IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

C A. No.: 2013-CP-43-02284
Appellate Case No.: 2014-002215
WCC File No.: 9930459

Arrowpoint Capital Corporation/Arrowood Indemnity Co., Carrier ..... Appellant,

v.

South Carolina Second Injury Fund, Carrier ..... Respondent,

In re

Mary McConico, Employee/Claimant

v.

Yuasa-Exide, Inc., Employer and Arrowpoint Capital Corp./Arrowood Indemnity Co., Carrier.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the South Carolina Workers' Compensation Commission err in denying Appellant's claim for reimbursement from the South Carolina Second Injury Fund when all the requisite elements necessary for reimbursement from the South Carolina Second Injury Fund were met pursuant to *Section 42-9-400* of the South Carolina Code of Laws?

II Did the South Carolina Workers' Compensation Commission legally err in its interpretation of *Section 42-9-400* of the South Carolina Code of Laws by ignoring the plain meaning of the statute and case law and requiring that any pre-existing conditions are manifest prior to the employee's hire and engagement of the required work activities?

III. Did the South Carolina Workers' Compensation Commission legally err and abuse its discretion in determining that Appellant's claim for reimbursement was not timely filed and is barred pursuant to *Section 42-7-320(B)(2),* when twenty-five (25) years of in-house medical records and expert medical reports reflect pre-existing medical conditions were aggravated by lead exposure during the employee's employment tenure at Yuasa-Exide?

STATEMENT OF THE CASE

Mary McConico, Employee/Claimant, alleged that she suffered with heavy metal poisoning, a stroke, and hypertension because of chronic and acute lead exposure from May 4, 1974 to July 31, 1999 Mary McConico [hereinafter "McConico"] sustained a permanent disabling stroke on her last date of employment in 1999.

Pursuant to a Commission-ordered mediation, McConico resolved her worker's compensation claim against Yuasa-Exide, Inc., Employer, by virtue of a Settlement Agreement, Release and Order (Clincher). In particular, McConico was paid $110,000.00 in indemnity benefits to resolve her allegations of an alleged compensable injury or occupational disease. No monies were paid for past, present or future medical treatment. Yuasa-Exide, Inc , and Arrowpoint Capital Corporation, a/k/a Arrowood Indemnity Company [hereinafter "Appellant" or "Appellants"] resolved or clinchered this case on a doubtful and disputed basis.

Appellant subsequently filed a Form 54 requesting reimbursement from the South Carolina Second Injury Fund for indemnity benefits paid (R. p. 51). The Form 54 stated that McConico had pre-existing conditions of heavy metal poisoning, diabetes, cardio vascular or cardiac disease, hypertension, gout and coronary artery disease, which were aggravated by McConico's repeated and/or cumulative exposure to lead on her last day of employment on July 31, 1999 Appellant alleged that the aggravation of the preexisting conditions because of injurious lead exposure qualified Appellant to obtain reimbursement from the South Carolina Second Injury Fund [hereinafter "the Fund" or "Respondent"]. Appellant also asserted in the Form 54 that McConico's pre-existing conditions, which were diagnosed and treated during her twenty-five (25) year employment, combined with other health maladies to render her permanently disabled (R. p. 51).

The Fund filed a Form 55 denying liability for the requested indemnity reimbursement. An adjudicatory hearing was held by the Honorable Andrea C. Roche, the Hearing Commissioner, on August 13, 2012. On December 19, 2012, the Hearing Commissioner promulgated an Order denying Second Injury Fund reimbursement to Appellant. (R. pp. 19 – 36). From this Decision, Appellant timely filed an appeal to the South Carolina Workers' Compensation Full Commission. The Fund also appealed the Hearing Commissioner's Decision and Order. Specifically, the Hearing Commissioner overruled the Fund's objection to the introduction of post-employment medical records, and concluded such were not untimely submitted.

On November 21, 2013, the Full Commission promulgated a Decision and Order affirming in part the Hearing Commissioner's decision denying Second Injury Fund reimbursement to Appellant. From this decision, Appellant timely filed an appeal to the Sumter County Court of Common Pleas. (R. pp. 1 – 17). By Order dated September 5, 2014 and filed on November 24, 2014, the Sumter County Court of Common Pleas promulgated an Order affirming the Decision and Order of the South Carolina Workers' Compensation Commission From this Order, Appellant appeals to this Honorable Court.

STATEMENT OF THE FACTS

Mary McConico, Employee/Claimant, is a 68-year old female, who worked at Yuasa-Exide and its predecessor companies from March 4, 1974 to July 31, 1999. (R. p. 199). During McConico's first nine years of employment, she worked for ESB, Inc. Over the next eight years, McConico worked at the Exide Corporation. (R. pp. 172). In June 1991, Yuasa purchased the Sumter Industrial Battery Division of Exide Corporation McConico was retained as an employee and began working for Yuasa-Exide, Inc. and later Yuasa, Inc. (R. pp 205, 296 - 297).[1] While at work for Yuasa-Exide, Inc., in 1999, McConico suffered an aneurysm and

[1] The employment records reflect McConico worked for ESB, Inc on March 19, 1979 as is reflected in a claim for disability benefits in R p 296 Records dated October 23, 1983 reflect McConico worked for Exide (R p 199) At the time of McConico's last exposure to lead, she worked for Yuasa, Inc (R p 303)

stroke. McConico was medically deemed totally disabled from returning to work. McConico began receiving long-term company disability benefits and Social Security disability benefits (APA pp. 180 – 184).

Medical Health History Questionnaires completed by McConico during her employment tenure with ESB, Inc., the Exide Corporation and later with Yuasa-Exide reflected a family history of diabetes, rheumatism and arthritis.

Over 25 years, McConico was treated by the physicians in the medical departments of ESB, Inc., Exide Corporation, Yuasa-Exide, and Yuasa, Inc for anemia, high blood pressure, kidney dysfunction, hypertension (cardiac disease) and peripheral neuropathy. Each different employer of McConico had complete knowledge of her medical conditions.

When McConico first began working at the Battery Manufacturing Plant in 1974, her blood lead level was recorded at 7 micrograms per deciliter of blood A normal blood level is less than 10 micrograms per deciliter of blood. The toxicology experts providing testimony in these lead exposure claims, state that the average blood lead level for the general population is 3 micrograms per deciliter of blood. From June 3, 1975 to May 2, 1985, McConico's blood lead levels ranged from 7 to 34 micrograms per deciliter of blood. (R. pp. 199 – 218). During this time, McConico worked for ESB, Inc. and the Exide Corporation.

