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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

ON WRIT OF CERITORARI TO THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Alison R. Lee

Circuit Court Judge

Appellate Case Number: 2025-02536

South Carolina Workers' Compensation Commission,Petitioner,

v.

WestPoint Home, LLC,Respondent.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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ARGUMENT IN REPLY

I. THE TESTIMONY OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S EXECUTIVE DIRECTOR AS TO HIS ALLEGED INTERPRETATION OF §42-11-70 CANNOT BIND THE COMMISSION AS A MATTER OF LAW BECAUSE THE INTERPRETATION OF §42-11-70 IS A LEGAL QUESTION FOR THE COURT.

Respondent spends almost seven pages arguing that the testimony of Gary Cannon, the Commission's Executive Director in 2021, but not in 2005 when the decision to protect WestPoint Stevens' workers by negotiating the letter of credit was made, binds the Commission on the law. While ignoring Mr. Cannon's testimony that retaining the funds was necessary¹, which the trial court adopted in its Order, Respondent's Brief relies on the argument with conclusions its Counsel elicited from Mr. Cannon with leading questions. This is particularly notable since WestPoint Home never addressed the Court of Appeals' deviation from this Court's instructions on statutory construction, choosing instead to substitute this testimony for actual argument on that issue.

Mr. Cannon's concessions were opinions on the law and are neither binding on the Commission nor on the Court. The trial court, which heard the testimony, correctly applied the law, and Mr. Cannon (or anyone else, for that matter) accepting Counsel's assertion that "the statute of repose expired in 2007" is meaningless. This Court is the sole arbiter of statutory meaning.

An issue regarding statutory interpretation is a question of law. *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 438, (2006); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107,

¹ Respondent's Brief relies on irrelevant and inadmissible testimony to support its money grab. The most relevant portion of Mr. Cannon's testimony included in Respondent's Brief is on Page 14 where he states: "[s]o 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." (App. 310, Respondent's Brief, 14). Mr. Cannon and the trial court both correctly interpreted the purpose of the Act, which is to provide for the needs of workers, who, in the case of asbestos-related injuries, may be sick shortly after exposure, but will not be diagnosed or disabled for many years thereafter. The Court of Appeals misapprehended the Statute to upend the entire system.

110, (2008) (“[d]etermining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.”). Numerous other cases support this proposition². Because the interpretation of § 42-11-70 is a matter of law for the Court, Petitioner is not bound by its Executive Director’s alleged interpretation of the statute.

II. RESPONDENT’S RELIANCE ON TWO UNREPORTED DISTRICT OF SOUTH CAROLINA CASES IS MISPLACED BECAUSE FEDERAL COURT DECISIONS INTERPRETING S.C. STATE LAW ARE NOT BINDING ON THIS COURT AND THESE CASES CAN BE EASILY DISTINGUISHED.

Respondent’s reliance on *Parker v. Asbestos Processing, LLC*, Case No. 0:11-1800-JFA, 2015 U.S. Dist. LEXIS 115094, (D.S.C. June 30, 2015); and *Matthews v. E.I. Du Pont*, Civil Action No.: 4:16-cv-02934-RBH, 2018 WL 5978111 (D.S.C. Nov. 13th, 2018) is misplaced because these cases are not binding on this Court and are easily distinguished. A federal court decision interpreting S.C. state law is not binding on this Court. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 473 n.9 (2009); *Blyth v. Marcus*, 335 S.C. 363 (1999). Accordingly, *Parker* and *Matthews* are not controlling authority. Ironically, Respondent’s Brief states, “*Parker* is on all fours here, yet it is not mentioned in the agency’s brief to this Court” and “[l]ike *Parker*, the agency’s brief does not mention *Matthews*-which is also on all fours with this case.” (Respondent’s

