RECEIVED
May 18 2026
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee
Circuit Court Judge

Appellate Case No. 2025-002536
Court of Appeals Op. No. 6121 (Sept. 17, 2025)

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

v.

WestPoint Home, LLC..... Respondent.

RESPONDENT'S BRIEF

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

LAW OFFICES OF HERBERT BEIGEL

Herbert Beigel
Pro Hac Vice
hbeigel@me.com
5641 N. Chieftan Trail
Tucson, AZ 85750
(520) 825-1995

Attorneys for Respondent WestPoint Home, LLC

May 18, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

QUESTIONS PRESENTED

1. **Expiration of Statute of Repose:** The Workers' Compensation Commission's Executive Director testified at trial that the statute of repose—South Carolina Code § 42-11-70—for claims by former WestPoint Stevens employees has expired. The Court of Appeals agreed. That ruling is consistent with every court that has analyzed the issue, including numerous decisions from the appellate division of the Commission itself. Did the Court of Appeals err in so holding?

2. **Law of the Case:** The Court of Appeals rightly held the Commission erred as a matter of law when it withdrew the entirety of WestPoint Home's $1.8 million deposit in 2005. The agency did not challenge that ruling in a rehearing petition or in its certiorari petition, nor did the Court grant certiorari review over that predicate issue. Is that ruling now the law of the case?

3. **Wrongful Withdrawal of Funds:** The Commission withdrew WestPoint Home's $1.8 million from the bank despite there being barely $600,000 in workers' compensation claims to pay with those funds. The controlling regulation and contract allowed the agency to access the letter of credit only when funds were "needed" to pay then-existing claims. Did the Court of Appeals err when it held that the Commission wrongly withdrew the full deposit?

4. **Prejudgment Interest:** After the Commission wrongfully seized WestPoint Home's money, the agency collected hundreds of thousands of dollars in earnings (and counting) on that money over the last two decades. The Court of Appeals held that WestPoint Home is entitled to recover those earnings, and it indicated that WestPoint Home may also be entitled to collect prejudgment interest, though it made no determination on the latter point and remanded for such an analysis. The Commission does not challenge WestPoint Home's entitlement to those earnings, but it does argue that sovereign immunity bars prejudgment interest. Does sovereign immunity protect the government from paying prejudgment interest on contract claims?

INTRODUCTION

The Court of Appeals held that the Workers' Compensation Commission wrongly seized WestPoint Home's money in 2005, has wrongly held WestPoint Home's money ever since, and must give the money back plus the earnings that accumulated over the last two-plus decades. The agency now asks this Court to construe South Carolina Code § 42-11-70 in such a way that allows the government to hold those private funds in perpetuity. The Court should soundly reject the agency's position.

For years, everyone who has had any authority to speak for the Commission has agreed that Section 42-11-70 is a statute of repose that blocks claims that are "too old to be fairly investigated and defended." *E.g.*, *Gibson v. Westinghouse Elec. Corp.*, No. 0319071, 2006 SC Wrk. Comp. LEXIS 895, at *19–21 (2007) (agency's appellate division).

That includes the commissioners themselves when acting in their judicial capacity.

It includes the agency's Executive Director. (*E.g.*, App. 322–23; Trial Tr. 40:18–41:4.)

And it includes the Commission's trial counsel in this case, who were seconded from the Attorney General's office to represent the agency. (*E.g.*, App. 370, 372, 376; Trial Tr. 88:24–25, 90:22–25, 94:18–25.)

Yet, once the Court of Appeals held the Commission wrongfully seized and must return WestPoint Home's money, the agency has done a complete about-face on its own judicial holdings, representations, and trial testimony.

Now, the Commission is inexplicably trying to disown ***its own precedent*** and ***its own representations*** by arguing that Section 42-11-70 is something other than a repose period. Worse, the agency's posturing is designed to allow the government hold a private company's money in perpetuity in direct defiance of an order of the United State Bankruptcy Court.

This is shocking behavior by the Fourth Branch of Government. The Court should reject the agency's newfound arguments, affirm the Court of Appeals, and allow WestPoint Home to recover its wrongfully-seized money, plus earnings, without delay.

COUNTERSTATEMENT OF THE CASE

This case involves a dispute about $1.8 million that WestPoint Home deposited ***21 years ago*** when purchasing assets of a company in bankruptcy that was self-insured for workers' compensation claims made by its South Carolina employees. That deposit was ordered by a Bankruptcy Court in New York in 2005 as security for potential claims by the bankrupt company's now-former employees, but it turned out to be far in excess of the security actually needed.

Despite not needing the entirety of that deposit, the Workers' Compensation Commission wrongfully seized all of WestPoint Home's deposit in 2005; it has wrongfully collected interest on that deposit ever since; the Court of Appeals has ordered it to return the unused, and never-to-be-used, portion, plus interest; but the agency refuses to do so. The factual background necessary to understand how this case came to be is detailed below, along with this case's procedural history.

I. Factual Background

A. WestPoint Stevens operated textile plants in South Carolina, but it declared bankruptcy in 2003 and went out of business in 2005.

WestPoint Stevens was a textile manufacturer with facilities in South Carolina. It was initially known as WestPoint Pepperell. On May 6, 1988, WestPoint Pepperell acquired four plants from J.P. Stevens, the merger of which became WestPoint Stevens. (App. 415; Letter from WestPoint Pepperell to Commission, at 2 (Aug. 28, 1989).)

In 2003, WestPoint Stevens filed for Chapter 11 bankruptcy, Case No. 03-13532 (RDD) (Bankr. S.D.N.Y.). Although the typical goal of a Chapter 11 case is for the debtor to reorganize and confirm a plan of reorganization, when the debtor is unable to confirm a plan, it may have to

liquidate its assets instead of reorganizing. That is what happened to WestPoint Stevens, as it was unable to propose a plan of reorganization that would obtain the requisite votes to confirm from its sophisticated, well-informed creditors. *See generally In re WestPoint Stevens, Inc.*, 600 F.3d 231, 236–37 (2d Cir. 2010) (describing the history of WestPoint Stevens' bankruptcy proceedings).

The entity that is now known as WestPoint Home was the successful bidder during the bankruptcy sale. (*See* App. 1077–82 (tracing the corporate history of WestPoint Home).) The parties entered into an Asset Purchase Agreement that outlined in specific detail that WestPoint Home was purchasing only WestPoint Stevens' assets out of the bankruptcy process. (App. 464; Asset Purchase Agreement with Attachments.)

WestPoint Stevens subsequently went out of business on ***August 8, 2005***. (App. 302; Trial Tr. 20:2–3.)

B. At the time of the bankruptcy, WestPoint Stevens was self-insured for purposes of workers' compensation claims.

At time of the 1988 WestPoint Pepperell–J.P. Stevens merger, the employees at J.P. Stevens' South Carolina plants were insured for workers' compensation claims through private insurance, and injuries to J.P. Stevens employees that occurred prior to that acquisition continued to be covered by insurance. (App. 416; Commission Internal Database Screenshot.) WestPoint Pepperell, on the other hand, was self-insured for purposes of workers' compensation claims. As noted above, the combined company eventually became known as WestPoint Stevens, and WestPoint Stevens was a self-insured employer for workers' compensation purposes. (App. 414; Letter from WestPoint Pepperell to Commission, at 1 (Aug. 28, 1989).)

The South Carolina Workers' Compensation Commission requires companies that self-insure for workers' compensation claims to provide sufficient surety for potential claims. The

Commission does not have any actuaries on staff. (App. 323; Trial Tr. 41:15–17 (testimony of Mr. Cannon).) Instead, the agency uses the following actuarial formula for calculating the surety requirement for self-insured employers:

- The average annual claims paid for the last three years,
- Multiplied by a factor of 1.5, and then
- Rounded to the next highest $50,000

(App. 420; Letter from Commission to WestPoint Stevens (July 14, 1997); App. 323–24; Trial Tr. 41:21–42:13.)