From September 23, 1987 through July 18, 1995, McConico's blood lead levels ranged from 15 to 55 micrograms per deciliter of blood. Specifically, on January 8, 1991, McConico was placed in the medical removal program (MRP) because her blood lead levels exceed 36 micrograms per deciliter of blood over a three (3) month period in violation of industry standards. McConico worked for Exide Corporation during this time The records reflect that even after being placed in the medical removal program, McConico's blood lead levels

remained above 40 micrograms per deciliter of blood from March 6, 1991 through May 1992. (R. pp. 205 – 208).

From September 23, 1987 through July 18, 1995, McConico's blood lead levels ranged from 15 to 55 micrograms per deciliter of blood. Specifically, on January 8, 1991, McConico was placed in the medical removal program because her blood lead levels exceed 36 micrograms per deciliter of blood over a three (3) month period. The records reflect that even after being placed in the medical removal program, McConico's blood lead levels remained above 40 micrograms per deciliter of blood from March 6, 1991 through May 1992. (R. pp. 205 – 208).

Despite placing McConico in the medical removal program and taking extra safety precautions to decrease her blood lead levels, McConico's blood lead levels ranged from 27 to 47 micrograms per deciliter of blood from 1995 until her stroke. (R pp. 299 – 300)

Industry regulations regulating lead exposure and OSHA regulations require an employee to be placed in the medical removal program ("MRP") when blood lead levels reach an unsafe level. Accordingly, McConico was placed on MRP on at least three (3) occasions. McConico's high blood lead levels constitute injuries from heavy metal poisoning during the times blood lead levels exceeded 36 micrograms per deciliter of blood over a six month period or 40 micrograms per deciliter of blood at any instance. (R. pp. 439 – 465 and 528 – 545).

Prior to McConico's employment at Yuasa Exide and stroke, she suffered with severe cardiac disease or hypertension. McConico's blood pressure was recorded as follows:

190/110 (R p. 166);	170/104 (R. p. 168);	162/102 (R. p. 172);	182/120 (R. p. 180);
180/100 (R. p. 182);	190/110 (R. p. 182);	170/108 (R. p. 184);	160/100 (R p. 186);
172/104 (R. p. 188);	234/116 and 224/120 (R. p. 190);	160/94 (R. p. 191);	204/118 (R. p. 193); and
204/126 (R. p. 193)			

As a consequence of severe hypertension aggravated by acute and chronic exposure to lead, McConico's cardiac disease resulted in a debilitating stroke. (R. pp 299 – 300)

In support of its request for reimbursement, Appellant relies upon 25 years of in-house medical records and numerous expert reports. First, the neuropsychological report of Dr. Randolph L. Waid, stated that blood lead levels in the range of 10 to 19 micrograms per deciliter of blood can cause hypertension, kidney damage, and neurocognitive impairment. McConico was exposed to this level of lead during her employment enure with ESB and the Exide Corporation. Dr Waid further opined McConico had also sustained brain damage with respect to neurocognitive functioning because of the stroke.

Second, Dr. Eugene Shippen and Dr. J. Routt Reigart, experts in the field of lead toxicology, completed Second Injury Fund Medical Questionnaires indicating that McConico's preexisting conditions of heavy metal poisoning, coronary artery disease, cardiovascular disease, arthritis and hypertension were aggravated by cumulative exposure to lead and resulted in her being permanently disabled. Dr. Reigart's expert report was also submitted as evidence for Appellant's reimbursement request. Drs. Shippen and Reigart further opined that McConico's last episode of heavy metal poisoning and/or her cerebral vascular accident (stroke) combined with other maladies, i.e., diabetes and gout to render her disabled.

The in-house medical records comprising of approximately twenty-five (25) years of medical history; treatment records of McConico; and medical questionnaires from toxicology experts were submitted to the Fund on June 30, 2011, as required by *Section 42-7-320(B)(2) S C Code Ann §42-7-320(B)(2) (2015)*

In addition to these records, post-employment medical records were submitted to the Fund by virtue of compact disc ("CD"). The CD is an electronic copy of all the medical records

generated after McConico's disabling stroke and medical care and treatment from 1999 to 2011 The CD contained a hyperlink rather than the medical documents, which was believed have been downloaded onto the CD. The Fund was unable to access the medical documents through the hyperlink. Thereafter, Appellant's counsel was notified in September, 2011 that the documents on the CD could not be retrieved. Within approximately three (3) days after receiving notice of the Fund's inability to retrieve the post-employment documents, the CD containing the same documents was hand delivered to the Fund.

The Fund alleged that Appellant's claim was barred by *Sections 42-7-310 and 42-7-320(B)(2) (2015)* The Fund asserted that the documents were not timely submitted by the June 30, 2011, deadline, and therefore, were barred from consideration. *S C Code Ann §§ 42-7-310 and 42-7-320(B)(2) (2015).*

The Hearing Commissioner rejected the Fund's argument that the post-employment documents were not timely submitted. The Hearing Commissioner further concluded that *Section 42-7-320(B)(2)* did not act as a bar to Appellants' recovery in view of the other printed/written evidence submitted to and received by the Fund. Id

The Fund cross-appealed the Hearing Commissioner's Decision on this issue to the Full Commission. The Full Commission determined that the statute acted as a bar to Appellant's recovery, despite arguments of Appellant that the Fund had not proven that the post-employment medical documents constituted the required information as is required pursuant to *Section 42-7-320(B)(2)* Id. Further, Appellant contended that the post employment documents were not needed to meet its burden of proof in light of the expert reports and questionnaires and 25 years of in-house medical records.

A. THE PURPOSE OF THE SOUTH CAROLINA SECOND INJURY FUND

The South Carolina Second Injury Fund was established to encourage employers to hire disabled or handicapped workers, or to retain employees who become partially disabled in the course and scope of their employment. The Fund provides reimbursement to an insurer or employer for compensation paid to an injured worker, who suffers increased permanent disability as a result of the preexisting condition and a subsequent workplace injury. The Fund was designed to encourage the employment and retention of disabled workers by providing financial relief to employers. Thus, the Fund removed any financial incentive an employer may have had to terminate a disabled worker who may increase the employer's liability. See generally State Workers' Comp. Fund v. S.C. Second Injury Fund, 313 S.C. 536, 538, 443 S.E.2d 546, 547 (1994); Greenwood Mills v. Second Injury Fund, 315 S C. 256, 257, 433 S.E.2d 846, 847 fn 1 (1993); Liberty Mut. Ins. Co v. S.C Second Injury Fund, 363 S C. 612, 625, 611 S.E.2d 297, 303 (Ct. App. 2005); American Motorists Ins. Co v. S C. Second Injury Fund, 300 S.C. 17, 21–22, 386 S.E.2d 276, 278–79 (Ct. App. 1989).