² Parties are not bound by testimony as to questions of law given by their witnesses. See *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009) (holding with respect to Rule 30(b)(6) testimony regarding meaning of term in insurance policy that “[t]his type of legal conclusion is not binding on [the carrier]”); *R & B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 787 (8th Cir. 2001) (holding that while party was bound by Rule 30(b)(6) testimony regarding facts, it was not bound by legal conclusion that agreement had been terminated); *King v. United States*, 119 Fed. Cl. 277, 285 (2014), aff’d, 627 Fed. Appx. 926 (Fed. Cir. 2016) (“legal conclusions given during a 30(b)(6) deposition are generally not binding on the deponent entity.”); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013)1F2 (“A 30(b)(6) witness’s legal conclusions are not binding on the party who designated him.”); *In re Wansdown Properties Corp. N.V.*, 620 B.R. 487, 499 (Bankr. S.D.N.Y. 2020) (“[a] party’s statement interpreting a contract cannot be a judicial admission because it constitutes a legal conclusion rather than a factual admission.”); *International Cards Co., Ltd. v. MasterCard International Inc.*, No. 13-cv-2576 (LGS), 2017 U.S. Dist. LEXIS 43789, 2017 WL 1133425, at *5 (S.D.N.Y. Mar. 24, 2017) (a party’s interpretation of a notice provision in a contract is “a legal argument rather than a factual statement” and therefore “is not a judicial admission that precludes [a party] from asserting the legally correct interpretation of the contract.”), aff’d, 741 F. App’x 41 (2d Cir. 2018); *In re Provide RX of Grapevine, LLC*, 507 B.R. 132, 144 (Bankr. N.D. Tex. 2014) (It is generally prohibited for a lay witness to interpret statutes and to give legal opinions).

Brief, pp. 21, 23). However, the Respondent's Brief fails to mention that even the Court of Appeal's opinion (App. 168-179) failed to mention *Parker* and *Matthews*, which can only be interpreted as the Court of Appeals recognizing that these cases were not controlling authority and/or were not on all fours, as the Respondent argues.

Parker and *Matthews* are easily distinguished. Not only do *Parker* and *Matthews* fail to find that §42-11-70 is a statute of repose, but, more importantly, the United States District Court lacks subject-matter jurisdiction to determine whether an employee has a compensable claim for an occupational illness under the South Carolina Workers' Compensation Act. (S.C. Code Ann. §42-3-180 (1976)) and is not the agency responsible for administering the Act.

In *Matthews*, the US District Court was charged with determining whether Plaintiff was a statutory employee of DuPont and thus barred from bringing tort litigation against certain defendants by the exclusive remedy in §42-1-540. *Matthews v. E.I. DU Pont*, No.: 4:16-cv-02934-RBH-cv-02934-RBH, 2018 WL 5978111 (D.S.C. Nov. 13th, 2018). Plaintiff asserted that §42-11-70 was a statute of repose that deprived him of any benefits under the Act in an attempt to avoid his claim being barred by §42-1-540. Judge Harwell granted summary judgment to Defendants on the grounds that the *tort* claim was barred by S.C. Code Ann. §42-1-540. Judge Harwell made no finding and did not have jurisdiction to find whether Plaintiff was or was not entitled to benefits under the South Carolina Workers' Compensation Act. Notably, Judge Harwell did not certify any question to this Court for an opinion on that issue.

The text of Judge Harwell's opinion is also relevant. Judge Harwell cites *Folta v. Ferro Eng*, 2015 IL 118070 (2015)(on p. 23 of the opinion) as an example of courts in other jurisdictions recognizing a statute of repose, which the Respondent supports. The court in *Ferro* acknowledged they were "cognizant of the harsh result of this case" but deferred to the legislature for where to

draw the appropriate balance. *Folta v. Ferro Eng'g.*, 2015 IL 118070, ¶ 43, 43 N.E.3d 108, 118. Judge Harwell erroneously found that the Illinois and South Carolina statutes were similar. They are not. S.C. Code § 42-11-70's plain language refers to the period following the employee's last exposure during which the disease must have been contracted. The Illinois statutes, which Judge Harwell references, by contrast, draw a stark distinction between (1) the time period by which disablement must occur following the employee's last exposure, and (2) the time period by which a claim must be filed following the last exposure³.