The agency's actuarial formula for calculating the surety amount is the same for bankrupt and non-bankrupt companies. (App. 360; Trial Tr. 78:7–19.) The formula is specifically designed to set surety "at a level sufficient to pay all claims in the event of an insolvency." (App. 420; Letter from Commission to WestPoint Stevens, at 1 (July 14, 1997); App. 325; Trial Tr. 43:1–10.)

In 1997, the Commission's actuarial formula yielded a surety requirement of $1.4 million for WestPoint Stevens. (App. 422; Letter from Commission to WestPoint Stevens (July 14, 1997).) WestPoint Stevens and the Commission entered into a "Memorandum of Understanding" that allowed WestPoint Stevens to post a letter of credit in that amount with NationsBank to secure payment for potential workers' compensation claims. (App. 427; Letter of Credit; App. 429; Memorandum of Understanding.)

In 2003, after WestPoint Stevens filed for bankruptcy protection, the Commission sent a letter to WestPoint Stevens indicating that its surety for workers' compensation claims would increase to $1.8 million. (App. 430; Letter from Commission to WestPoint Stevens (July 15, 2003).) In response, WestPoint Stevens amended its existing letter of credit to increase the amount to $1.8. million. (App. 431; Amendment to Letter of Credit (Aug. 1, 2003).)

C. WestPoint Home deposited $1.8 million to collateralize a letter of credit, but the Commission improperly took the entire deposit.

As noted above, WestPoint Home was the successful bidder during the bankruptcy sale, and it entered into a court-supervised and court-approved Asset Purchase Agreement to acquire certain of WestPoint Stevens' assets. As a condition of its purchase of assets out of bankruptcy, WestPoint Home agreed to deposit up to $35 million to collateralize WestPoint Stevens' various existing letters of credit in numerous jurisdictions. (App. 491; Asset Purchase Agreement § 3.1(a).) Included among those letters of credit was the $1.8 million letter of credit WestPoint Stevens had with the Commission to cover potential workers' compensation claims in South Carolina. (App. 786; Cash Collateral Control Letter Agreement, at WPH0009.)

The Asset Purchase Agreement provided that WestPoint Home was depositing its cash with the understanding that it retained the "right to receive back any portion" of that money that was not used. (App. 491; Asset Purchase Agreement § 3.1(a).)

On August 17, 2005, the Commission withdrew the full amount of WestPoint Home's $1.8 million deposit. (App. 271; Commission Reply to Counterclaim ¶ 32.) However, unknown to WestPoint Home, there were not $1.8 million in payments owed to former WestPoint Stevens employees at the time the Commission withdrew the entire deposit. (App. 305–06; Trial Tr. 23:23–24:8.)

D. The Commission hired a third-party administrator to process claims by former WestPoint Stevens employees, and the last claim was made in 2006.

Through the discovery process, WestPoint Home learned that the Commission hired Key Risk to adjust and administer workers' compensation claims by former WestPoint Stevens employees. (App. 800; Contract for WestPoint Stevens South Carolina Run-Off.) The Commission transferred portions of WestPoint Home's deposit to Key Risk and authorized it to pay claims

made by former WestPoint Stevens employees. The Commission transferred $500,000 of WestPoint Home's deposit to Key Risk in September 2005. (App. 311; Trial Tr. 29:10–13; App. 874; Email from Smith to Sanders (Aug. 26, 2005).) Once those funds were exhausted, the Commission sent Key Risk another $500,000 in April 2006. (App. 314–15; Trial Tr. 32:21–33:9; App. 875; Email from Smith to Sanders (Apr. 5, 2006).)

But Key Risk did not need all of the funds that the Commission sent in the second transfer. Therefore, once Key Risk completed its work administering claims by former WestPoint Stevens employees and all open claims were closed, Key Risk returned $364,512.49 of WestPoint Home's original deposit back to the Commission. (App. 317; Trial Tr. 35:17–22; App. 876; Table of Account Balance.)

Accordingly, the principal remaining from WestPoint Home's deposit is ***$1,164,512.39***. (App. 317; Trial Tr. 35:17–22.) The principal balance has not changed since ***2008***. (App. 319; Trial Tr. 37:3–5.)

There has not been a new claim made against the money deposited by WestPoint Home in ***20 years***. The last such new claim was initiated on June 21, 2006. (App. 811; Key Risk Loss Run Report, at Claim Ending 4475.) Tellingly, following WestPoint Stevens' bankruptcy, seven of its former employees filed workers' compensation claims based on alleged lung illnesses; the Commission denied all seven of those claims. (App. 330–31; Trial Tr. 48:25–49:8; App. 812–852; WestPoint Stevens Claims Data.)

There have not been any payments made from the money deposited by WestPoint Home in ***over 18 years***. The last such payment was made on May 7, 2008, and it was a check for $45.41 to the Turner Padget Graham & Laney law firm for legal expenses. (App. 846; Key Risk WestPoint Payments Spreadsheet, at Claim Ending 7445.)

As of February 28, 2023—the last time the parties reported to the circuit court—the balance on the account holding the remainder of WestPoint Home's deposit was $1,730,565.36, which included both (1) principal remaining from WestPoint Home's initial deposit and (2) earnings that have accumulated on that principal while WestPoint Home's money has been in the Commission's custody. It is undisputed that there are ***no open claims***, there is ***no money reserved to pay claims***, and there have been ***no new claims in two decades***. (App. 321; Trial Tr. 39:6–14.)

II. Procedural History Before the Circuit Court

This litigation is the odyssey of WestPoint Home's attempt to reclaim the unused portion of its deposit and the earnings that have accumulated while the Commission has wrongfully withheld WestPoint Home's money.

As described below, those efforts have lasted nearly a decade and a half because of the Commission's consistent refusal to provide any information at all about what happened to WestPoint Home's deposit. As discovery revealed and as trial confirmed, WestPoint Home is entitled to receive its money back plus earnings on that money, as the Commission never needed to sweep the full amount of the deposit out of the bank, and there is no chance of any new claims being made against that deposit as a matter of law.

A. In 2012, WestPoint Home began inquiring into the status of its deposit and requested a refund of the unused portion, but it was stonewalled by the Commission.

The interactions between the parties regarding WestPoint Home's attempt to recover the unused portion of its deposit began with a phone call in 2012, and then with a follow-up letter on February 22, 2013, in which WestPoint Home's then-General Counsel wrote to the Commission seeking certain information as part of an overall goal for "a reduction in the Security Amount held by the State." (App. 787; Letter from Fundler to Commission (Feb. 22, 2013).)

It took the Commission seven months to respond to that letter. When it did, the Commission only stated that it was "unable to release the information you have requested." (App. 788; Letter from Roberts to Fundler (Sept. 10, 2013).)

WestPoint Home responded by explaining that its money was being used to pay claims for former WestPoint Stevens employees, that it has a reversionary interest in the remainder of its deposit pursuant to an order of the Bankruptcy Court, and that the repose period for any additional claims has closed. (App. 790; Letter from Fundler to Roberts (Oct. 15, 2013).) The Commission wrote back that it still would not provide any of the requested information to WestPoint Home. (App. 792; Letter from Roberts to Fundler (Nov. 19, 2013).)

B. The Commission filed suit in 2014 seeking a declaration that it is entitled to keep information regarding WestPoint Home's deposit a secret, and WestPoint Home counterclaimed to recover its money with interest.

As the next step of its stonewalling, the Commission commenced this case on April 17, 2014, and sought a declaration that WestPoint Home was not entitled to receive the information it had requested, arguing that the information was strictly confidential and could not be disclosed outside of the agency. (App. 250–54; Compl.) In other words, the Commission sought a ruling that it did not have to tell WestPoint Home anything about how the agency had spent WestPoint Home's money in the intervening nine years.