B. APPLICABILITY OF THE SOUTH CAROLINA SECOND INJURY FUND STATUTE

The Second Injury Fund Statute as set forth in Section 42-9-400(d) lists thirty-three (33) medical maladies or conditions which constitute an irrebuttable presumption that the underlying pre-existing listed condition is permanent and constitutes a hindrance or obstacle to employment or re-employment. *S C Code Ann §42-9-400(d) (1999).* McConico's preexisting conditions of cardiac disease, arthritis and heavy metal poisoning are three of the statutorily listed conditions that existed prior to her last exposure to lead. *S C Code Ann §42-9-400(d)(3)(4) and (22) (2001)* Despite these pre-existing medical conditions, Yuasa Exide continued to employ McConico.

Appellant provided proof of the pre-existing conditions of heavy metal poisoning and hypertension or cardiac disease by virtue of blood lead level reports, expert medical questionnaires, and medical records dating from 1975 through 1999. Accordingly, it is presumed as a matter of law that the pre-existing cardiac condition and heavy metal poisoning constitute a hindrance or obstacle to employment or re-employment. *S C Ann §42-9-400 (1999).* Thus, the prerequisites of the Second Injury Fund needed to trigger reimbursement were proven by Appellant.

Reimbursement from the Fund is governed by *South Carolina Code Annotated Section 42-9-400.* In addition to providing timely notice of the reimbursement claim, a carrier/employer must establish four elements in order to be entitled to reimbursement. For a pre-July 1, 2007 claim, these elements include the following: (1) that the claimant had a preexisting permanent physical impairment/condition (*§42-9-400(a)*); (2) that the employer had knowledge of the preexisting impairment prior to the workplace injury (*§42-9-400(c)*); (3) that the preexisting impairment was a hindrance/obstacle to employment or re-employment (*§42-9-400(d)*); and (4) that the preexisting impairment combined with or was aggravated by the workplace injury to result in substantially greater disability than that which would have resulted from the subsequent injury alone (*§42-9-400(a)*).

Yuasa Exide, Inc. is entitled to reimbursement from the Fund because it was the last employer for which McConico worked McConico was exposed to lead which aggravated pre-existing conditions caused by her previous employment with ESB, Inc. and the Exide Corporation.

By way of background, the initial owner of the Sumter Battery Plant was ESB, Inc The company began its battery manufacturing operations in Sumter in 1961. McConico began

working at ESB, Inc. in 1974. It was during this initial employment tenure at the battery manufacturing facility that McConico began experiencing problems with high blood pressure, cardiac disease, and heavy metal poisoning.

In 1983, the Exide Corporation purchased the battery plant from ESB, Inc. McConico continued to work at the battery manufacturing facility as an Exide employee, despite diagnosed problems of hypertension and heavy metal poisoning, which warranted medical treatment. During McConico's employment at the Exide Corporation, she was also plagued with anemia and kidney problems. During this time, McConico underwent various x-rays and other diagnostic tests which revealed abnormalities of the chest. McConico also had an abnormal electrocardiogram, which is evidence of cardiac disease.

Despite the aforesaid problems, McConico was retained as an employee when Yuasa Battery, also known as Yuasa Exide purchased the Sumter battery manufacturing facility from the Exide Corporation on June 10, 1991.

The aforesaid chronology of events manifests the applicability of the Second Injury Fund statute in this instance. The purpose of the Second Injury Fund that is to retain disabled workers who suffer permanent disability and pre-existing medical conditions that are an obstacle or hindrance to employment and reemployment was fulfilled. Moreover, McConico's medical and employment history prove that the heavy metal poisoning and cardiac disease were not one continuous event but separate and distinct events transferring over 25 years reflects various levels of exposure to lead, some harmful and injurious while other exposures were less pernicious.

C. FUNDING OF THE SOUTH CAROLINA SECOND INJURY FUND

The South Carolina Second Injury Fund is funded by assessments upon each carrier and

self-insured employer. *S C Code §42-7-310(b)(2) (2015)* Appellant, as is all carriers, authorized to transact business in this state:

> **"shall make payments to the fund in an amount equal to that portion of one hundred thirty-five percent of the total disbursement made from the Fund during the preceding fiscal year... The charge to each insurance carrier is a charge based upon normalized premiums. An employer who has ceased to be a self-insurer shall continue to be liable for any assessments to the fund on account of any benefits paid by him during such calendar year. Any assessment levied or established in accordance with this Section constitutes a personnel debt of every employer or insurance carrier so assessed and is due and payable to the Second Injury Fund when payment is called for by the fund...."**

Appellant continues to pay Second Injury Fund assessments and has been since 1991. Hence, the reimbursement does not come from the taxpayer or the state coffers, but rather from the employers that fund the Second Injury Fund.

D. OSHA'S REGULATIONS AND POLICIES AND INDUSTRY STANDARDS REGARDING PERMISSIBLE EXPOSURE LIMITS TO LEAD

OSHA first sought to regulate lead in the work place in 1978. In 1980, OSHA initially proposed establishing the permissible exposure limit to 70 micrograms per deciliter of blood. In 1983, OSHA finally promulgated regulations to reflect that if an employee's blood lead level reached or exceeded 60 micrograms per deciliter of blood, the employee had to be removed from the work environment. The regulations also require that if an employee's blood lead level exceeded 50 micrograms per deciliter of blood over a six month average, the employee must be removed from the work place or placed into a medical removal program ("MRP"). *Id See also,* 29 C.F.R 1910-1025(k)(1)(i)(a-b); and 29 C.F R. 1926.62 Appendix C (I), et seq. (R. pp. 528 - 557).

In short, government experts conclude that the permissible exposure limit of 60 micrograms per deciliter of blood, or sustained blood lead level of 50 micrograms per deciliter is sufficient to avoid various health maladies associated with chronic lead exposure.