Parker dealt with a motion for summary judgment in a legal malpractice claim. *Parker v. Asbestos Processing, LLC*, Case No. 0:11-1800-JFA, 2015 U.S. Dist. LEXIS 115094, (D.S.C. June 30, 2015). The legal malpractice claims depended on Plaintiffs proving they had a viable workers' compensation claim. Judge Anderson found Plaintiffs had failed to show the viability of their workers' compensation cases *for purposes of bringing legal malpractice claims*. Judge Anderson did not find, and did not have jurisdiction to find, whether Plaintiffs were entitled to benefits under the South Carolina Workers' Compensation Act; again, no question was certified to this Court as to the meaning and effect of §42-11-70.

III. A DETAILED REVIEW OF THE STATE COURT AND WORKERS' COMPENSATION CASES CITED BY RESPONDENT TO SUPPORT ITS "STATUTE OF REPOSE" ASSERTION REVEALS THAT THE CITED

³ 820 Ill. Comp. Stat. Ann. 310/1(f) states that, for asbestos cases, disablement must occur within 3 years of the last injurious exposure. 820 Ill. Comp. Stat. Ann. 310/6(c) on the other hand, states that, in asbestos cases, "unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred."

Under Illinois law, this explicitly distinguishes the difference between when a disease must be contracted and when a claim may be filed. Considering that WestPoint Stevens went out of business in 2005 and Respondent filed suit for the funds in 2014, even under the Illinois law Judge Harwell cites, valid claims could still be brought until 2030 and Respondent's case would be 16 years premature.

South Carolina law, on the other hand, establishes no such express limit on when such occupational disease claims can be filed. S.C. Code Ann. § 42-11-70 establishes only a time period during which the disease must be contracted, not a time limit by which such asbestos claims must be brought. Therefore, Judge Harwell's conclusion that SC courts' hands are tied is not based on the substance of SC statutes and is merely based on a patent misunderstanding of Illinois statutes. Thus, even as a mere persuasive authority, *Ferro* should not be used as a meaningful comparison when deciding how to interpret the issues at bar.

AUTHORITY DID NOT SUPPORT RESPONDENT'S ARGUMENT AND IS EASILY DISTINGUISHED.

A detailed review of the authority cited by Respondent to support its “statute of repose” assertion reveals that the cited authority does not support Respondents’ argument and is easily distinguished. Neither *Vespers v. Springs Mills, Inc.*, 276 S.C. 94 (1981), nor *Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13 (1960)), stands for the proposition that § 42-11-70 is a statute of repose. In *Vespers*, Justice Ness reversed the denial of a jurisdictional claim and held that the employee was entitled to compensation. Notably, the employee was disabled by byssinosis some nine months after the employer hired her. She worked for 18 years in the textile industry for other employers. The court’s decision in *Vespers* conformed with the statutory scheme that the Court of Appeals abrogated below.

Glenn did not deal with any claim. but rather with determining which carrier should pay it. The court recognized that “contracted” and “disabled” were different concepts. It held “Section 72-253 declares the event to be treated ‘as an injury by accident’ to be **not contraction of the occupational disease, but ‘disablement or death resulting from it.’”** *Glenn, supra* at 236 S.C. 21. (Emphasis Added). This finding illustrates the Court of Appeals’ error in equating contracting the disease with “death or disablement” resulting from the disease. These reported cases, as well as those workers' compensation cases cited by the respondent, do not treat contracted and disabled as synonyms for the purpose of the Act like the Court of Appeals erroneously did below.

A closer look at the Commission’s prior decisions shows that they do not support the Respondent’s conclusion that § 42-11-70 is a statute of repose that bars all occupational illness claims two years after the last date of injurious exposure and/or last date of employment instead, these cases support the Commission’s position that § 42-11-70 is a coverage statute that articulates an element or prerequisite that must be met in order for a disease to become a compensable