WestPoint Home responded with a counterclaim seeking to receive the requested information and to recover "all monies owed and improperly retained by the State." (App. 264; Ans. & Am. Countercl.) It amended its counterclaim, with permission from the circuit court, to also seek interest. (*Id.*)

The parties jointly moved to have this case referred to the Business Court, where it was assigned to Judge Lee. They also agreed to bifurcate the case into two issues: (1) "Whether

Defendant is entitled to access certain records and information maintained by Plaintiff," and (2) "Whether Defendant is entitled to recover certain monies that are currently in the custody of the State of South Carolina." (App. 221; Consent Scheduling Order (Dec. 11, 2014).)

The parties briefed Issue 1, and the circuit court initially granted summary judgment in the Commission's favor on that issue. (App. 223; Order (Apr. 26, 2019).) WestPoint Home timely sought reconsideration of that ruling, and after briefing and a status conference, the circuit court ordered the Commission to disclose two pieces of information to WestPoint Home: (1) "The number of open health care claims currently asserted against the above-described funds being held by the Treasurer [*i.e.*, WestPoint Home's deposit]"; and (2) "The amount of the funds that remain." (App. 223; Order (July 3, 2019).)

Those disclosures resulted in a sea-change in the litigation.

C. The Commission revealed that it still held over $1.1 million of the principal deposit; it had earned an additional $600,000 in investment returns off of WestPoint Home's deposit; and it had not paid a claim in over a decade.

The Commission complied with the circuit court's instruction to disclose these data points, and its disclosure was damning: Nearly 15 years after WestPoint Home made its deposit, the agency still held the bulk of that deposit, and there were no open claims.

Armed with this new information, WestPoint Home supplemented its arguments regarding reconsideration and asked the circuit court to require the Commission to produce a loss-run report showing how the agency has paid claims using WestPoint Home's money, and then to perform "an actuarial analysis to determine how much security, if any, would be needed for potential future claims." (App. 1125; Supp. Mem. at 6 (Sept. 13, 2019).)

Consistent with its stonewalling, the Commission again opposed any additional disclosure, and again it argued that South Carolina law prohibited the Commission from disclosing any

information to WestPoint Home about how WestPoint Home's deposit had been spent. (App. 1134; Resp. Mem. (Oct. 10, 2019).)

The court held a hearing on October 18, 2019, regarding the access-to-records issue. During that hearing, the Commission revealed for the first time—***after litigating the issue for over five years***—that the data sought by WestPoint Home was not truly confidential, but instead was in the custody of Key Risk, a third-party administrator that adjusted claims for the Commission.

Following that surprise disclosure, WestPoint Home subpoenaed records from Key Risk, without objection by the Commission. Key Risk produced records showing that the last payment made on any workers' compensation claim from a former WestPoint Stevens employee was a $45.41 payment to the Turner Padget Graham & Laney law firm on May 7, 2008. (App. 846; Key Risk WestPoint Payments Spreadsheet, at Claim Ending 7445.)

WestPoint Home then sought to depose the Commission through a Rule 30(b)(6) witness regarding the information it received from Key Risk. Consistent with its efforts to prevent WestPoint Home from learning anything about the deposit, the Commission moved for a protective order and sought to quash the deposition. (App. 1144; Mot. for Protective Order (Mar. 8, 2021).) The circuit court denied that motion and noted that the disclosure of information from Key Risk without objection from the Commission effectively resulted in WestPoint Home's prior motion to reconsider being granted. (App. 236; Order Denying Mot. for Protective Order (Nov. 16, 2021).)

Following that order, the Commission produced records revealing the agency has its own actuarial formula for calculating the amount of surety it requires of self-insured employers. (App. 420; Letter from Commission to WestPoint Stevens (July 14, 1997).) Under that actuarial formula, which was detailed above in Section I.B, WestPoint Home should have recovered the full balance of its deposit in ***2012***—which is precisely when WestPoint Home first reached out to the

Commission about recovering the remainder of the deposit. (App. 787; Letter from Fundler to Roberts (Feb. 22, 2013) (recounting 2012 discussion with the agency regarding recovering funds).)

The Commission's records also revealed that at the time of the production, the Commission held a balance of $1.7 million using WestPoint Home's deposit: principal of $1.16 million, and the remainder was interest earned off of the principal. (App. 877; Trust Fund Report.)

D. At trial, the Commission's Executive Director conceded both that the agency never needed the entire $1.8 million deposit in the first place and that the repose period for new claims closed in 2007.

A bench trial took place on August 31, 2022, in Richland County. At trial, Gary Cannon—at the time, the Commission's Executive Director—testified unequivocally that the Commission withdrew the entirety of WestPoint Home's $1.8 million deposit even though there never has been and never will be an actual need for the agency to use all of that money.

1. The Commission took all of WestPoint Home's deposit even though there has never been a need for the entire $1.8 million deposit.

Director Cannon began his testimony by confirming that the plain language of the letter of credit collateralized by WestPoint Home's deposit allowed the Commission to withdraw money only "if needed":

> Q: And item four [of the letter of credit] says that the Commission can draw on a letter of credit ***if needed*** to pay any Workers' Compensation claim or claims of administration expense; is that right?
>
> A: Yes, sir, that's what it says, ***if needed***.

(App. 304; Trial Tr. 22:2–:6 (emphasis added).)

He then conceded the Commission withdrew the entire letter of credit—all $1.8 million of WestPoint Home's money—in 2005 even though only a fraction of the deposit was "needed" to pay claims:

Q: The agreement says that the time the agency can call the letter of credit is if the money is needed to pay claims, right?

A: That's what it says.

Q: That's right. And when the agency withdrew $1.8 million on August 17th of 2005 and moved it to an account w[ith] the State Treasurer's office, ***there was not $1.8 million in claims pending, were there?***

A: ***No, sir, there was not.*** We weren't sure, though, because of the type of business they had and the potential asbestos claims that could have been filed.

Q: Right. Claims could have been filed?

A: That's right.

Q: ***But they weren't filed?***

A: ***They were not.***

Q: There were not $1.8 million of claims pending at the time the money was taken from my client's bank account, were there?

A: ***No, sir, not any pending claims***, but it is the Commission's responsibility to ensure money is available for any claims to be fled in the future for employees of a self-insured company.

Q: And the way the agency ensures that that money is there is by having these letters of credit, right?

A: That's correct.

(App. 305–06; Trial Tr. 23:19–24:18 (emphasis added).)

And Director Cannon confirmed that the agency still does not "need" that money even today:

Q: The agency basically took it as a $1.8 million loan from WestPoint Home that you can use to pay claims if they ever come up, right?

A: We never considered it a loan. We considered it money that would be available to pay the claims if they came up, not a benefit to the Commission. We gained nothing by getting that money other than

exercising our fiduciary responsibility to ensure the claims that would be paid for the employees of [WestPoint] Stevens.

Q: ***But you didn't need $1.8 million?***

A: ***Not the day we drew it down***, but we weren't sure what we would need in the future.

Q: ***And you haven't needed it today, have you?***

A: Well, ***we have not***, but we have examples of similar businesses that claims have been fled where the authorities were—since the '50s. So we have to look at the businesses, we have to look at the potential claims coming in to ensure that money is available. If it's not available and a claim is filed 40, 50 years later, then the injured employee has no recourse to pay for their medical benefits or compensation.

Q: Mr. Cannon, we'll get into that in just a minute, but my question is, again, very precise. ***As we stand here today in August of 2022, the agency has not needed $1.8 million to pay claims of former WestPoint Stevens employees, has it?***

A: ***That's correct.***

(App. 310–11; Trial Tr. 28:2–29:3 (emphasis added).)

Stunningly, Director Cannon tried to explain away this obvious breach of the letter of credit and unlawful taking of WestPoint Home's money by saying that the Commission's behavior was consistent with an unwritten agency policy:

Q: So there's really no dispute that that money was going to be there [in the bank, collateralizing the letter of credit]. It was just a question of which account is it in. Is it in my client's account where it will collect interest or is it in the agency's account where it will collect interest not for my client?