On the contrary, industry experts conclude that a lower permissible exposure limit to lead is needed to sufficiently protect workers in the lead industry. Accordingly, Yuasa Exide reduced permissible exposure limit below OSHA's threshold. Specifically, an employee of Yuasa Exide beginning in 1991 would have been placed on MRP if a six month lead average or three samples registered greater than 36 micrograms per deciliter of blood. An employee of Yuasa Exide would also be subject to MRP if there was a one-time blood lead level reading of 44 micrograms per deciliter of blood or greater. These industry standards were strictly enforced by McConico's last employer, Yuasa Exide, Inc.

STANDARD OF REVIEW

In the instant case, Appellants submit that the standard of review is bifurcated. The question of statutory interpretation is a question of law for the court, which requires a de novo standard of review, while the question of whether Appellants satisfied its burden of proof in establishing the elements for reimbursement is a question of fact, requiring the application of the substantial evidence standard of review.

Judicial review of a Workers' Compensation Commission decision is governed by South Carolina Code Annotated *§1-23-380* of the Administrative Procedures Act (hereafter "the APA"); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. *S C Code Ann §1-23-380(A)(5) (Supp 2014).*

Review of the Commission's factual findings is governed by the substantial evidence standard. "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* Bursey v. South Carolina Dep't of Health & Envtl Control, 360 S C. 135, 600 S.E.2d 80 (Ct App 2004); *see also* Tiller v. Nat'l Health Care Ctr., 334 S C. 333, 513 S.E.2d 843 (1999); *see also S C Code Ann §1-23-380(A)(5)(e).* "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its

action." Frame v. Resort Services Inc., 357 S.C. 520, 527–28, 593 S.E.2d 491, 495 (Ct. App. 2004); Bass v. Isochem, 365 S.C. at 468, 617 S.E.2d at 376. In particular, workers' compensation awards "must not be based on surmise, conjecture or speculation." Tiller, 334 S.C. at 339, 513 S.E.2d at 845.

In addition, a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Case law unequivocally establishes that statutory interpretation is a question of law, and the appellate court "is free to decide matters of law with no particular deference to the fact finder" King v Int'l Knife & Saw - Florence, 395 S C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); S.C. Uninsured Employers' Fund v House, 360 S C. 468, 602 S.E.2d 81 (Ct. App. 2004). Likewise, the determination of legislative intent in a statute is a matter of law. Wehle v. S.C. Retirement Syst., 363 S.E. 394, 611 S.E 2d 240 (2005); Liberty Mutual Insur. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (2005). Thus, in summary, an appellate court must review the Commission's interpretation of a statute as a question of law and must review the Commission's application of the facts to the statute as a question of fact under the substantial evidence standard of review. *See* King, 395 S.C. at 442, 718 S.E.2d at 229

ARGUMENTS

I. THE COMMISSION ERRED IN FACTUALLY FINDING AND CONCLUDING AS A MATTER OF LAW THAT MCCONICO DID NOT SUFFER WITH PRE-EXISTING CONDITIONS OF HEAVY METAL POISONING, HYPERTENSION (CARDIAC/CARDIOVASCULAR DISEASE), AND ARTHRITIS PRIOR TO HER DEBILITATING STROKE.

It is axiomatic that in workers' compensation cases, the date of injury is controlling with regard to the payment of benefits, statute of limitations, and reimbursement from the South Carolina Second Injury Fund. *Section 42-9-400(a)* states that an employer or insurance carrier, after paying awards of compensation stemming from a disability resulting from an injury by accident, is entitled to reimbursement from the South Carolina Second Injury Fund **upon providing proof of the existence of preexisting conditions**. *S C Code Ann §42-9-400(a) (1999)*. State Accident Fund v. S.C. Second Injury Fund, 409 S.C. 240, 762 S.E.2d 19 (2014). It stands to reason that if July 1999 is the operative date of injury, then evidence of heavy metal poisoning and cardiac disease before July 31, 1999 is ample proof of a pre-existing medical condition.

Despite the Commission's finding of fact that McConico sustained an occupational exposure or accidental injury to heavy metal or lead on July 31, 1999, (Finding of Fact #1), the Commission inexplicably found that exposure to lead over a twenty-five (25) year employment history was only one injury and that there was no pre-existing heavy metal exposure or poisoning (Finding of Fact #4). (R. pp. 9 – 10). These two findings are simply incongruent and illogical, and the factual findings and legal conclusions are not supported by the only evidence in the record.

The only evidence in the record reflects that prior to McConico's last exposure to heavy metal or lead in 1999, she had received medical treatment during the course of her twenty-five

(25) year employment history for heavy metal lead poisoning and cardiac or cardio vascular disease (hypertension) (R pp. 145 – 146; 149; 153; 155; 159; 166; 168; 172; 174; 180, 182; 184; 186; 188; 193 – 194; 196; 294 and 299); and heavy metal poisoning R. pp. 200 – 218).

The medical records reflect McConico had suffered with hypertension and stroke-like symptoms on October 17, 1977, a few years after first working at ESB, Inc. or her first employer in the battery manufacturing industry. McConico's treatment for heavy metal poisoning and cardia disease is evidence during her employment tenure with the Exide Corporation or second employer. (R p. 294). McConico later became temporarily disabled due to severe hypertension on February 26, 1998, while employed for Yuasa Exide (R. p 299) These separate and distinct events certainly manifest the Appellant's knowledge of pre-existing conditions of cardiac disease and heavy metal poisoning in accordance with *Section 42-9-400(a) as of July 31, 1999* Id.

It is obvious that McConico had been diagnosed and treated for heavy metal poisoning by placement in the medical removal program for high lead levels at various times, from 1990 through 1998, prior to her employment and last date of employment with Yuasa Exide in July 1999. Accordingly, the Commission's Decision and Order is erroneous and must be reversed as a matter of law. *S C. Code Ann §42-9-400(a)(3)(22) (1999).*

A. THE COMMISSION'S LEGAL CONCLUSION REQUIRING THAT AN INJURED WORKER HAVE A PRE-EXISTING CONDITION PRIOR TO EMPLOYMENT IN ORDER TO QUALIFY FOR SECOND INJURY FUND REIMBURSEMENT IS CONTRARY TO STATUTORY AND CASE LAW.