occupational illness, that the condition must have been “contracted” within two years of the last date of injurious exposure or employment. None holds that a claimant must become “dead or disabled” within two years from the last date of injurious exposure or employment to recover benefits under the Act. In *Rumsey v. Daniel Island Int’l*, 2003 WL 22380606, the Commission cited § 42-11-70 to support its finding that claimant did not prove his last injurious exposure to asbestos dust was during his employment with Defendants, and cited to *Vespers v. Springs Mills*, 276 S.C. 94 (1981), *Id.* at p. 7. The decision concluded that his disease had not been “contracted” within the time period under § 42-11-70. The Commission did not hold that his claim was barred because he had not been “disabled” within two years of his last date of injurious exposure with Defendants. The Commission noted that the term “contracted” for purposes of § 42-11-70 had never been definitively defined and that *Glenn* and *Vespers* defined “contracted” only in dicta and for the purposes of interpreting other provisions of the Workers’ Compensation Act. *Id.* at p. 8. The Commission further commented that *Glenn* referenced the predecessor to § 42-11-70 while determining when compensability began for purposes of filing a claim under the predecessor to § 42-15-40. The Commission acknowledged “contracted” could not mean “last exposure” or “definitively diagnosed.” The opinion illustrates that the Commission treated “last exposure,” “contracted,” “definitively diagnosed,” and “disability” as distinct terms with separate meanings. *See id.* at p. 9-10. The Commission held “‘contracted’ must mean, at the very least, that some event or occurrence demonstrating the existence of an occupational disease must take place within one to two years of a claimant's last exposure to the hazard which caused the disease.” *Id.* at p. 9. The Commission never held that the claimant must show some event or occurrence demonstrating “disablement or death” from the occupational disease within one to two years of last exposure.

Rumsey cited *Meyer v. Iowa State Penitentiary*, 476 N.W.2d 48 (Iowa Sup. 1991) as persuasive authority. In *Meyer*, the Iowa Supreme Court interpreted a statute substantively similar to § 42-11-70 and found that it was neither a statute of limitations nor a statute of repose. Instead, it stated the conditions that must be met before a right to compensation arises.⁴ *Meyer* at 476 N.W.2d 60. The court explained, “[l]ike a statute of limitations the section is grounded in time. Unlike a statute of limitations, however, it has nothing to do with when actions must be brought.” *Id.* at 476 N.W.2d 60.

This finding is consistent with the South Carolina Workers’ Compensation Act. The statute of limitations is codified at § 42-15-40. Section 42-15-40 also contains a statute of repose for repetitive trauma injuries.⁵ Noticeably absent from § 42-15-40 is a statute of repose for injuries by accident or occupational illnesses. *Expressio unius est exclusion alterius*.

As the court held in *Glenn*, the provisions of the Workers Compensation Act, including § 42-11-70 and § 42-15-40, must be interpreted conjunctively in order to effectuate the full purpose of the Act. To that end, § 42-11-70 sets forth an affirmative period of time during which compensability must accrue, and § 42-15-40 sets forth a statutory period of limitation on the period of time within which a claim, which is otherwise compensable under § 42-11-70, must be brought. *Rumsey*, at p. 14. Each of the other cases cited was decided on a basis other than the theory that “contracted” and “disabled” are synonyms. In *Gibson v. Westinghouse Electric Corp*, 2007 WL 869985, the Commission found that Gibson did not contract his occupational disease within two years from his last date of employment under § 42-11-70. It noted that § 42-11-70 was a part of

⁴ As the Commission has advised the Court, S.C. Code Ann. § 42-11-70 is a Coverage Statute setting out a pre-requisite for an employee to establish a covered claim.

⁵ “... the right to compensation is barred unless a claim is filed with the commission within two years after the employee knew or should have known that his injury is compensable but no more than seven years after the date of last injurious exposure.” (Emphasis added). S.C. Code Ann. § 42-15-40 (2008 Supp.).

the burden of proof. The Commission found that Gibson's problems were related to his tobacco use and did not use the term "statute of repose."

In *Truax v. Daniel Construction*, 2009 WL 1433538, Truax sought coverage for asbestos related occupational illness. He alleged he was exposed between 1969 and 1972 and became disabled in 2006. The Commission neither denied the claim on the grounds of the statute of limitations nor on the grounds of statute of repose. Instead, it found no medical evidence supporting the finding that asbestosis was "contracted" within two years of last exposure, and that the claimant had not met the burden of proof required by § 42-11-70. In *Bishop v. Westinghouse Electric Corp.*, 2007 WL 904837, the commission did not apply § 42-11-70 because it found that the claimant was totally and permanently disabled as a result of a non-work-related condition.

