limiting the time for filing a claim, it has the effect of creating a substantive right created by law. Thus, ***statutes of repose can have the effect of extinguishing a claim even prior to discovery of the claim***. While South Carolina Courts have not expressly considered what effect the statute of repose has on the exclusivity provision in the context of worker's compensation claims, the Workers' Compensation Commission has routinely barred employees from receiving benefits under the Act pursuant to Section 42-11-70 where the two-year time period has expired. These administrative decisions acknowledge that the purpose of the statute of repose is to protect the employer against such claims which, due to the passing of time, can no longer properly be investigated and defended. Further, this Court must give due consideration to ***the legislature's intent*** in its decision to limit the time period for employees with asbestos-related injuries to recover under the Act despite harsh application in this case.
>
> * * * * *
>
> Here, the plain reading of the statute of repose serves to clearly provide that claims for pulmonary disease arising out of the inhalation of organic or inorganic dusts must be brought within two years after the last exposure to the hazard. Mr. Matthews worked for DuPont throughout the 1960s. He developed his pulmonary disease decades later, well past the period provided for in the statute of repose. ***While this result may seem unfair, this Court is not tasked with legislating.***

Matthews, 2018 U.S. Dist. LEXIS 193735, at *24–26 (citing the Commission's decisions in *Truax*, *Gibson*, and *Bishop*, among numerous other authorities) (emphasis added and cleaned up).

What's more, the Commission's argument that the law should be ignored so the agency always has money to pay claims is not even supported by its own actions. As described on Pages 3 and 4 of WestPoint Home's opening brief, the agency uses an actuarial formula to set the amount of security needed for self-insured employers. That formula takes (1) the average annual claims

actually paid for the prior three years; (2) multiplied by a factor of 1.5; and then (3) rounded to the next highest $50,000. (R. p. 216; Letter from Commission to WestPoint Stevens (July 14, 1997); R. pp. 119–120; Trial Tr. 41:21–42:13.) Based on this actuarial formula, a company that has not paid anything in claims for three consecutive years need not post security.

It cannot be true that the agency was entitled to take all of WestPoint Home's deposit to ensure that there were reserves to pay future claims when the agency's own method for setting security does not require such reserves if the employer's actual claims paid dwindles to nothing. In addition to being contrary to the actual law governing this issue and the General Assembly's inclusion of a statute of repose to provide employers with a knowable end date for potential claims, the agency's "policy" argument is contrary to how the Commission actually sets security for self-insured employers.

All Case Law Supports WestPoint Home's Argument: Finally, and tellingly, the Commission never mentions *Matthews*, *Truax*, *Gibson*, or *Bishop* in its return brief. The only time it even dips its toe in the water to acknowledge adverse precedent, the agency cites Judge Anderson's opinion in *Parker* and dismissively states that *Parker*'s "holding was dicta" and that its ruling "is neither correct nor persuasive." (Op. Br. at 14.) This is wrong for several reasons.

First, by definition, a "holding" cannot be "dicta." *See generally Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is 'not essential to the decision.'" (quoting *Black's Law Dictionary* 465 (7th ed. 1999))).

Second, Judge Anderson based his summary judgment decision on the Commission's own prior rulings enforcing Section 42-11-70 in *Truax*, *Gibson*, and *Bishop*, as well as decisions from the South Carolina Supreme Court construing the word "contract," to conclude that the statute of repose bars a claim unless the worker actually "became disabled" within two years of his or her

last exposure to the occupational hazard. 2015 U.S. Dist. LEXIS 115094, at *12–22. His analysis of the statute of repose and reliance on the agency's consistent treatment of the issue was the basis of a summary judgment ruling.

Third, the Commission does not even try to explain or defend its statement that *Parker* is somehow "incorrect." The agency's silence in its brief is not surprising, since *Parker* is based on numerous prior decisions from the Commission itself; is consistent with South Carolina Supreme Court precedent and this Court's ruling in *Muir*; was affirmed by the Fourth Circuit; and has subsequently been reinforced by *Matthews*. The Court should not credit the Commission's dismissive treatment of *Parker*, which is fully on-point here.

Puzzlingly, while arguing that the Court should ignore *Parker*, the Commission's brief states "[o]ur courts have ruled consistently with th[e] interpretation" of South Carolina Code § 42-11-70 that would allow the agency to keep WestPoint Home's deposit. (Op. Br. at 13.) In support of this statement, the Commission cites *McCraw v. Mary Black Hospital*, 350 S.C. 229, 565 S.E.2d 286 (2002). But *McCraw* doesn't involve Section 42-11-70 at all. There, the claimant filed her worker's compensation claim less than two years after she last worked at the hospital, so the statute of repose was not a part of that case in any way. *Id.* at 232, 565 S.E.2d at 287. *McCraw* has nothing to do with this case, and the Court should reject the agency's misplaced reliance on it.

