THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1205798

Briett Johnson, Employee, ... Appellant,

v.

Pike Electric, Inc., Employer, and
Liberty Mutual Insurance Company, Carrier, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

At the time of Appellant Briett Johnson's ("Decedent") fatal May 17, 2012 accident, he was employed by Pike Electric, Inc.[1] (Decision and Order of Commissioner Wilkerson, filed Feb. 28, 2014, p. 2 ("Single Commissioner Decision")). The accident occurred at or near 1828 Lake City Highway, Johnsonville, South Carolina. (Def. APA p. 73). Decedent was returning from where he was working in Winnsboro, South Carolina, to his home in Johnsonville, South Carolina. (Transcript of hearing before Commissioner Avery B. Wilkerson, Jr., held Nov. 4, 2013, 87, lines 10-23 ("Tr.")).

Margaret Hamilton, Decedent's long-term girlfriend, and Shanice Hamilton, Decedent's daughter, asserted that Shanice was entitled to benefits under the Workers' Compensation Act.[2] Respondents denied the claim on the basis that Decedent was intoxicated at the time of his fatal accident and that his intoxication was the proximate cause of the accident.

The parties were heard by Commissioner Avery B. Wilkerson, Jr. on November 4, 2013 and he issued his Decision and Order on February 28, 2014. (Single Commissioner Decision). Commissioner Wilkerson found that, at the time of the accident, Decedent had a blood alcohol level of .208, was traveling at approximately 95 miles per hour and that Decedent's intoxication caused his accident. As a result, he is not entitled to benefits. (Single Commissioner Decision, pp. 18-20).

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[1] At the time of the Decedent's accident, Pike Electric carried workers' compensation insurance with Liberty Mutual Insurance Company. Pike Electric and Liberty Mutual are referred to jointly as Respondents herein.

[2] At the time of his death, Decedent was still married to Sarah Ann Johnson who also claimed entitlement to benefits as a surviving spouse. Commissioner Wilkerson determined Shanice is Decedent's sole dependent, (Single Commissioner Decision, p. 20), and that finding was not appealed to the Full Commission. (Form 30, dated March 14, 2014).

Appellant appealed to the Full Commission, raising one issue: "[w]hether the Single, Commissioner erred as a matter of fact or of law in concluding that the Defendants had met their or its burden of establishing the defense of intoxication?" (Form 30). An Appellate Panel of the Full Commission heard oral argument on August 11, 2014 and issued its Decision and Order on September 26, 2014. The Commission upheld the Single Commissioner in all respects. (Decision and Order of the Appellate Panel, filed Sept. 26, 2014 ("Commission Decision")). The Commission found that the lack alcohol containers at the accident site was inconsequential, as they "are not always found at accident scenes involving alcohol," and Decedent may have consumed alcohol prior to entering his vehicle and/or thrown the containers out of the truck. The Commission also held that the fact that there was no detectable odor of alcohol in the truck or on Decedent's body was not determinative, as "none of the witnesses had training on the detection of alcohol ..." The Commission found that Deputy Coroner Reynolds "followed the correct protocol in drawing blood from the Decedent's heart on the date of the accident," as well as in submitting the blood sample to SLED. Relying on several experts, the Commission concluded that "a blood alcohol level of .208 causes impairments to judgment and motor control." Relying on Dr. Ballenger's report and Mr. Sears's testimony, the Commission found that "Decedent's blood alcohol level of .208 was the cause of the Decedent's accident." Although Decedent was driving 95 miles per hour at the time of the accident, this was not his "normal nature." As to the validity of the blood sample, the Commission gave "greater weight to the Assistant Coroner report, the SLED toxicology report, the testimony of Don Reynolds, [and] the testimony of Robert Sears than the testimony of Dr. Ellen Riemer ..." The Commission ultimately

found that, "[b]ased on the greater weight and preponderance of the reliable and substantial evidence in the record, ... the proximate cause of the accident was the Decedent's intoxication, as he had a blood alcohol level of .208, which impaired his judgment and reasoning to believing that traveling at 95 miles an hour was reasonable." (Commission Decision, pp. 5-8).