In the case of State Workers' Compensation Fund v. The South Carolina Second Injury Fund In Re. Hunt v. S C. State Forestry Comm., 313 S.C. 536, 443 S E.2d 546 (1994), the State Accident Fund was awarded reimbursement for disability suffered by Warren M. Hunt ("Hunt"), a

firefighter for the State Forestry Commission. Hunt was deemed disabled as a consequence of coronary artery disease and arteriosclerosis. Hunt had been employed with the Forestry Commission for thirty (30) years. Hunt had been diagnosed with heart disease and arterial sclerosis, for twelve (12) years prior to him becoming permanently and totally disabled *Id* In Hunt, the coronary artery disease did not pre-exist prior to the initial hire. Hunt's cardiac disease developed during the course of his employment. Because the cardiac disease developed during the course and scope of Hunt's employment with the Forestry Commission, the law did not disqualify the Forestry Commission and the State Accident Fund from obtaining reimbursement from the South Carolina Second Injury Fund:

The Court noted that Second Injury Fund reimbursement is available when

> **"[T]he employer had knowledge of the permanent physical impairment at the time the employee was hired, or at the time the employee was retained in employment after the employer acquired such knowledge...."** S.C. Code Ann, §42-9-400(c) (1999). (Emphasis added)

This provision makes it clear that if an employer can prove knowledge of a pre-existing condition at the time an employee is working or is "retained" to continue to perform his or her employment duties, then a subsequent injury aggravating or combining with the preexisting condition, qualifies the employer for recovery or reimbursement from the Fund. *Id*

The Fund did not plead or argue that Appellant had to prove McConico had pre-existing conditions of cardiac disease and heavy metal poisoning prior to her working at ESB, Inc., the Exide Corporation or Yuasa Exide. Even if the Fund had made such an argument, the uncontradicted evidence clearly shows Appellant had knowledge of McConico's prior medical impairments and continued to acquire additional knowledge about McConico's medical condition from June 10, 1991 until July 1999 because of its in-house medical department. This erroneous legal proposition regarding the new Commission mandated prerequisites for Second

Injury Fund reimbursement was not enunciated by the Fund in any of its pleadings, pre-trial briefs, or oral presentations before the Commission. It stands to reason that the Fund did not take this position because of the law and 25 years of in-house medical records and blood lead readings reflected McConico suffered with hypertension, cardiac disease and high blood lead levels before she began working at the Exide Corporation around 1983; and at Yuasa Exide in June 1991.

B. MCCONICO'S CLAIM WOULD BE SUBJECT TO REIMBURSEMENT IRRESPECTIVE OF WHETHER THE CLAIM IS CHARACTERIZED AS AN INJURY BY ACCIDENT OR OCCUPATIONAL DISEASE.

The date of injury is the controlling factor in workers' compensation claims. The conclusion that McConico's pre-existing condition must have been in existence prior to her first day of work at the Yuasa plant is contrary to South Carolina law.

The South Carolina Workers' Compensation Act establishes that an occupational disease is not a compensable injury until the employee alleging the disease suffers a disability as described in *Sections 42-9-10, 42-9-20, or 42-9-30. S C Code Ann §42-11-10 (Supp 2012)* The South Carolina Supreme Court reached this legal conclusion in Glenn v. Columbia Silica Sand Co., 236 S.C 13, 19-20, 112 S.E.2d 711, 714 (1960). In Glenn, the court quoted with approval this statement from Professor Larson's Treatise:

> Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know she has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.

Id. at 19-20, 112 S.E.2d at 714 (quoting 2 *Larson's Workers' Compensation Law* §95.21). This same statement was used to support the Supreme Court's decision in Drake v. Raybestos Manhattan, Inc., 241 S.C. 116, 122-23, 127 S.E.2d 288, 291-92 (1962), overruled on other grounds by Hunt v. Whitt, 279 S.C 343, 306 S.E.2d 621 (1983).

Additional case law from South Carolina's Appellate Courts reaffirm that an occupational disease claim does not ripen until the point that "the employee becomes disabled and could, through reasonable diligence, discover that her condition is compensable." Muir v. C.R Bard, Inc., 336 S.C 266, 519 S.E.2d 583 (Ct. App. 1999); *see also* Bass v. Isochem, 365 S.C 454, 476, 617 S.E.2d 369 (Ct. App. 2005).

Last, the South Carolina Court of Appeals determined that an occupational disease is compensable once a condition has been definitively diagnosed. Rogers v. Kunja Knitting Mills, 312 S.C. 377, 379-81, 440 S.E.2d 401, 403-04 (Ct. App. 1994). It goes to follow that an occupational disease injury does not exist until an employee has been definitely diagnosed with an occupational disease or through reasonable diligence could have discovered she had an occupational disease. See also, State Workers' Comp. Fund v. S.C. SIF, 313 S.C. 536, 443 S.E.2d 546 (1994).

Accordingly, the Commission legally erred in its interpretation of the statute and case law. Hence, the decision must be reversed as a matter of law. State Accident Fund v. S C. Second Injury Fund, 409 S.C. 240, 762 S.E.2d 19 (2015).

II. THE COMMISSION ERRED AND ABUSED ITS DISCRETION IN FINDING AND CONCLUDING THAT APPELLANT DID NOT PROVE MCCONICO'S PRE-EXISTING CONDITIONS OF HEAVY METAL POISONING, CORONARY ARTERY DISEASE AND HYPERTENSION (CARDIAC DISEASE) CREATED SUBSTANTIALLY GREATER MEDICAL COSTS AND PERMANENT DISABILITY AND WERE OBSTACLES TO EMPLOYMENT AND REEMPLOYMENT.

Cardiovascular or cardiac disease by definition includes hypertension and coronary artery disease. (R. p. 441 and 461 – 462). Appellant submitted into evidence a medical questionnaire from Dr Edward L. Baker, Jr., who opined that the aforesaid conditions, as well as heavy metal poisoning, were aggravated by McConico's last exposure to lead. Dr. Baker opined that hypertension and coronary artery disease, etc., are a hindrance or obstacle to employment and re-employment. (R. pp. 136 - 138).

Additionally, Dr. Eugene Shippen medically opined that McConico's pre-existing medical conditions and maladies were aggravated by her last exposure to lead in July 1999 Dr Shippen also opined that heavy metal poisoning, hypertension, coronary artery disease, etc., posed as an obstacle and hindrance to employment and re-employment; and that the medical conditions resulted in increased medical costs. (R. pp. 133 - 135).