* * * * *

At bottom, South Carolina Code § 42-11-70 required former WestPoint Stevens employees to bring any claim for a latent occupational lung disease no later than August 2007, which was two years after WestPoint Stevens ceased operations. Every case construing the statute of repose agrees with this outcome, and the Commission's Executive Director confirmed this dispositive point through his testimony at trial. The agency has not presented any relevant argument in opposition

to this inescapable conclusion. Accordingly, the Court should reverse the circuit court's decision below and direct the Commission to return the remainder of WestPoint Home's deposit.

II. The law only allows the Commission to withdraw funds secured by a letter of credit when "needed," another restriction imposed by law the agency ignores in its brief.

In its opening brief, WestPoint Home detailed how the law prohibits the Commission from withdrawing money secured by a letter of credit unless and until that money is actually "needed for payment of a claim that occurred during the self-insured period." S.C. Code Ann. Regs. 67-1507(D)(5). This same "if needed" limitation on the Commission's ability to withdraw funds was included in a Memorandum of Understanding regarding the letter of credit for which WestPoint Home's deposit provided collateral. (R. p. 225; Memorandum of Understanding ¶ 4.)

In its return, the Commission never engages this legal argument. Instead, it trumpets an "internal policy" that the agency claims allows it to "draw down the letter of credit when the company went out of business," irrespective of whether any claims actually "occurred" for which the money is actually "needed." (Op. Br. at 10.) Nevertheless, the agency spends two pages praising that policy as "rational" and its own "wisdom" in adhering to that policy here. (*Id.* at 10–11.)

The agency's self-serving argument—which, again, ignores the law controlling the analysis and forbidding the agency's conduct here—is precisely the type of overreach by the "so-called Fourth Branch of government" that cannot withstand judicial scrutiny:

> "[S]urely one thing no agency can do is apply the wrong law to the citizens who come before it, especially when the right law would appear to support the citizen and not the agency. . . . An agency decision . . . that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand."
>
> * * *
>
> In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval.

Joseph v. S.C. LLR, 417 S.C. 436, 461, 465, 790 S.E.2d 763, 776–78 (2016) (quoting *Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 977 (10th Cir. 2016)) (cleaned up) (Kittredge, J., concurring).

To enforce the basic separation-of-powers norm that an administrative agency only enforces the law as passed by the legislative branch, the General Assembly expressly forbids agencies from relying on such "internal policies" as a substitute for law. *See* S.C. Code Ann. § 1-23-10(4) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.").

The Supreme Court agrees. *See, e.g.*, *Joseph*, 417 S.C. at 455, 790 S.E.2d at 773 (striking as contrary to the Administrative Procedures Act a "position statement" that the LLR was attempting to enforce without first promulgating it as a regulation subject to legislative oversight).

Here, Regulation 67-1507(D)(5) prohibits the Commission from drawing down the entirety of a letter of credit when the proceeds were not then and never have been "needed for payment of a claim that occurred during the self-insured period." The agency has no answer to this legal argument beyond citing its own "internal policy," which flies in the face of the regulation itself.

That "internal policy" to withdraw money when the agency believes a company may be going out of business—irrespective of whether any "claim that occurred during the self-insured period" even exists—cannot overcome the plain language of the governing regulation, and it certainly cannot justify the agency's unlawful conduct here.[2] Accordingly, the Court should

[2] Further undercutting its position, the agency concedes that its purported "internal policy" isn't published anywhere. (R. pp. 109–110; Trial Tr. 31:24–32:15.) It cannot be the law that an agency can override a promulgated regulation and a Memorandum of Understanding by relying on an unwritten "internal policy" about which the public has no notice and cannot even look up to read for itself.

reverse the circuit court's approval of the agency unlawfully drawing down the entirety of WestPoint Home's $1.8 million deposit.

III. The Court should disregard the Commission's numerous misstatements of fact.

In addition to these obvious legal errors, the Commission's brief is loaded with incorrect statements of fact, and it attempts to insulate those misstatements from scrutiny by arguing that the Court is bound by the circuit court's factual findings. (Op. Br. at 9.) Not so.