A: And we were following policy of drawing down the letter of credit when the company [*i.e.*, WestPoint Stevens] went out of business.

Q: That policy is not published anywhere, is it?

A: No, sir.

(App. 313–14; Trial Tr. 31:24–32:15.)

2. There is no reason for the Commission to retain any of WestPoint Home's deposit.

Not only did Director Cannon concede that the agency has never needed the entirety of WestPoint Home's deposit, he also conceded that the agency will never have a need for any of the remaining money in the future. First, Director Cannon confirmed the agency's own actuarial formula has required $0 as security for claims from former WestPoint Stevens employees since 2012, which is when WestPoint Home first contacted the agency about recovering its money:

> Q: So in 2012, the agency's formula for calculating the surety needed on deposit was zero dollars; is that right?
>
> A: Based on this formula.
>
> * * *
>
> Q: And it's been zero every year since 2012, right?
>
> A: That's correct.

(App. 328; Trial Tr. 46:3–:5, 46:16–:17.)

Not only did the agency's own actuarial formula reveal that the agency didn't need any of WestPoint Home's money since 2012, Director Cannon testified the statute of repose for any new claims filed by former WestPoint Stevens employees ***closed on August 8, 2007***:

> 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.***

(App. 322–23; Trial Tr. 40:15–41:4 (emphasis added).)

E. The circuit court denied WestPoint Home all relief.

After trial, the circuit court requested that the parties submit competing proposed orders resolving the issues in dispute. Thirteen months after trial, the circuit court denied WestPoint Home all relief, finding that the agency was "fully justified" in sweeping the entirety of WestPoint Home's deposit out of the bank and retaining it indefinitely, though it repeatedly acknowledged that Section 42-11-70 is a statute of repose. (App. 213–16; Order at 9–12.) The circuit court entered final judgment in this matter on September 25, 2023.

Respectfully, that order went against all evidence presented at trial recited above and South Carolina law addressing the issues in this case. WestPoint Home timely appealed.

III. Appellate Proceedings

The Court of Appeals rightly reversed on all points. In a unanimous published decision, the court held, first, that "the Commission improperly drew down the letter of credit because the funds were not needed for the payment of any pending claims." (App. 173.)

The court then held that "WestPoint [Home] is entitled to the return of its unused funds" and "any interest the funds have earned in the Treasury account up to the date the Commission returns the money" because the statute of repose for workers' compensation claims for latent injuries—South Carolina Code § 42-11-70—expired in August 2007, two years after WestPoint Stevens wound up. (App. 174–78.) It cited numerous decisions from the Commission itself, as well as trial testimony from the agency's Executive Director, that confirmed this conclusion. (*Id.*)

Finally, the court remanded the question of WestPoint Home's entitlement to prejudgment interest, as the circuit court had not yet passed on the issue. (App. 178–79.)

The Commission sought rehearing, but it did not challenge the Court of Appeals' threshold ruling that the Commission improperly withdrew the entirety of WestPoint Home's deposit. Instead, the agency only argued for the Court of Appeals to treat South Carolina Code § 42-11-70 as something other than a statute of repose—despite decades of the agency and courts treating it as such—so the agency could forever hold WestPoint Home's deposit; and it asked the court to reconsider the remand for purposes of assessing prejudgment interest. (App. 183–196.) The Court of Appeals unanimously denied that petition on November 21, 2025. (App. 198.)

The Commission then sought and was granted certiorari review of the Court of Appeals' holdings that (1) enforced Section 42-11-70 as it is written and as it has always been enforced, and (2) remanded the question of prejudgment interest to the circuit court. Just as it did not seek rehearing on the point, the agency did not seek certiorari review of the predicate holding that the Commission should not have seized WestPoint Home's deposit in the first place. That ruling was correct, and it is now the law of the case—a point on which the remainder of this appeal can turn.

STANDARD OF REVIEW

This appeal involves the interpretation of statutes and regulations, which is reviewed *de novo*. *Books-A-Million, Inc. v. S.C. DOR*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

ARGUMENT

The factual backdrop of this case is extreme, inexplicable government overreach. A state agency has poached nearly $1.2 million from WestPoint Home and held those funds for years without any oversight or accountability, earning interest on WestPoint Home's money all the while. And once the Court of Appeals instructed the agency to simply return that money to

WestPoint Home, the Commission came to this Court with arguments that are directly at odds with the agency's own prior judicial rulings, the agency's own testimony at trial, and every federal and state court ruling that has addressed these issues, with the apparent goal of allowing the agency to keep WestPoint Home's money forever.

The agency's secreting of WestPoint Home's money is unlawful. The agency's litigation posturing is surprising and disappointing. And the agency's arguments are not even preserved for this Court's review. The Court should affirm the Court of Appeals' decision accordingly.

I. South Carolina Code § 42-11-70 bars all potential claims by former WestPoint Stevens employees.

The bulk of the Commission's brief to this Court involves the agency's newfound re-characterization of South Carolina Code § 42-11-70 as something other than a statute of repose—which is how the agency and courts have always treated this law. The Commission's sudden pivot is baseless and should be rejected.

"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***." *Matthews v. E.I. du Pont de Nemours & Co.*, Case No. 4:16-cv-2934-RBH, 2018 U.S. Dist. LEXIS 193735, at *24–26 (D.S.C. Nov. 14, 2018) (emphasis added); *see Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142–43, 628 S.E.2d 38, 41 (2006) ("A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.").

Because they create substantive rights, statutes of repose are not subject to equitable defenses like "waiver, tolling, and estoppel." *G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003).

The statute of repose for pulmonary diseases in the South Carolina Workers' Compensation Act is South Carolina Code § 42-11-70, which provides:

> Time in which disease must have been contracted.
>
> Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

This statute has all of the hallmarks of a classic statute of repose: it identifies a fixed event ("the last exposure") following which liability for an occupational pulmonary disease definitively ends;[1] it is not pegged to the discovery of an injury; and it is phrased in absolute terms that bar a potential claim unless the elements of the statute are satisfied, irrespective of when the claimant has knowledge of a potential claim. In other words, Section 42-11-70 reflects a legislative determination that, after a specific point in time, liability ends—period.

Courts and the Commission itself have repeatedly examined Section 42-11-70, and they resoundingly reject the argument the agency is now presenting to this Court.

Federal Courts. For instance, in *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*,

[1] The Commission's opening brief nakedly states that Section 42-11-70 "contains no such language or limitation" or any "magic language" as to when liability ends. (Commission's Br. at 4, 18.) But the statute obviously does: the clock begins ticking after the "last exposure" to the occupational hazard, and for pulmonary diseases, it runs out two years after the "last exposure." S.C. Code Ann. § 42-11-70. This is the judgment the General Assembly has made.

675 F. App'x 239 (4th Cir. 2017), a series of plaintiffs claimed to have been injured from exposure to asbestos during their employment at Springs Mills, a textile plant in South Carolina. At the direction of their then-counsel, they filed suit in Mississippi state court asserting common law claims against asbestos manufacturers, but the plaintiffs never provided notice of their claims to Springs Mills, as required by the Workers' Compensation Act to preserve claims under that statute.

In *Parker*, the plaintiffs were suing their former counsel for legal malpractice, arguing that the attorneys failed "to advise their clients that, by going forward solely with asbestos tort claims, the Plaintiffs were forever waiving the right to assert any South Carolina workers' compensation claims they might have had at the time." *Id.* at *6. In response, the defendant-attorneys argued that the plaintiffs did not have any workers' compensation claims to waive because, by the time the defendant-attorneys were engaged to file a tort suit in Mississippi, the statute of repose for such claims had already expired because the plaintiffs had not "contracted" their injuries within two years of their last exposure at Springs Mills. *Id.* at *11–12.

Judge Anderson agreed with the defendant-attorneys.[2] He began his analysis by acknowledging that "there are no decisions from the South Carolina Supreme Court construing § 42-11-70 [the statute of repose]. Thus, this Court must predict how the South Carolina Supreme Court would rule if squarely presented with the issue." *Id.* at *13.