Accordingly, *Vespers Gibson*, *Truax*, and *Bishop* do not support the Respondent's position and are easily distinguished.

IV. RESPONDENT'S ARGUMENT THAT THE PETITIONER FAILED TO PRESERVE THE ISSUE OF WHETHER THE COMMISSION PROPERLY NEGOTIATED THE LETTER OF CREDIT IS NOT SUPPORTED.

First, Respondent selectively quotes Rule 242(D)(1), SCACR. While Respondent quotes, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court," Respondent omits the following sentence which states, "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." [emphasis added] Obviously, the question of whether or not § 42-11-70 is a statute of repose directly impacts the viability of potential claims, thereby justifying the appropriateness of drawdowns on the letter of credit. Therefore, the issue of whether the Petitioner properly negotiated the letter of credit is a subsidiary question to whether § 42-11-70 is a statute of repose.

Second, Respondent's argument that Petitioner did not raise the issue of the appropriateness of the Commission's drawdown on the letter of credit in the Court of Appeals and in its petition for rehearing is patently false. Petitioner properly preserved this issue because it was raised by Petitioner before the Court of Appeals (App. 132-133), in Petitioner's petition for rehearing (pp. 194-195), and in its Petition For Certiorari (App. 6-7, 20-22). Accordingly, the Respondent's argument is simply incorrect.

As the Court found in *State v. Davis*, 371 S.C. 170, n. 10, (2006),

We note the State contends certiorari was improvidently granted because the petitioner failed to separately challenge the Court of Appeals' harmless error analysis. We disagree. Petitioner maintained in the petition for rehearing to the Court of Appeals, as well as in the petition for a writ of certiorari, that the error by the trial court was not harmless. The argument is also made in petitioner's brief to this Court. The Appellate Court Rule regarding certiorari to the Court of Appeals states that "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. Because petitioner specifically raised a question regarding the admission of hearsay, a harmless error argument is "a subsidiary question fairly comprised" within that issue.

Id.

Respondent's reliance on *Moseley v. All Things Possible*, 395 S.C. 492, 495 n. 4 (2011) is misplaced because *Moseley* is easily distinguished. In *Moseley*, the trial court found that fraud had been established by clear and convincing evidence and awarded actual and punitive damages against defendants Hampton and ATP. The Court of Appeals reversed the judgment against Hampton. The judgment against ATP was affirmed. ATP sought a writ of certiorari, which the Supreme Court granted. The Supreme Court noted in footnote 4 of its opinion, "[i]n 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." (Emphasis added). *Moseley*, 395 S.C. 492, 495 n. 4, The fact that Plaintiff Moseley failed to seek certiorari as to Defendant Hampton's liability while Defendant ATP did seek certiorari as to its liability completely

distinguishes *Moseley* from the present case. Unlike the plaintiff in *Moseley*, Petitioner sought certiorari on the issue of the appropriateness of the Commission's drawdown on the letter of credit. (App. 6-7, 20-22).⁶ Even assuming, for the sake of argument, that Petitioner did not, the issue of whether the Petitioner properly negotiated the letter of credit is a subsidiary question of whether or not § 42-11-70 is a statute of repose.

V. THE COMMISSION'S DRAWDOWN ON THE LETTER OF CREDIT WAS APPROPRIATE.

“A state workers’ compensation commission or board is, in the first instance, responsible for effectuating the purposes of the workers’ compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives.” 100 C.J.S. *Workers’ Compensation* § 706 (2000). “Such commission, board, or bureau is vested with the authority to formulate policies and standards for administering the workers’ compensation act.”

James v. Anne’s, Inc., 390 S.C. 188, 201-02 (2010).