Contrary to the Order, the medical qualifications of Drs Eugene Shippen and Edward L. Baker were fully set forth in Appellant's evidentiary submissions and exhibits The qualifications of Dr. Edward L. Baker are fully set forth in the global report beginning on Page 3. (R. p. 442). The qualifications of Dr. Eugene Shippen were addressed in a previous 'Commission Order involving the case of Lee Ernest Franklin in which the Second Injury Fund was a party. Transportation Ins., Travelers Ins. Co. and Great American Ins. Co , et al. v. South Carolina Second Injury Fund, 389 SC 422, 699 S.E 2d 687 (2010) (R. pp. 592 - 593). Specifically, the Commission Order in Franklin stated that Dr. Shippen was a member of the American Occupation Society's Environmental Clinic Panel, which consists of nationally known American Lead Experts. Further, the curriculum vitae and deposition of Dr Eugene Shippen were submitted into evidence in the Franklin case. Id.

The Fund was presented with the complete file in the underlying case regarding Lee

Ernest Franklin v. Yuasa Exide. Id. Thus, the Fund and the Commission are familiar with Drs. Baker and Shippen's background, expertise and qualifications. Hence, it is obvious the Commission ignored such and the experts unrefuted expert opinions and conclusions.

A. MEDICAL RECORDS GENERATED DURING MCCONICO'S EMPLOYMENT TENURE AT ESB, INC., EXIDE CORPORATION AND YUASA-EXIDE, INC. REFLECT THAT CARDIAC DISEASE POSED AS AN OBSTACLE TO EMPLOYMENT AND REEMPLOYMENT AND INCREASED MEDICAL COSTS.

But for McConico's exposure to lead, it appears her hypertension was continuously aggravated. McConico's hypertension was uncontrolled and resulted in the constant use of high blood pressure medications and increased medical monitoring. (R. 365; 371; 384 and 388). Because McConico's hypertension was difficult to control, she was unable to physically work from February 26, 1998 to March 8, 1998 and received disability benefits while working for Yuasa Exide. (R. p. 299).

Despite knowledge of McConico's hypertensive condition, heavy metal poisoning, and arthritis, Yuasa-Exide, Inc., retained and re-employed McConico after its purchase of the Sumter Battery Manufacturing Facility from the Exide Corporation in June 1991 Transportation Ins., Travelers Ins. Co and Great American Ins. Co., et al. v. South Carolina Second Injury Fund, 389 SC 422, 699 S E.2d 687 (2010). See also, Yuasa Exide v. NLRB, 1997 U.S App. Lexis 20848. McConico's employment voluntarily terminated because she suffered a disabling stroke impacted by acute and cumulative chronic exposure to lead on July 31, 1999. (R. p. 300). Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (1987).

III. THE COMMISSION LEGALLY ERRED AND ABUSED ITS DISCRETION IN DENYING REIMBURSEMENT TO APPELLANT WHEN ALL NECESSARY ELEMENTS FOR REIMBURSEMENT HAD BEEN PROVEN PURSUANT TO SECTION 42-9-400.

In the case of Ellison v. Frigidaire Home Products, 271 S.C. 159, 638 S.E.2d 664 (2006), Ellison was awarded permanent and total disability compensation benefits as a consequence of a fractured left leg that resulted in a twenty (20%) percent medical impairment rating to the left lower extremity. The Supreme Court found that because Ellison had pre-existing physical conditions of hypertension and sleep apnea, these non-occupational maladies or congenital conditions, in combination with his work place injury rendered him permanently and totally disabled. In affirming the Commission's award of permanent and total disability compensation benefits, the Court cited Section 42-9-400 (1985 & Supp. S. 2005), which provides impertinent part:

> (a) **If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical liability or either,** *for disability that is substantially greater, by reason of the* **combined effects** *of the preexisting impairment and subsequent injury*
>
> (d) As used in this Section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle obtaining employment or to obtaining re employment if the employee should become unemployed.

S C Code Ann 02-9-400(a) and (d)

McConico did not discover her health conditions were related to her employment activities until she was definitively diagnosed by virtue of a medical examination on March 17, 2011.

Based upon the uncontroverted evidence, McConico's pre-existing conditions of heavy metal poisoning, cardiac disease, which includes hypertension, combined with the stroke or coronary artery disease and rendered her permanently and totally disabled. Thus, in accordance with the Supreme Court's holding in Ellison, Appellant proved it is entitled to reimbursement

from the Fund. Transportation Ins. Co., Travelers Ins. Co. and Great American Ins Co., et al. vs. South Carolina Second Injury Fund, 389 S.C 422, 699 S.E 2d 687 (2010) and Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 73 S.E.2d 324 (Ct. App. 2012).

A. APPELLANT PRESENTED EVIDENCE SHOWING THAT MCCONICO'S STROKE OR CEREBRAL VASCULAR ACCIDENT WOULD NOT HAVE OCCURRED BUT FOR THE PRESENCE OF THE PREEXISTING PRIOR IMPAIRMENTS OF HEAVY METAL POISONING AND HYPERTENSION/CARDIAC DISEASE.

McConico's blood lead levels routinely ranged in the mid to upper 40s. McConico was placed in the medical removal program (MRP) because of dangerously elevated blood lead levels McConico's acute and cumulative chronic exposure to lead continuously aggravated her blood pressure. McConico received constant treatment from the medical physicians employed by ESB, Inc., the Exide Corporation and Yuasa-Exide, Inc McConico took hypertensive medications on a regular basis during the majority of her twenty-five (25) years of employment.

Despite utilizing blood pressure medication and routinely seeing the plant physician for medical treatment, McConico suffered a stroke. (R. p. 300). Dr. J. Routt Reigart opined that blood lead levels in the ranges of McConico led to hypertension Dr. Reigart opines that there is a clear association between the development of hypertension and the occurrence of heart disease (cardiac) and stroke.

Again, the Fund presented no evidence to refute Dr Reigart's expert medical and scientific conclusions. To this end, in absence of medical evidence to the contrary, the Commission committed reversible error in denying reimbursement. State Accident Fund v S C. Second Injury Fund, 409 S.C 240, 762 S.E.2d 19 (2014); Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (1987); See Also Burnette v. City of Greenville, 737 S E.2d 200 (Ct. App. 2013).