WestPoint's claim here is for "an accounting and award of excess cash collateral," along with pre- and post-judgment interest based on what the accounting revealed. (R. p. 53; Ans. & Am. Countercl. at 3.) Actions for an accounting are equitable in nature, meaning that this Court may review the evidence and find facts for itself. *Laughon v. O'Braitis*, 360 S.C. 520, 524–25, 602 S.E.2d 108, 110 (Ct. App. 2004). And the evidence fully rebuts the agency's appellate spin.

First, the Commission acknowledges in its brief that it utilizes its own actuarial formula for establishing how much security is required for self-insured employers. In its brief, though, the Commission states "that formula operates for an ongoing business" and implies that it would be inapplicable here, where WestPoint Stevens went bankrupt. (Op. Br. at 5.) But Director Cannon expressly testified that the agency's actuarial formula for calculating the surety amount is the same for bankrupt and non-bankrupt companies. (R. p. 156; Trial Tr. 78:7–19.) In fact, the formula is specifically designed to set surety "at a level sufficient to pay all claims in the event of an insolvency"—exactly the opposite of what the Commission claims in its brief. (R. p. 216; Letter from Commission to WestPoint Stevens, at 1 (July 14, 1997); R. p. 121; Trial Tr. 43:1–10.)

Second, the Commission argues that it was entitled to withdraw the entirety of WestPoint Home's $1.8 million deposit despite not having $1.8 million in claims pending because the agency was concerned that "no further payments" would be made for claims by former WestPoint Stevens

employees. (Op. Br. at 6.) This is not true. Director Cannon expressly testified the agency knew the letter of credit had not been canceled and that WestPoint Home had assumed that obligation:

> Q: But you knew that WestPoint Home had stepped into the shoes of WestPoint Stevens and had assumed that letter of credit?
>
> A: We did.

(R. p. 105; Trial Tr. 27:5–:8.) Director Cannon further confirmed that at no point "did the agency ever think that letter of credit was no longer in existence"—again, exactly the opposite of what the Commission states in its brief. (R. p. 148; Trial Tr. 70:6–:8.)

Third, and perhaps most surprisingly, the Commission tries to imply that it "needed" the entire $1.8 million deposit at the time it withdrew the money because "[b]etween 2005 and 2013, claims totaling over one million seven hundred thousand dollars were paid for WestPoint Stevens employees." (Op. Br. at 8.) This is incredibly misleading.

In support of this statement, the Commission cites Exhibit 31, which are spreadsheets showing workers' compensation claims payments made to various former WestPoint Stevens employees by Key Risk, a third-party administrator hired by the Commission to process claims.

Those spreadsheets show payments made both ***before and after*** WestPoint Home made its $1.8 million deposit in 2005. Virtually every entry has a row that says "Previously PD" as the Payee, and "Adjustment" as the Transaction Type. All of those "Previously PD" payments predate WestPoint Home's deposit and have nothing to do with WestPoint Home's deposit, and the Commission knows it. There weren't $1.7 million in claims paid with WestPoint Home's money; the total amount of WestPoint Home's funds that were spent paying claims by former WestPoint Stevens employees was only $635,488—barely one-third of the total deposit that was wrongfully withdrawn. (R. pp. 113, 115; Trial Tr. 35:17–22, 37:3–5.) And the last claim was closed and last payment made in May 2008: $45.41 in legal expenses. (R. p. 637; Spreadsheet, at Claim 7445.)

It is telling that the agency would go to such lengths to obscure the actual facts of this case. The truth is that the agency had no lawful basis to withdraw WestPoint Home's money when it did, and it has no lawful basis to withhold that money one moment longer.

IV. The Court should reject the remainder of the agency's makeweight arguments.

In addition to dodging the fundamental legal points of WestPoint Home's arguments and misstating the evidence at trial, the Commission peppers its opposition brief with additional arguments that the Court should readily reject.

Statute of Limitations: On Pages 11 and 12 of its brief, the Commission argues for the first time that WestPoint Home's claim is barred by the statute of limitations. But the agency never pled the statute of limitations as a defense. (R. pp. 68–76; Reply to Am. Countercl. ¶¶ 38–98.) The agency therefore waived this argument as a matter of law. *See* Rule 8(c), SCRCP (requiring a party to affirmatively plead "statute of limitations" in order to preserve this affirmative defenses); *Collins Entm't, Inc. v. White*, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it.").

Nor can a statute of limitations even apply to WestPoint Home's claim for an accounting, as that claim sounds in equity. *See Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005) ("This Court has held that the statute of limitations does not apply to actions in equity.").

Accordingly, the Court should disregard the agency's belated statute-of-limitations argument.