Contrary to the Respondents’ claims, the Commission followed S.C. Ann. Regs. 67-1507(D)(5) and the Memorandum of Understanding (“MOU”) (APP. 429). On August 15, 2005, WestPoint Stevens sent a letter to the Commission indicating that “workers’ compensation liabilities asserted against [WestPoint Stevens] were not liabilities assumed by the Purchaser,” and “no further payments will be made with respect to workers’ compensation claims asserted against WestPoint Stevens Inc.” (App. 795). As trial testimony confirms, and the Circuit Judge held, Petitioner reasonably took this statement to mean that the Respondent intended to cancel the letter of credit. (App. 339-343). The MOU allowed the commission to draw down the letter of credit “if needed to pay any Workers’ Compensation claim or claims of administration expense which are the property of the employer.” The Commission’s regulations also allowed the drawdown in this

⁶ For the same reasons previously articulated, i.e., that Petitioner did seek certiorari on the issue of the appropriateness of Commission’s drawdown on the letter of credit, *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010) also has no application.

unique circumstance, where the employer gave notice that it would not pay any further claims, which was interpreted at the time as an intent to cancel the letter of credit. Reg. 67-1507(D)(4) provides “When the self-insurer fails to replace the letter of credit with another accepted proof of compliance, the Commission may demand payment of the letter of credit and deposit the proceeds in the South Carolina State Treasurer’s Office to guarantee payment of any claim occurring during the self-insured period.” Reg. 67-1507(D)(5) provides “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.” The Commission’s actions of drawing on the letter of credit and using the funds to pay workers’ compensation claims that were the responsibility of Westpoint Stevens demonstrate that the proceeds were needed for the payment of a claim. The record reflects that the Commission actually utilized funds from that draw to pay more than \$600,000.00 in claims. (App. 342) There is no dispute that these claims were paid and drawdowns to pay them were proper.

Respondent’s Brief quotes Mr. Cannon’s testimony out of context on page 32 of its brief by omitting the colloquy before the quoted language. There, Mr. Cannon testified:

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 would be paid for the employees of J. P. 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 filed 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. (Emphasis added).

(App. 310). What Respondent fails to recognize is that the Commission was charged not only with securing funds for actual claims, but for potential claims. The record confirms a high probability that employees have contracted occupational disease related to their exposure at WestPoint Stevens and will have claims that can easily exhaust all of the funds the State Treasurer holds.

WestPoint Home has repeatedly stated that the Commission somehow intends to keep the funds it is holding in trust indefinitely. The record is bereft of evidence to support this claim. The Commission has never asserted that it is entitled to keep the funds indefinitely and WestPoint Home has never cited any evidence to support that contention.

The Commission has repeatedly and consistently taken the position that it is not holding these funds in perpetuity. The Commission's position has always been that the entity that paid the funds to the Commission has a future reversionary interest in any remainder. The question of when the holder of the reversionary interest is entitled to the balance of any unexpended funds is clearly a question under the Workers' Compensation Act, which the Workers' Compensation Commission must determine. S.C. Code Ann. Section 42-3-180 (1976, as amended)

The Respondents have not filed any pleading, motion, petition, or request for hearing asking the Commission to determine this question in its capacity under Section 42-3-180. South Carolina courts have repeatedly stated that "where an adequate administrative remedy is available to determine a question of fact, one must pursue the administrative remedy or be precluded from seeking relief in the courts" *Ward v. State*, 343 S.C. 14 (2000).

To address concerns about the return of funds, the Commission has amended Reg. 67-1507 to include express language outlining the procedure for a party to request the release of funds held by the Commission on behalf of employees of a defaulted self-insurer, similar to the provisions

under Reg. 67-1505 (surety bond) and Reg. 67-1506 (pledged securities)⁷. With , the Commission has used its quasi-legislative authority to resolve Judge Lee’s concern about a practical method for returning concern about a practical method to return the funds when it becomes ripe to do so.

VI. SOVEREIGN IMMUNITY BARS CLAIMS FOR INTEREST AGAINST THE STATE. IT IS AN ERROR TO FIND OTHERWISE AND REMAND THE MATTER FOR A DETERMINATION.