Appellant timely appealed to this Court.

FACTUAL BACKGROUND

Decedent's accident occurred on May 17, 2012. Decedent, traveling approximately 95 miles per hour in a 55 mile per hour zone, was attempting to pass a car in a turn, lost control of his vehicle, which went off the right side of the road, rolled several times, struck a light pole and came to rest on top of a parked car. (Def. APA pp. 74, 101-102). The accident occurred sometime between 6:00 and 6:30 p.m. (Def. APA pp. 73, 95, 101). A witness statement included in the South Carolina Multi-disciplinary Accident Investigation Team ("MAIT") report stated that Decedent had passed her "then disappeared, he was going pretty fast, saw him rolling." (Def. APA p. 129).

Johnsonville Rescue/EMS observed that Decedent "had crushed injuries to the right side of [his] neck." (Def. APA p. 95). Thomas E. Redmond, an EMT on the scene, testified that he filled out this report. (Tr. 36, lines 2-24). Florence County Deputy Coroner, Don A. Reynolds, who has served as Deputy Coroner for 18½ years, concluded that Decedent died of severe head trauma. (Def. APA pp. 73-74) (Reynolds Dep. 18, lines 12-23). Decedent's Certificate of Death lists the immediate cause of death as "Severe Head Trauma due to Auto Accident." (Cl. APA, Ex. 1).

Mr. Reynolds arrived on the scene at around 7:30 p.m. (Reynolds Dep. 6, lines 3-8) (Id., 8, lines 2-4). At around 8:30 p.m., after Decedent had been removed from the vehicle and moved to the nearby rescue squad building, Mr. Reynolds performed a "heart stick" blood draw. Mr. Reynolds testified that he did not swab Decedent with alcohol prior to taking the sample. (Id., 21, lines 5-10). Mr. Reynolds collected the blood sample in a tube and placed a tamper-proof seal on it. His secretary mailed the tube to the South Carolina Law Enforcement Division ("SLED") the following day. There was nothing unusual or out of the ordinary with regard to taking the blood sample and Mr. Reynolds testified that he did not deviate from his standard protocol in obtaining the sample. (Id., 11, line 5 – 14, line 6) (Id., 23, lines 18-25) (Id., 38, line 21 – 40, line 10). Mr. Reynolds testified that he made the determination that Decedent's cause of death was severe head trauma by observing the Decedent (noting there "was some blood," although not much), and talking with EMS personnel. (Id., 18, line 10 – 19, line 3). He also removed "some personal items out of [Decedent's] pocket," which were turned over to the family. (Id., 27, lines 18-20).

Mr. Redmond confirmed that Mr. Reynolds observed Decedent both while he was in the vehicle and after it had been placed on the gurney. (Tr. 56, lines 1-10).[3] Mr. Redmond testified that he was not trained in how to look for alcohol use at an accident scene. He also agreed that EMS does not always find alcohol containers at the scene of an accident where someone has been drinking because people sometimes throw out the containers in order to dispose of the evidence that they have been drinking. (Id., 51, lines 15-16) (Id., 54, lines 4-22). Mr. Redmond confirmed that he observed Mr. Reynolds

[3] Mr. Redmond testified that he was a close personal friend of Decedent, Margaret and Shanice Hamilton and, in fact, previously worked with Margaret Hamilton's mother. (Tr. 55, lines 10-25).

follow all of the correct protocols at the scene of Decedent's accident. (Id., 57, lines 14-23).

Robert M. Sears, the toxicology technical lead for SLED, (Sears Dep. 4, line 21 – 5, line 3), described the procedure used in testing Decedent's blood. His office received Decedent's blood sample on May 22 and began testing it on May 23. (Id., 5, line 20 – 7, line 15). The test returned a valid blood alcohol level of .208. (Id., 14, line 2 – 15, line 9) (Id., 44, lines 18-20) (Def. APA pp. 93-94).