From there, Judge Anderson identified two cases from this Court where it had "interpreted the same term ['contracted'] when construing a statute in the same chapter and title." *Id.* at *14. In *Vespers v. Springs Mills*, 276 S.C. 94, 97, 275 S.E.2d 882, 884 (1981), and *Glenn v. Columbia*

[2] The statement in the agency's brief that South Carolina Code § 42-11-70 has "never been used" to block claims is obviously not true. (Commission Br. at 18.) *Parker* and the other cases cited herein do exactly that.

Silica Sand Co., 236 S.C. 13, 21, 112 S.E.2d 711, 715 (1960), this Court construed the word "contracted" in South Carolina Code § 42-11-40 to mean "disablement or death."

Because South Carolina follows the rule of statutory construction that the same word should be given the same meaning when it appears throughout a single statutory scheme, Judge Anderson concluded the statute of repose must mean that a latent injury claim is barred unless a worker becomes disabled by or dies from a pulmonary disease within two years after his or her last exposure. 2015 U.S. Dist. LEXIS 115094, at *16. As he put it: "[I]n order to demonstrate that they had a viable workers' compensation claim, the Plaintiffs must be able to show that they became disabled within two years of their last exposure to asbestos as the Springs Mills plants." *Id.* at *21–22.

Judge Anderson also surveyed decisions from the Commission that dealt with the issue. By his count, three decisions from the Commission used the exact same analysis he did—namely, relying on *Vespers*'s construction of the term "contracted" within the same statutory scheme—to conclude that South Carolina Code § 42-11-70 was a statute of repose that barred longtail claims: *Gibson v. Westinghouse Elec. Corp.*, No. 0319071, 2006 SC Wrk. Comp. LEXIS 895 (S.C. Work Comp. Comm'n 2007); *Bishop v. Westinghouse Elec. Corp.*, No. 0318085, 2006 SC Wrk. Comp. LEXIS 1015 (S.C. Work Comp. Comm'n 2007); and *Truax v. Daniel Constr./Fluor Daniel*, No. 0411701, 2009 SC Wrk. Comp. LEXIS 30 (S.C. Work Comp. Comm'n 2009).

Because the repose period of Section 42-11-70 had lapsed on all of the plaintiffs' potential workers' compensation claims before they engaged tort counsel in Mississippi, Judge Anderson granted summary judgment in the defendant-attorneys' favor and dismissed the legal malpractice claims. *Id.* at *29.

Parker is on all fours here, yet it is not mentioned in the agency's brief to this Court.

Nor does *Parker* stand alone. Consider *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), which is a standard asbestos tort case. There, the plaintiff filed suit against 29 defendants, with DuPont as the only remaining defendant when this order was entered. *Id.* at *1. DuPont moved for summary judgment, arguing that the plaintiff was its statutory employee and, therefore, the Workers' Compensation Act provided the exclusive remedy. *Id.* at *8. The plaintiff opposed by arguing he was not a statutory employee (which the court rejected), and that "the Workers' Compensation Act is not Mr. Matthews's exclusive remedy because he does not have a right to compensation under the Act based on the statute of repose." *Id.* at *22. Judge Harwell framed this aspect of the plaintiff's opposition as follows:

> It is Plaintiff's position that because the Act includes a statute of repose for Mr. Matthews's asbestos-related lung cancer, which by its nature has a long latency period, his occupational disease is not compensable under the Act. Therefore, Plaintiff argues that unless there is a right to compensation under the Act, the exclusive remedy provision is inapplicable.

Id. at *9.

Judge Harwell rejected the plaintiff's argument. He began his analysis by explaining that "[s]tatutes 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." *Id.* at *24. Because statutes of repose create a "substantive right created by law," they "can have the effect of extinguishing a claim even prior to discovery of the claim." *Id.*

Like Judge Anderson in *Parker*, Judge Harwell noted that "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." *Id.* at *24–25 (citing *Truax*, *Bishop*, and *Gibson*). In his view, "[t]hese administrative decisions acknowledge that the purpose of the

statute of repose is to protect the employer against claims which, due to the passage of time, can no longer properly be investigated and defended." *Id.* at *25.

Judge Harwell does not appear to think this was a close call. He acknowledged that neither party asked him to certify the question to this Court, *id.* at *24 n.7, and he affirmatively held that his decision was compelled by "the legislature's intent in its decision to limit the time period for employees with asbestos-related injuries to recover under the Act, despite its harsh application in this case," *id.* at *25. He confirmed his ruling by looking to cases from other jurisdictions that reached similar conclusions. *Id.* (citing *Hendrix v. Alcoa*, 506 S.W.3d 230 (Ark. 2016), and *Folta v. Ferro Eng'g*, 43 N.E.3d 108 (Ill. 2015)). Judge Harwell summarized:

> 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. Accordingly, this Court agrees with Defendant DuPont that as to DuPont, Mr. Matthews's claim is governed by the Workers' Compensation Act and its exclusivity provisions. Any effect of the Act's statute of repose does not allow him to seek compensation through a civil lawsuit.

Id. at *26 (emphasis added).

Like Parker, the agency's brief does not mention Matthews—which is also on all fours with this case.

State Courts. The Court of Appeals' construction of South Carolina Code § 42-11-70 here is reinforced by *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). In *Muir*, the Court of Appeals held the claimant complied with Section 42-11-70's one-year repose period for non-pulmonary illnesses because he brought his claim in March 1993, just months after his last exposure to the occupational hazard in August 1992. 336 S.C. at 294–95, 519 S.E.2d at 597–98.

The court's analysis in *Muir* is fully consistent with the straightforward analysis of both *Parker* and *Matthews*, and it is consistent with the Court of Appeals' order in this case.

The Commission Itself. As discussed throughout both *Parker* and *Matthews*, the Workers' Compensation Commission—sitting in its appellate capacity, meaning that at least three commissioners agreed on this result in each agency decision cited above and discussed more fully below—has repeatedly denied lung cancer claims based on the statute of repose. A thorough discussion of those cases follows, but it is important to note yet another misleading factual statement in the agency's brief.

On Page 7, the Commission proclaims that there are "450 claims filed for occupational diseases with dates of exposure dating back to the 1950s" filed with the agency, again suggesting that these somehow relate to WestPoint Home and the money in dispute here. (Commission Br. at 7.) To be clear: ***none*** of these relate to WestPoint Home's deposit or any former WestPoint Stevens employees. The agency tried the same sleight of hand at trial, but ultimately conceded that this "statistic" has nothing to do with this case:

> Q: Mr. Cannon, I want to clarify something you just testified to about the agency looking at claims for people from the '50s. Those aren't WestPoint Stevens employees. You weren't talking about WestPoint Stevens?
>
> A: No.
>
> Q: So all that line of questioning actually has nothing to do with our account that we're talking about today?
>
> A: It does not.

(App. 348; Trial Tr. 66:10–17.)

And it is not surprising that none of these claims involve former WestPoint Stevens employees, as Director Cannon conceded at trial that the repose period for claims by those workers closed on August 8, 2007—two years after WestPoint Stevens ceased operations:

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.

(App. 322–23; Trial Tr. 40:25–41:4.)

In its opening brief, the Commission tries to run from this testimony, but those efforts are in vain. That trial testimony is in lockstep the agency's repeated enforcement of Section 42-11-70.

Truax v. Daniel Const./Fluor Daniel, No. 0411701, 2009 SC Wrk. Comp. LEXIS 30 (2009), is perhaps the agency's most fulsome treatment of the issue. There, the Commission used strong language to make the point that longtail claims are barred by the statute of repose:

> 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 any 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.