IV. THE COMMISSION LEGALLY ERRED AND ABUSED ITS DISCRETION IN FINDING THAT APPELLANT'S CLAIM FOR REIMBURSEMENT WAS NOT TIMELY FILED AND SHOULD BE BARRED PURSUANT TO SECTION 42-7-320(B)(2).

The Fund does not dispute that extensive or 25 years of printed medical evidence was timely presented. Two and a half decades of medical evidence was submitted to prove that McConico suffered with pre-existing permanent impairments and conditions, which were either aggravated or combined with the workplace injury to create greater permanent disability. Furthermore, Appellant submitted into evidence printed medical health history questionnaires confirming that McConico's cumulative occupational exposure to lead aggravated pre-existing conditions of cardiac disease and coronary artery disease. Appellant submitted health evaluations and reports from Drs. Edward L. Baker, J Routt Reigart and Barry Weissglass which conclude that McConico's exposure to lead was a significant contributor, accelerating factor, and/or aggravating factor for her injury and permanent disability in July 1999. The aforesaid medical experts noted that McConico's exposure to lead combined with or aggravated the preexisting conditions, i.e., heavy metal poisoning, cardiac disease, cardiovascular disease and cerebral vascular accident, to result in substantially higher medical costs and permanent disability

The Fund does not and cannot dispute that twenty-five (25) years of in-house medical reports and expert questionnaires were timely submitted on June 30, 2011.

Despite overwhelming evidence of proof that qualifies this case for reimbursement, the Fund argues that an unreadable disc containing medical documents reflecting medical treatment obtained by McConico since she last worked at Yuasa-Exide warrants a denial of reimbursement.

The Fund alleges that documents submitted by Appellant were untimely pursuant to Section 42-7-320. Appellant timely submitted the disc to the Fund, only later to learn three

months after its submission that the Fund was unable to read the records contained on the disc when notified on September 2011. Upon learning of the Fund's inability to read the documents contained on the disc, Appellant immediately rectified the issue by providing a new disc containing the same documents within three (3) days.

A technical error in service upon another party that is rectified without prejudice to the other party does not act as a bar. See e.g , Dalenko v. News and Observer Publishing Co., U S. District Lexis 136787 (2010). In Dalenko, Defendants timely submitted their Answer to Plaintiff s Complaint, but relied upon electronic service. *Id* Plaintiff was not served with Defendant's responsive pleadings in a timely fashion because of the mission of the Certificate of Service. In particular, Defendants had filed pleadings with the Court through electronic service, but had not attached the required Certificate of Service, thereby making its responsive pleadings untimely. The United States District Court in Dalenko refused to enter an Order of Default reasoning that while Defendants may have mistakenly relied upon electronic service, the error which resulted in Plaintiff not receiving the responsive pleadings did not arise to the level of bad faith requiring an entry of default. Id.

Although this case is not directly on point regarding the issue raised by the Fund, the Court's analysis in Dalenko is persuasive. In the instant case, Appellant timely submitted all required documents to the Fund on or before June 30, 2011, but mistakenly relied upon technology when it included an illegible electronic record containing McConico's post-employment medical reports. Appellant immediately rectified its mistake by hand delivering another disc containing the same medical records which were now legible. The disc containing the legible records were delivered within three (3) days after the Fund had notified Appellant that the records and documents contained on the first disc were not legible. Similar to

the Plaintiff in Dalenko, the Fund has failed to show bad faith, willful action on part of Appellant, prejudice or injustice.

The post-employment records were submitted to the Fund to provide an overview of the case with respect to Appellant's efforts to defend the claim. As a matter of fact, the post-employment records contained on the disc are not material with regard to the Fund's decision to accept or deny Appellant's claim for reimbursement because the medical records contained on the disc mainly include information about unrelated employment ailments i e., bronchitis, diabetes, right heel pain, and right knee pain The post-employment records also contain laboratory reports, documents from LabCorp, CT scans and x-rays of the right heel and right knee, venous Doppler studies of the right leg, chemistry analysis and mammogram reports. (R. pp. 106; 110; 117 – 120; 131 – 132 ; 157; and 164).

In short, the required information, absent the disc, was provided to the Fund in a timely manner. Medical records reflecting McConico's pre-existing health impairments; knowledge of these impairments/conditions by McConico and Appellant; and that the conditions were a hindrance and obstacle to employment and re-employment were submitted on June 30, 2011 The aforesaid documents were all that was required to have the Fund consider Appellant's request for reimbursement

As an aside, had Appellant's application for reimbursement included a request for reimbursement of past, present and future medical treatment, then the post-employment medical records would have been required and necessary for the Fund's consideration. Because Appellant's request is not for reimbursement of medical costs, but only indemnity, the Fund's argument is without merit Thus, the Commission legally erred and abused its discretion in reversing the Hearing Commissioner on this issue.

Regardless of whether the disc materials were entered into evidence, Appellant submitted volumes of other evidence which support a valid Second Injury Fund claim. The Fund acknowledges receiving all printed medical and blood lead reports and employment files that were generated during McConico's employment tenure with all three employers The Fund further admits receiving the medical questionnaires, expert medical reports and knowledge affidavits. These materials were timely submitted and were in a legible and printed formal. These printed records are what established a *prima facie* case for reimbursement. The disc containing post-employment medical records only provide additional confirmation that McConico remains permanently and totally disabled.

Accordingly, assuming arguments the submission of the disc is considered untimely Appellant still fulfilled its obligations required under the statute to obtain reimbursement. State Accident Fund v. S.C. Second Injury Fund, 409 S C. 240, 762 S.E.2d 19 (2014).

CONCLUSION

Based upon the foregoing arguments, it is respectfully submitted that the Commission abused its discretion and committed an error of law in denying Appellant reimbursement from the Fund. Specifically, at the time McConico was last exposed to lead in July 1999, she had been diagnosed and treated for heavy metal poisoning, cardiac disease (hypertension), anemia and kidney dysfunction for over 25 years. During this 25 year employment tenure, McConico suffered lead poisoning, first with ESB, Inc., and later with the Exide Corporation, two separate and distinct employers from her last employer, Yuasa Exide McConico's work at Yuasa Exide clearly exposed her to lead which aggravated her prior medical conditions and combined with the stroke she suffered in 1999, to render her permanently and totally disabled

The Fund presented absolutely no evidence to refute or contest Appellant's knowledge of McConico's pre-existing medical conditions and its medical proof that McConico's last injurious and cumulative exposure in July 1999 aggravated prior medical conditions and impairments. In-house medical treatment records reflect that certain instances of lead exposure during her employment tenure over 25 years resulted in comprehensive medical treatment, while other instances of lead exposure resulting in less intrusive medical treatment. This medical evidence clearly reflects these conditions pre-existed her employment at Yuasa Exide; and that McConico was retained as an employee despite her various serious health maladies.