Mr. Sears testified that a heart stick is an acceptable method to draw blood, "provided that they did an external exam on the body, and felt like there was no significant internal trauma that would be a very acceptable way to do that." (Sears Dep. 15, line 14 – 16, line 1).[4] Mr. Sears also testified that there was nothing unusual about how Decedent's blood sample was transmitted to his office via mail, and that there was no risk of contamination through that process. (Sears Dep. 9, line 21 – 11, line 10). The non-tamper seal was in tact. (Id., 11, line 18 – 12, line 5) (Id., 30, line 5 – 31, line 7). The fact that the blood sample was not immediately refrigerated did not raise any concerns, in part because the vials used to take the sample contain sodium fluoride and potassium oxalate which helps prevent microbial growth and clotting. (Id., 37, lines 8-24) (Id., 42, line 12 – 43, line 12).

In addition, although Mr. Sears acknowledged that, in theory under certain hypothetical circumstances, it is possible that stomach contents can be present in the chest cavity, (Sears Dep. 35, line 11 – 36, line 8) (Id., 44, line 21 – 45, line 7), he also pointed out that this would have been "pretty obvious to somebody who does this regularly." Mr. Sears did not observe anything with regard to the blood sample that

[4] Appellant's expert, Dr. Ellen Riemer agreed with Mr. Sears. (Riemer Dep. 39, lines 4-23).

would have indicated that stomach fluids were mixed in with the sample. (Id., 35, line 23 – 35, line 1) (Id., 45, lines 8-13). In fact, if the contents of Decedent's stomach contained alcohol and those contents were mixed with the blood sample, which Mr. Sears explained would be "very unlikely because ... once circulation stops ... you shouldn't profuse into the heart," (id., 46, lines 4-23), Decedent's blood alcohol level would have been greater than .5. (Id., 47, lines 6-10). Mr. Sears testified that he didn't "see any peaks that would indicate to me that there was a huge amount of any external compounds there," which he would have seen if there had been a stomach rupture. They did not find other residue or components that are sometimes present from a mixed drink or flavorings included with alcohol. (Id., 48, lines 5-10) (Id., 50, lines 3-7). They also ran a drug screen and Mr. Sears explained that, "often times if there are other things besides the blood, the drug screen will give us odd readings," which the sample in this case did not. (Id. 52, lines 4-14). Instead, he testified that, "[i]n this particular case, the chromatograms are very clean. The ethanol is very sharp. I don't, again, see anything. One of the reasons that we do the headspace mass spec, as I mentioned earlier, is to show that ethanol is the only component underneath the ... peak of interest. There's no medications or anything else there. And in the headspace mass I see ethanol and the internal standard and that's it." (Id., 50, line 14 – 51, line 7). Mr. Sears expressed his professional opinion that alcohol impaired Decedent's abilities and judgment, and contributed to his fatal accident. (Id., 18, line 25 – 25, line 3) (Id., 26, line 16 – 28, line 1).

At the time of the accident, Decedent was driving a company-owned truck. Margaret Hamilton testified that normally, Decedent "was a very good driver because he loved his CDL and – and he loved the company truck and he always looked out for

himself and the other drivers and he preaches that to me about the company truck." (Tr. 100, lines 8-12). After confirming that Decedent was a "very careful driver," Margaret was asked:

> Q: And, again, you said that he was very protective of that company truck as well?
>
> A: Yes, sir.
>
> Q: Okay. So, this would be out of character for him on this day of travel ninety-five (95) miles an hour, would it not?
>
> A: Very much.
>
> Q: Okay. And from the times you've been around him that doesn't appear to be his normal judgment of driving a vehicle, does it?
>
> A: No, sir.

(Tr. 107, lines 5-19). Shanice testified that her father was "[a] very careful, protective and defensive driver." (Id. 123, lines 10-12) (Id. 124, line 23 – 125, line 4). Mr. Redmond, who knew Decedent personally, agreed that he was not known to speed. (Id., 55, lines 4-6).