2009 SC Wrk. Comp. LEXIS 30, at *5–6 (internal citations omitted).

The Commission explained that enforcing the law in this manner protects employers from liability when "employer representatives are no longer available" and "the personnel records and any pertinent test results are likewise unavailable." *Id.* at *7. And in denying Mr. Truax's claim, the Commission held that "it is ***impossible*** to reconcile the thirty-two year gap in this case between the Claimant's last date of employment (1972), and the date he 'contracted' his disease (*i.e.* became disabled) in 2006." *Id.* (emphasis added, parentheticals provided by the agency).

The same theme appears throughout other Commission decisions. The Court of Appeals' analysis here matches ***exactly*** that of the Commission when it has previously addressed this issue. Consider this excerpt from a ruling by the Commission itself, which fully tracks the Court of Appeals' decision, all the way down to relying on this Court's ruling in *Vespers*:

> A question arises as to whether the word "contracted" as used in the statute [*i.e.* S.C. Code Ann. § 42-11-70] may be construed [as] the acquisition of the disease at the time symptoms and disability occur, or at the time of exposure. The answer is settled by established case law in South Carolina.
>
> Our supreme court has previously issued a definition of the word "contracted" in workers' compensation cases in *Vespers v. Springs Mills, Inc.*, 275 S.E.2d 882, 276 S.C. 94 (S.C. 1981). Justice Ness wrote:
>
> > "The term 'contracted' is a term of art which has been defined for compensation purposes in occupational disease cases as "disablement or death."
>
> A straightforward reading of the statute supports the definition of "contracted" in *Vespers*. Our legislature could not have intended that the word "contracted" to be synonymous with "exposure." If it did so, there would be no logical purpose for enacting the statute in the first place. The language references two distinct events: (1) exposure and (2) contracting the occupational disease. Since exposure and contracting the disease are distinct, and not the same, an ordinary and unambiguous meaning should be assigned to the word contracting, *i.e.* when the disease manifests itself and/or disables the claimant. ***The legislature chose to make compensability dependent on their being less than one (or two) year(s) between exposure and contraction of the disease.***
>
> ***The Appellate Review Panel finds that the purpose of 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended.*** Accordingly this statute should be read to effectuate the legislative intent to reasonably limit an employer's period of potential liability for workers' compensation benefits. In determining the legislature's intent, consideration should be given to the necessity for the law, the evils sought to be remedied, and the purpose to be achieved. *Stewart v. The Industrial Comm'n,* 504 N.E.2d 84 (Ill. 1987) (finding that Illinois has a valid state interest in its ***statute of repose*** for occupational diseases).

Gibson v. Westinghouse Elec. Corp., No. 0319071, 2006 SC Wrk. Comp. LEXIS 895, at *19–21 (2007) (emphasis added). The agency repeated verbatim this same analysis in *Bishop v. Westinghouse Elec. Corp.*, No. 0318085, 2006 SC Wrk. Comp. LEXIS 1015, at *19–21 (2007).[3]

* * * * *

At bottom, every case that has analyzed South Carolina Code § 42-11-70 has held that the repose period for a workers' compensation claim for "a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years" from the worker's final exposure to the hazard. For former WestPoint Stevens employees, the repose period for any new claims closed no later than August 8, 2007, as WestPoint Stevens stopped conducting business on that same day in 2005—***precisely as Director Cannon testified at trial***.

In light of this crush of legal authority and unambiguous trial testimony, the Court of Appeals' ruling is wholly consistent with how this issue has been treated by every judicial body, including the Commission itself—***the Petitioner here***. And while the agency bemoans the result in this case—namely, returning to a private entity money that the government never should have taken in the first place—such an outcome is an unavoidable function of "the legislature's intent in its decision to limit the time period for employees with asbestos-related injuries to recover under" the Workers' Compensation Code. *Matthews*, 2018 U.S. Dist. LEXIS 193735, at *25. And "[w]hile this result may seem unfair, this Court is not tasked with legislating." *Id.* at *26.[4]

---

[3] The legal analysis the Commission itself detailed in *Gibson* and *Bishop*—including reliance on this Court's settled precedent in *Vespers*—is precisely the same analysis the Court of Appeals employed here. Yet, in its brief to this Court, the agency describes this analysis—***the agency's own legal analysis***—as "truly incomprehensible." (Commission Br. at 4.) It then spends Pages 12 through 17 of its brief trying to argue around the legal analysis that the agency itself (and every court that has ever examined the issue) has used to deny stale claims outside of the repose period.

[4] Respectfully, WestPoint Home submits that requiring the Commission to follow the law, enforcing a statute of repose, and returning WestPoint Home's money is in no way "unfair."

Accordingly, the Court should affirm the Court of Appeals' opinion regarding the application of Section 42-11-70 here and direct the Commission to return the remainder of WestPoint Home's deposit. Not only would that align this case with South Carolina law and general notions of equity—there is no legitimate reason for the government to sweep money from a private company's bank account and hold it indefinitely—it is compelled by an order of the Bankruptcy Court.[5]

Finally, consider the alternative: absent enforcing Section 42-11-70, how could WestPoint Home ever get its money back? It's not as if future claims by former WestPoint Stevens employees could be insurable, so there is no realistic way for WestPoint Home to substitute security in order to free up the cash currently held by the state. The circuit court had no realistic answer, either, as it suggested the parties should somehow work together to figure out a way to return the deposit when the last former WestPoint Stevens employee dies—a truly impossible task. (App. 217–18.)

And the agency's brief suggests a solution that is no solution at all. The Commission indicates it has proposed a new regulation that "provides a procedure for any held funds to be released in whole or in part when 'the Commission determines that all contingent liability arising during the period of self-insurance has expired,'" citing proposed Regulation 67-1507(E)(1). (Commission Br. at 24–25.)

But if the agency is no longer going to enforce Section 42-11-70's repose period, as its posturing in this litigation suggests, how could the agency possibly "determine that all contingent

[5] The Bankruptcy Court approved the Asset Purchase Agreement and its provision that WestPoint Home retained a "right to receive back any portion of the Letter of Credit Purchase Price in excess of any amounts not drawn under any such letters of credit." (App. 491; Asset Purchase Agreement § 3.1(a); App. 432; Order in *In re WestPoint Stevens Inc.*, Case No. 03-13532 (RDD) (Bankr. S.D.N.Y. July 8, 2005). That order is entitled to full faith and credit. *McNaughton-McKay Elec. Co. v. Andrich*, 324 S.C. 275, 280–81, 482 S.E.2d 564, 567 (Ct. App. 1997).

liability" has gone away? The Commission suggests that its proposed regulation solves this case and implies this Court should stand down in deference to the administrative rulemaking process, but the agency's "solution" is illusory and is no help at all.[6] The Court should affirm the Court of Appeals' ruling and direct repayment of WestPoint Home's deposit without delay.

II. The Commission wrongly seized WestPoint Home's money.

A. The Court of Appeals' ruling that the Commission wrongly seized WestPoint Home's $1.8 million deposit was not challenged, thus mooting the remainder of this appeal.

WestPoint Home presented three issues to the Court of Appeals: (1) whether the Commission wrongly seized the entirety of WestPoint Home's $1.8 million deposit in 2005, (2) whether the Commission must return the unused portion of that deposit and earnings that have accumulated on that deposit, and (3) whether WestPoint Home is entitled to recover interest for the period while its money was improperly within the agency's custody. The Court of Appeals agreed with WestPoint Home on all three issues, though it did not announce a bottom-line number owed to WestPoint Home and remanded the case back to the circuit court to calculate the interest owed.

In neither its petition for rehearing (App. 180–197) nor its petition for certiorari review (App. 1–25) did the Commission challenge the Court of Appeals' ruling on this case's threshold point: whether the Commission rightly seized WestPoint Home's money in the first place. But the

[6] On Page 25 of its brief, the Commission states that the situation presented by this case—namely, where the agency has seized funds of self-insured businesses and is holding those private monies in perpetuity—"has never happened before." This is not true at all. It is outside of the factual record presented to the circuit court, but the agency disclosed in discovery that it has engaged in the same behavior with respect to numerous other businesses in addition to WestPoint Home. WestPoint Home is pleased to supplement the record with those details if the Court so desires, but, in all candor, information necessary to disprove this incorrect factual statement in the Commission's opening brief is not presently in the record.

agency was required to do both in order to preserve this foundational issue for this Court's review. *See* Rule 242(d)(1), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for a writ of certiorari as a question presented to the Supreme Court.").