Accordingly, Appellant respectfully requests a reversal of the Commission and Circuit Court Orders and that the matter be remanded to the Commission to incorporate undisputed facts presented by Appellant.

Greenville, South Carolina

March 13, 2015

Respectfully submitted,

By: Vernon F. Dunbar

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable W. Jeffrey Young, Circuit Court Judge

C.A. No.: 2013-CP-43-02284
Appellate Case No.: 2014-002215
WCC File No.: 9930459

Arrowpoint Capital Corporation/Arrowood Indemnity Co., Carrier ....Appellant,

v.

South Carolina Second Injury Fund, Carrier . ... Respondent,

In re

Mary McConico, Employee/Claimant

v.

Yuasa-Exide, Inc., Employer and Arrowpoint Capital Corp./Arrowood Indemnity Co.,

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Timothy Killen, Attorney for the South Carolina Second Injury Fund by depositing a copy of it in the United States Mail, postage prepaid, on March 13,

2015, addressed to Timothy Killen, Wilson, Jones, Carter & Baxley, 4500 Fort Jackson Boulevard, Columbia, South Carolina 29209.

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RECEIVED
MAR 16 2015
SC Court of Appeals

March 13, 2015

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Arrowpoint Capital Corporation v. SC Second Injury Fund
Mary McConico v. Yuasa-Exide and Arrowpoint Capital Corporation
Appellate Case No.: 2014-002215
Lower Court No : 2013-CP-43-02284
Our File No.: 20113.14073

Dear Ms Kitchings:

Please find enclosed an original and one (1) copy of Appellant's Initial Brief and Designation of Matters to be Included in the Record on Appeal in the above-referenced matter.

Please return a filed and stamped copy of these documents to me in the self-addressed, stamped envelope which I have enclosed for your use.

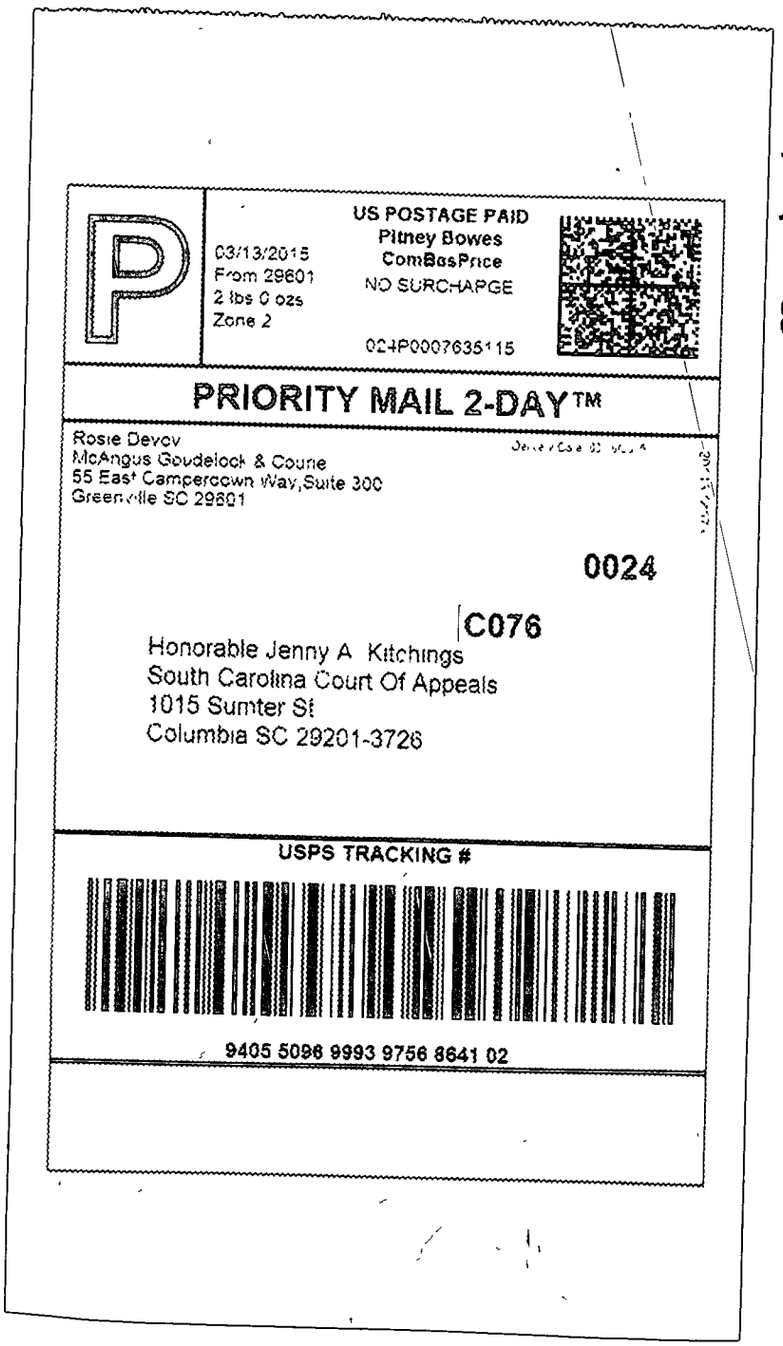
By copy of this letter to Timothy Killen, Attorney for Respondent, South Carolina Second Injury Fund, I am apprising him of my communication with you and serving a copy of same upon him.

With kind and warm regards, I remain

Very truly yours,

Vernon F. Dunbar

VFD/rhd
Enclosures: Initial Brief of Appellant
Designation of Matter to be Included in the Record on Appeal
Certificate of Service
SASE
cc: Timothy Killen, Wilson, Jones, Carter & Baxley (w/enclosures)
Eric Rowell, Arrowpoint Capital Corp (w/enclosures) ***SENT VIA EMAIL***
Renee Wray, Arrowpoint Capital Corporation (w/enclosures) ***SENT VIA EMAIL***



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Honorable Jenny A Kitchings
South Carolina Court Of Appeals
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Columbia SC 29201-3726

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