Both Margaret and Shanice confirmed that Decedent drank whisky and beer. (Tr. 99, lines 15-19) (Id., 122, line 23 – 123, line 3). Although it is a two-hour trip from Winnsboro to Johnsonville, Margaret testified that Decedent had gotten off work around 2 or 3 p.m. on May 17. (Id., 93, lines 20-23). Margaret speculated that Decedent may have dropped off a co-worker, possibly in Denmark, SC, "because he would have probably been on home earlier if he didn't and just dropped him off where he usually take him to, Winnsboro." (Id., 94, lines 5-25).

Dr. James C. Ballenger, retired Professor and Chairman of the MUSC Department of Psychiatry & Behavioral Sciences, noted Decedent's history as a careful driver, that he

had had only three prior speeding tickets (two of which were less than 10 miles per hour over the speed limit and one that was less than 25 miles per hour over the limit). (*See* Def. APA pp. 125-126). With that background and based on Decedent's blood alcohol level of .208, Dr. Ballenger opined to a reasonable degree of medical certainty that, "the proximate cause of Briett Johnson's vehicular accident was that he was severely impaired from consumption of alcohol," which in turn, "led to his poor judgment and loss of his ability to drive safely." (Def. APA pp. 70-72).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

The standard applied by appellate courts in cases involving the intoxication defense is whether substantial evidence in the record supports the Commission's finding. Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.C. 375, 378, 656 S.E.2d 772, 774

(Ct. App. 2008). 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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Jones, 376 S.C. at 378, 656 S.E.2d at 774. Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

The Full Commission is the ultimate fact finder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Witness credibility is for the Commission to decide. Chandler v. Suitt Constr. Co., 288 S.C. 503, 506, 343 S.E.2d 633, 635 (Ct. App. 1986). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). Expert testimony "is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony," which, once admitted, "is to be considered just like any other testimony." Id. at 340, 513 S.E.2d at 846. Furthermore, "[w]here there is conflicting medical evidence, the findings of fact of the commission are conclusive." Grayson v. Carter Rhode Furn., 317 S.C. 306, 309, 454 S.E.2d 320, 321-22 (1995).

ARGUMENT

I. The Commission properly held that Respondents met their burden of proving Appellant's claim is barred by the intoxication defense.

Section 42-9-60 of the South Carolina Workers' Compensation Act ("Act") provides, in pertinent part, that "No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee." S.C. Code Ann. § 42-9-60.[5] The party claiming this defense bears the burden of proof. As noted above, the Commission's determination of this issue will be upheld by a reviewing court where, as is the case here, it is supported by substantial evidence, even if two inconsistent conclusions could be drawn from the evidence. Jones, 376 S.C. at 378, 656 S.E.2d at 774.

Appellant's case consists primarily of an attempt to coerce this Court into second guessing the Commission's resolution of both disputed facts and conflicting expert opinions, and an apparent attempt to shock this Court with graphic photographs of the accident scene. Appellant's actual legal argument consists of less than two and a half pages. (App. Br. pp. 16-18). In contrast, Appellant's argues for a full nine pages, (App. Br. pp. 1-2, 7-12, 18), two facts that were never contested: that certain witnesses testified

[5] Appellant relies heavily on Johnson v. Charles Keck Logging, 121 N.C. App. 598, 468 S.E.2d 420 (N.C. App. 1966), averring that North Carolina precedent is entitled to special weight. While that is true in certain circumstances, it is not appropriate where the North Carolina and South Carolina workers' compensation statutes are dissimilar, which is the case with the intoxication defense. *Compare* S.C. Code § 42-9-60, *with* N.C. Gen. Stat § 97-12 (providing that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by ... his intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee ..." and defining "[i]ntoxication" and "under the influence" to mean "that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury," and specifying that "[a] result consistent with 'intoxication' or being 'under the influence' from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance"). More importantly, as is discussed below, Charles Keck Logging is factually distinguishable from the case before the Court.

that they did not smell alcohol on Decedent and that no alcohol containers were found at the accident site, neither of which is dispositive. The overwhelming majority of Appellant's Brief consists of a dramatic and inflammatory rendition of the facts. However, in the end, Appellant provides no reason for this Court to overturn the Commission's findings of fact, which are supported by substantial evidence.