While the agency now tries to blend this unpreserved issue into Question Presented 2 of its opening brief, the Court of Appeals' ruling—which was undoubtedly correct—is the law of the case. *See, e.g.*, *Moseley v. All Things Possible*, 395 S.C. 492, 495 n.4, 719 S.E.2d 656, 658 n.4 (2011) ("In its opinion, the court of appeals found the facts did not warrant relief against Hampton. That finding is the law of the case, for the Moseleys did not seek certiorari on that issue."); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

The Commission's failure to seek both rehearing and certiorari review of the Court of Appeals' ruling on this threshold issue should be fatal to the entirety of the agency's appeal. Whether the Commission rightly took WestPoint Home's money in 2005 controls the analysis. If the agency wasn't entitled to seize the full deposit in the first place, it cannot logically be entitled to keep what's left from that deposit. And if the agency wasn't entitled to seize the full deposit, it cannot logically be entitled to keep earnings that have accrued on the deposit over the last 21 years.

An unpreserved, yet dispositive, issue moots the remainder of the appeal. *E.g.*, *Hampton Building Supply, Inc. v. Wilson*, 285 S.C. 135, 138–39, 328 S.E.2d 635, 636–37 (1985); *M&T Bank v. Davis*, Op. No. 2022-UP-146, 2022 S.C. App. Unpub. LEXIS 176, at *2–3 (Ct. App. Mar. 23, 2022); *Morin v. Trippe*, Op. No. 2016-UP-492, 2016 S.C. App. Unpub. LEXIS 632, at *1–2 (Ct. App. Nov. 23, 2016); *Boyce v. Nelson*, Op. No. 2015-UP-420, 2015 S.C. App. Unpub. LEXIS 492, at *2 (Ct. App. Aug. 12, 2015). The Court can dismiss this appeal on this basis alone.

B. The agency did not "need" the full $1.8 million deposit at the time it withdrew WestPoint Home's money in 2005, nor has it "needed" that money in the 21 years since.

If the Court finds that the Commission did, in fact, preserve this threshold question for appellate review, the result should remain the same. The Court of Appeals' decision on this issue is unimpeachable, and the agency doesn't genuinely argue otherwise.

Full Deposit Has Never Been "Needed" To Pay Existing Claims. As described above, WestPoint Home's $1.8 million deposit was made at the instruction of the Bankruptcy Court to collateralize a letter of credit that WestPoint Stevens provided the Commission as security for workers' compensation claims. (App. 432.) The Commission's regulations allow self-insured employers to provide a letter of credit as security for potential claims, and the regulations detail the limited circumstance under which the agency can withdraw money through a letter of credit:

> The Commission may exercise the letter of credit at any time ***if the proceeds are needed for payment of a claim that occurred during the self-insured period***.

S.C. Code Ann. Regs. 67-1507(D)(5) (emphasis added). 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:

> The Commission may, at any time, draw on the Letter of Credit ***if needed*** to pay any workers' compensation claim and claims administration expense which are the responsibility of the Employer.

(App. 429; Memorandum of Understanding ¶ 4 (emphasis added).)

There is no dispute that the Commission withdrew all $1.8 million of WestPoint Home's deposit even though there were not $1.8 million of payments owed on "claims that occurred during the self-insured period." For one, nearly $1.2 million of the principal remains untouched and is still within the agency's custody ***21 years after it was withdrawn***. (App. 317; Trial Tr. 35:17–22.)

Likewise, Director Cannon testified repeatedly at trial that there were not $1.8 million of payments owed when the agency withdrew the entirety of the deposit, and that there haven't been $1.8 million of claims made by former WestPoint Stevens employees against that deposit. (App. 305–06, 310–11; Trial Tr. 23:19–24:18, 28:2–29:3.) As he conceded:

> Q: As we stand here today in August of 2022, the agency has not needed $1.8 million to pay claims of former WestPoint Stevens employees, has it?
>
> A: That's correct.

(App. 310–11; Trial Tr. 28:24–29:3.)

It is unavoidable that the agency wrongfully withdrew the entirety of WestPoint Home's $1.8 million deposit in August 2005. There were not then, and there never have been, $1.8 million of workers' compensation "claims that occurred during the self-insurance period" for former WestPoint Stevens employees. S.C. Code Ann. Regs. 67-1507(D)(5).

The Court of Appeals rightly enforced both the regulation and the contract according to their plain "if needed" language: "However, on the date the Commission drew down the letter, it did not need the full $1.8 million balance to pay pending claims, and in fact, WestPoint has never had $1.8 million in claims pending against it. . . . Accordingly, we hold the circuit court erred in determining the Commission was justified in drawing down the entire $1.8 million letter of credit, and we reverse the circuit court as to this issue." (App. 174.)

In its brief to this Court, the Commission does not challenge the Court of Appeals' straightforward application of unambiguous language to undisputed facts. Ignoring both the law and the contract, the agency instead argues that its decision to seize WestPoint Home's money was "reasonable" and "done in good faith." (Agency Br. at 21.)

But the government's conduct here isn't measured against a "reasonableness" or "good faith" standard; it's measured against the actual language of the controlling regulation and contract.

Regulations are construed using the familiar tools of statutory construction. *See Murphy v. S.C. DHEC*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes."). The plain language controls, and courts routinely reject an agency's interpretation of a regulation that goes against the plain language or that leads to absurd results. *See, e.g.*, *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation."); *Blackmon v. S.C. DHEC*, 436 S.C. 529, 539, 873 S.E.2d 774, 780 (Ct. App. 2022) ("When the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper." (quoting *Kiawah Dev. Partners II v. S.C. DHEC*, 411 S.C. 16, 39, 766 S.E.2d 707, 720–21 (2014))) (cleaned up).

Regulation 67-1507(D)(5) allows the agency to withdraw money only as-needed when claims occur, and that same limitation was memorialized in the Memorandum of Understanding. The Commission should have withdrawn money only when a payment was due, and it should have withdrawn only the amount "needed" for that specific payment; after all, this is exactly how a letter of credit is designed to function (and it is exactly how insurance would have paid out if a policy had been in place). In fact, Director Cannon acknowledged that the agency could have administered claims that way, but it chose not to. (App. 309; Trial Tr. 27:9–17.)

The law simply does not allow the Commission to indiscriminately take a private company's money unless and until those funds are actually needed to make a payment on a claim that has already been filed. Put differently, nothing in the law permits the agency to prospectively seize and hold private funds *en masse* in anticipation of potential, future, unknown, may-never-occur claims.

And there is an obvious reason for this withdraw-only-as-payments-arise system: The money in the bank that collateralizes a letter of credit belongs to the private company that posts the funds, and that company is entitled to earn interest on its money while in the bank. This was a specific part of the arrangement here. (*See, e.g.*, App. 779; Cash Collateral Control Letter Agreement (Aug. 8, 2005) ("Interest, if any, earned on the Cash Collateral Account [from which the Commission withdrew the funds] shall be deposited in the Cash Collateral Account.").) By withdrawing the entire deposit without $1.8 million of payments then-owed, the Commission has wrongfully deprived WestPoint Home of the benefit of ***21 years of earnings on its own money***.

The Commission does not argue it complied with the regulation or the Memorandum of Understanding, nor does it dispute the propriety of the Court of Appeals' legal analysis. The agency's proposed "reasonableness" standard for government seizure of private money finds no basis in the law, and the Court should readily reject it, just as the Court of Appeals did.