Sovereign Immunity: On Page 19 of its brief, the Commission argues that "sovereign immunity" bars collecting prejudgment interest from a state agency. But all it cites for this position is a concurring opinion from Justice Pleicones in *EllisDon Construction, Inc. v. Clemson University*, 391 S.C. 552, 707 S.E.2d 399 (2011). The Commission says that this concurring

opinion "disposed of the issue" and settles the question "as a matter of law and precedent." (Op. Br. at 19.) Hardly.

In *EllisDon Construction*, the plaintiff claimed it was entitled to prejudgment interest against Clemson based on a contract provision stating that "Clemson would pay interest to Appellant in accordance with the Prompt Payment Act found at section 29-6-50 of the South Carolina Code." 391 S.C. at 553, 707 S.E.2d at 400. The Procurement Review Panel held that the plaintiff failed to comply with the statutory prerequisites to trigger interest under that Code section, but that it could still collect interest against Clemson based on the general interest statute, South Carolina Code § 34-31-20. *Id.* at 554, 707 S.E.2d at 400. The Supreme Court ultimately held that the plaintiff could not access the general interest statute (S.C. Code Ann. § 34-31-20) because it had specifically contracted for a different interest statute to apply (S.C. Code Ann. § 29-6-50). *See id.* at 555, 707 S.E.2d at 401 ("Therefore, Appellant is not entitled to interest under section 34-31-20(A) because it contracted for a different rate of interest.").

Sovereign immunity had nothing to do with the Supreme Court's decision in *EllisDon Construction*, and the concept does not even appear anywhere in the majority's opinion. If anything, *EllisDon Construction* indicated that the plaintiff would have been entitled to recover interest from Clemson under the general interest statute if it hadn't specifically contracted for interest under a different statute. That directly rebuts the Commission's argument.

The General Assembly specifically provides that litigants like WestPoint Home should not be deprived of the time value of their money. *See* S.C. Code Ann. § 34-31-20(A) ("In ***all cases*** of accounts stated and in ***all cases*** wherein any sum or sums of money shall be ascertained and, being due, ***shall draw interest according to law***, the legal interest shall be at the rate of eight and three-fourths percent per annum.") (emphasis added). "All cases" means exactly what it says, and the

law does not exclude cases where an agency has misappropriated a private entity's funds. As such, WestPoint Home is entitled to prejudgment interest as detailed in its opening brief.

2019 Order: The circuit court initially entered an order holding that WestPoint Home was not entitled to learn information about how its deposit had been used by the agency. WestPoint Home timely sought reconsideration of that order, which the circuit court effectively granted over a series of partial rulings requiring the Commission to disclose information to WestPoint Home. (R. p. 34; Order Denying Mot. for Protective Order at 3 n.1 (Nov. 16, 2021).)

Nevertheless, to the limited extent there is some stray remark or statement by the circuit court in the 2019 order that is inconsistent with the arguments and authorities presented in WestPoint Home's opening brief, WestPoint Home included the 2019 order as part of this appeal so that it could not be accused of failing to preserve an issue or an argument. It is simply untrue to say that WestPoint Home has "abandoned any appeal" of that order, as the Commission argues in its return brief. (Op. Br. at 19–20.) The Court should disregard that final argument accordingly.

CONCLUSION

The Commission's opposition brief provides no true opposition to this appeal at all. Instead, it is loaded with incorrect statements of fact, citations to irrelevant case law, and policy arguments that are better suited for a legislative white paper than for a merits brief to this Court.

But what's missing from the Commission's brief is more telling than what's in it.

The Commission's brief does not address the crush of case law cited in WestPoint Home's brief (including decisions from the agency itself) holding that the statute of repose has closed on all potential claims by former WestPoint Stevens employees—nor does the Commission's brief address the fact that its Executive Director confirmed this exact point through testimony at trial. Silence.

The Commission's brief does not address WestPoint Home's argument that both the governing regulation and the Memorandum of Understanding regarding the letter of credit prohibited the agency from withdrawing the entirety of WestPoint Home's deposit without there being any claims actually incurred for which that money was needed. Silence.

And the Commission's brief does not address the actual statute that entitles WestPoint Home to recover prejudgment interest here. Silence.

The Commission's silence on every dispositive point is deafening and leaves no doubt that the circuit court's decision cannot stand. Accordingly, WestPoint Home respectfully requests that the Court reverse the decision below and remand the matter with instructions for the circuit court to direct the Commission to return to WestPoint Home the remainder of its deposit, the interest earned on that deposit, and prejudgment interest to which WestPoint Home is entitled as a matter of South Carolina law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certify that this Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below via email at the address(es) below:

Pleading(s): Appellant's Reply Brief

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