Respondent’s argument that pre-*McCall v. Batson*, 285 S.C. 243 (1985) cases have no application to the interest issue is misplaced. Our courts have repeatedly found that the general interest statute, S.C. Code Ann. § 34-31-20, does not apply to the State. Appellants have not referenced any statute, contract, or case that allows the recovery of interest against the State in this circumstance. Judgments, it is true, are, by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government, and the interest is no part of the amount recovered. *Monarch Mills v. South Carolina Tax Commission*, 149 S.C. 219 (1929), overruled by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) superseded by Statute, South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-20(b) (“All other immunities applicable to a governmental entity ... are expressly preserved.”) as recognized in *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 563 (1995) (“The [Tort Claims] Act first completely restores sovereign immunity. S.C. Code Ann. § 15-78-20(b) The Act then provides specific waivers and limitations on actions against governmental entities.”) and *Giannini v. S. C. Department of Transportation*, 378 S.C. 573 (2008) (citing *McCall v. Batson* as “superseded by statute”). The fact that “[a]ll other immunities applicable to a governmental entity . . . are expressly preserved” underscores the importance of the pre-*Batson* case holdings that hold the general interest statute has no application to the State.

⁷ This amendment was submitted in accordance with the Administrative Procedures Act, became law May 10th, 2026. 2025 SC Regs Text 690151 SCSR 49-11 Doc No. 5431,

Section 34-31-20 was originally enacted in the 19th Century. *See Gilliland v. Phillips*, 1 S.C. 152 (1869) (noting the enactment of the Act of I 866 (13 Stat. at Large, 429)). At that time and at least through the first three quarters of the 20th Century, sovereign immunity precluded any suit against the State not specifically authorized by Statute. *Unisys Corp. v. S. C. Budget & Control Board*, 346 S.C. 158 (2001) (“At the time our constitution was adopted in 1868, the State was immune from suit on a contract. *Treasurers v. Cleary*, 37 S.C.L. (3 Rich. Law) 372 (1832) (action on debt against the State): *see also Hodges v. Rainey*, 341 S.C. 79 (2000) (observing that in 1934 the State was protected by total sovereign immunity.”).

As a general principle, the doctrine of sovereign immunity “prevents the assessment of interest on debts of the state without the state’s consent. 72 Am. Jur. 2d *States, Territories, and Dependencies* §93 (2007) Likewise, state government entities are not liable for interest on their debts “unless the constitution, a statute, or a contract calls for it.” *Id.* *See also*, 81 C.J.S., *States* §§524 and 526 (2004) (with the latter section noting that a claim of prejudgment interest against the state cannot be implied). Because statutes granting such consent are in derogation of sovereign immunity, they must be narrowly construed. *Unisys Corporation v. South Carolina Budget & Control Board*, 346 S.C. 158 (2001) (“[A] statute waiving the State’s immunity from suit, being in derogation of sovereignty, must be strictly construed.”) In other words, unless such statutes expressly apply to the government, they do not. *United States v. NY. Rayon Importing Co.*, 329 U.S. 654, 658-59, 67 S.Ct. 601, 91 L.Ed. 577 (1947) (“Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.”). *See also Schortmann v. U.S.*, 82 Fed. Cl. I (2008). Because § 34-31-20 was enacted at a time when sovereign immunity prevented

the assessment of interest on debts of the state without the state's express consent and because it does not expressly provide such consent, S.C. Code Ann. § 34-31-20 cannot be read to apply in this case, and the Court of Appeals erred in remanding the case for consideration of any prejudgment interest.

Respondent argues that Justice Pleicones' concurrence in *Ellis Don Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 556-557 (2011) was somehow inconsistent with the main opinion is not supported. His argument supplements and supports the opinion. Respondent argues that "[i]f anything *Ellis Don 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." (Respondent's Brief, 38). Respondent fails to appreciate the general rule that sovereign immunity prevents the assessment of interest on debts of the state without the state's consent. No consent is reflected in the record here. For the first time in the record, Respondent refers to some alleged contract as providing a basis for interest to be collected. None is specifically identified, nor is any in the record.

Because there is no express statute or contract imposing an obligation for recovery of interest against the State in this situation, and such recovery is otherwise barred by sovereign immunity, it was error for the Court of Appeals to remand the case for consideration of this issue.

CONCLUSION

For the reasons stated above, the Court should overturn and vacate the decision of the Court of Appeals in this matter and reinstate the Circuit Court's decision denying WestPoint Home the relief it sought.

Respectfully submitted:

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May 27, 2026