Canceling the Letter of Credit? So, too, should the Court disregard the agency's suggestion that it was somehow justified in ignoring the governing law when seizing WestPoint Home's full deposit because the agency "interpreted at the time [that WestPoint Home had] an intent to cancel the letter of credit." (Agency Br. at 21.) This is simply not true.

On August 15, 2005, WestPoint Stevens sent a letter to the Commission notifying the agency of the Asset Purchase Agreement through which WestPoint Home purchased WestPoint Stevens' assets under the Bankruptcy Court's supervision. (App. 795; Letter from Sears to Smith (Aug. 15, 2005).) The Asset Purchase Agreement required WestPoint Home to deposit funds sufficient to collateralize WestPoint Stevens's various existing letters of credit, which included the $1.8 million letter of credit that WestPoint Stevens had with the Commission. (App. 491; Asset Purchase Agreement § 3.1(a).) Moreover, the Asset Purchase Agreement specifically provided that

WestPoint Home retained the "right to receive back any portion" of its deposit that was not used. (*Id.*)

The August 15, 2005 letter did not somehow put the letter of credit in jeopardy. To the contrary, it specifically notified the Commission that funds would be available to support the letter of credit despite WestPoint Stevens' bankruptcy and dissolution. And at trial, Director Cannon confirmed that the agency never believed the letter of credit had been canceled:

> 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.

(App. 309; Trial Tr. 27:5–:8.) He reiterated the agency was aware of the agreement that provided WestPoint Home was assuming WestPoint Stevens' letter of credit while also being entitled to retain all interest earned on its deposit:

> Q: How did you come to know that WestPoint Home had assumed the obligations of WestPoint Stevens' letter of credit?
>
> A: We received a copy of this letter of credit. Now, the copy that I have here, it only has one signature on it. One is from WestPoint Stevens. It's not for the agency.
>
> Q: If you turn the page, I'll bet you'll see more signatures as you go?
>
> A: Oh, I got you.
>
> Q: But you understand my point, this document is the document that makes it clear that WestPoint Home is standing in the shoes of WestPoint Stevens for WestPoint letters of credit, right?
>
> A: Right. We were aware of it, but we're not a party to it.

(App. 351; Trial Tr. 69:6–:21.) And Director Cannon confirmed at trial that at no point "did the agency ever think that letter of credit was no longer in existence"—exactly the opposite of what the Commission states in its brief to this Court. (App. 352; Trial Tr. 70:6–:8.)

$1.7 Million in Claims? It is likewise disingenuous for the Commission to report to the Court that "[c]laims totaling $1,709,438.31 were incurred in the claims run provided by the independent administrator." (Commission Br. at 9.) This statement in the agency's brief suggests that perhaps the funds were "needed" to pay claims after all. This is entirely misleading.

Buried in Footnote 5 of the Commission's brief is a generic concession that this figure includes claims that arose before the deposit was withdrawn. The agency failed to explain in its brief that ***over $1 million*** of those payments were for claims prior to the agency's withdrawal of WestPoint Home's deposit and have ***nothing at all to do with the money in dispute here***. The agency made the same misleading statement to the Court of Appeals; just as now, WestPoint Home was forced to explain the full truth in its briefing below. (*Compare* App. 131 (Commission's brief to the Court of Appeals stating that the agency paid $1.7 million on claims by former WestPoint Stevens employees), *with* App. 159–160 (WestPoint Home's reply brief, pointing out the misleading nature of the agency's suggestion).) The Court should not be misled.

* * * * *

At bottom, the Commission's appellate argument (on an unpreserved, dispositive issue) is entirely inconsistent with the law, the parties' contract, and with the agency's own testimony at trial. If it reaches the question, the Court should affirm the Court of Appeals' ruling that the agency wrongfully withdrew the entirety of WestPoint Home's deposit.

III. WestPoint Home is entitled to collect prejudgment interest.

The Court of Appeals held that WestPoint Home is entitled to recover the earnings the government accumulated on WestPoint Home's money, a ruling the agency does not challenge before this Court. (App. 178.) The Court of Appeals also held that WestPoint Home may also be entitled to collect prejudgment interest, though it remanded the question for consideration by the

circuit court in the first instance while noting that any final calculations should avoid a double recovery. (App. 178–179.)

The agency asks this Court to declare that sovereign immunity prevents recovery of prejudgment interest here. The Court of Appeals did not make any specific ruling on this issue, rendering this issue not yet ripe for this Court's consideration.

To the extent the Court wishes to address the point, though, there is no sovereign immunity for prejudgment interest in a contract dispute. The Commission cites pre-*McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), authority for the proposition that prejudgment interest does not run against the government. (Commission Br. at 23.) That authority, however, does not square with current South Carolina law.

Following *McCall*, the General Assembly restored sovereign immunity in part through South Carolina Code §§ 15-78-10 *et seq.* But the General Assembly specifically exempted contract-based liability (which this dispute undoubtedly is, as it is not a tort claim) from the limited restoration of sovereign immunity. *Id.* § 15-78-20(d).

And the General Assembly specifically provides that litigants are entitled to prejudgment interest "in all cases" where, as here, they are owed a sum certain. *See id.* § 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 nothing in the law excludes cases where an agency has misappropriated a private entity's funds in violation of both private contract and state regulation as to when such funds can be withdrawn. What's more, the only case where the Court appears to have addressed this issue indicates that such interest is recoverable here.

In *EllisDon Construction, Inc. v. Clemson University*, 391 S.C. 552, 553, 707 S.E.2d 399, 400 (2011), 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." 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.

This 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, though, had nothing to do with the Court's decision, and the concept does not even appear anywhere in the majority's opinion.

Notably, sovereign immunity was the sole basis for finding against the plaintiff that Justice Pleicones raised in his standalone opinion. *Id.* at 556–57, 707 S.E.2d at 402 (Pleicones, J., concurring in result). If sovereign immunity truly controlled the issue, then Justice Pleicones's opinion would have carried the day. Yet, his concurrence did not draw support from any other justice, confirming that Section 34-31-20 applies in "all cases," just as the statute says.

If anything, *EllisDon Construction* indicates 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, and it reinforces that WestPoint Home is entitled to recover prejudgment interest (while taking steps to avoid double recovery). The Court of Appeals' remand on this issue should be affirmed.

CONCLUSION

The backdrop of this case is one of remarkable overreach by a state agency. This Court has previously expressed grave concern that "[t]he ever increasing reach of the so-called Fourth Branch of government presents a threat to our civil society," a warning that rings especially true here. *Joseph v. S.C. LLR*, 417 S.C. 436, 465, 790 S.E.2d 763, 778 (2016) (Kittredge, J., concurring).[7]

Consider: The Commission took WestPoint Home's money without any lawful basis; refused to disclose anything about what happened to that money (including whether any of WestPoint Home's money was still held by the government); sued WestPoint Home to keep that information secret; and has now (1) done a complete about-face from settled precedent regarding South Carolina Code § 42-11-70, including numerous decisions from the agency's own appellate division; (2) disclaimed in-trial testimony from its Executive Director; and (3) loaded its brief to this Court with misleading "statistics," all with the goal of retaining WestPoint Home's money indefinitely.

This Court should not endorse such conduct from a statewide agency, particularly one that performs both executive and judicial functions. WestPoint Home respectfully requests that the Court affirm the Court of Appeals' ruling in all respects.

Signature Page Attached

[7] These points were contained in Justice Kittredge's concurrence, but the *Joseph* majority likewise "embrace[d] completely" these same points. 417 S.C. at 455 n.3, 790 S.E.2d at 773 n.3. Undoubtedly, Justice Kittredge's observations reflect the sentiment of the Court.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By:/s/ M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

LAW OFFICES OF HERBERT BEIGEL

Herbert Beigel
hbeigel@me.com
5641 N. Chieftan Trail
Tucson, Arizona 85750
(520) 825-1995
Admitted Pro Hac Vice

Attorneys for WestPoint Home, LLC

May 18, 2026