Respondents respond to the barebones legal arguments raised by Appellant, and also address Appellant's inaccurate factual assertions.

A. Appellant has presented no persuasive legal or factual reasons for overturning the Commission Decision.

Relying on Charles Keck Logging, Appellant incorrectly suggests that Respondents failed to document the validity of the blood test and/or failed to present an expert to vouch for the correct administration. (App. Br. pp. 17, 18). In Charles Keck Logging, the North Carolina Court of Appeals reviewed a long list of problems in that case, such as the failure to establish a proper chain of custody for the blood sample, the failure to produce an expert witness who could testify as to the validity of the testing, lack of testimony clearly establishing that an alcohol swab had not been applied prior to the blood draw, the date and time were incorrectly marked on the blood sample, questions regarding whether the machine was correctly calibrated, questions whether a power outage might have affected the analysis, and that an insufficient number of controls might have been run on the blood sample that could have affected the test results. Charles Keck Logging, 468 S.E.2d at 422-23. None of those concerns are present here.

Instead, here Mr. Sears, the SLED toxicologist, testified extensively regarding the validity of the test. First, on visual inspection, Mr. Sears testified that he did not see any evidence of additional fluid other than blood being the vial. (Sears Dep., 45, lines 8-13).

Second, Mr. Sears testified that, if the sample fluid had been contaminated with gastric contents, the blood alcohol level reading would have registered a .5 or greater. (Id., 47, lines 6-10). Third, Mr. Sears testified that, if the sample had been contaminated, there would have been components other than blood and alcohol in the sample, which there were not. (Id., 50, lines 3-7). Fourth, Mr. Sears testified at length regarding the validation and testing performed on the blood sample. (Id., 5, line 22 – 7, line 2) (Id., 12, line 3 – 15, line 9).

Next, Appellant challenges the way the blood was drawn. However, Respondents presented sufficient evidence to prove that the "heart stick" is an acceptable way to draw blood in this case and that the evidence was not contaminated. First, Appellant's entire argument regarding the heart stick depends on a mischaracterization of Mr. Sears's testimony. Mr. Sears did not testify that the blood draw "would be valid only if one had first ruled out internal injuries," as is suggested by Appellant. (App. Br. pp. 13, 17). Instead, Mr. Sears testimony is as follows:

> Q: All right. We've had some discussions with the deputy coroner about how the blood was drawn. And he has testified that he took a syringe and injected it into the heart after the death. Is there any problem or any contamination or any other issue that you would have from a coroner drawing blood directly from the heart of an individual?
>
> A: In many cases, a heart stick is what the coroner or assistant coroner will use because they are not going to cut open the body as they would with an autopsy. This is an accepted method for them to draw the fluid. I guess, you know, provided that they did an **external exam** on the body, and **felt like** there was **no significant internal trauma** that would be a **very acceptable way to do that.**"

(Sears Dep. 15, line 10 – 16, line 1) (emphasis added). Dr. Riemer agreed. (Riemer Dep. 39, lines 4-23). The trauma that Mr. Reynolds observed was to Decedent's neck and head. (Reynolds Dep. 18, lines 12-23).

Mr. Reynolds has held the position of Florence County Deputy Coroner for over eighteen years and his duty is to investigate deaths. (Reynolds Dep., 6, lines 7-11). Mr. Reynolds was trained by SLED and undergoes sixteen hours of continuing education each year. (Id., 7, lines 1-13). Mr. Reynolds also received additional training on drawing blood from Dr. Conratti, a pathologist in Charleston, SC. (Id., 32, line 14 – 33, line 2). Mr. Reynolds has investigated approximately 4,000 deaths, with over 1,000 of those deaths being related to wrecks, (id., 39, lines 1-3), and he draws blood on every wreck victim unless an autopsy is ordered. (Id., 34, likes 10-25). Needless to say, Mr. Reynolds is proficient in his job as Deputy Coroner and knows how to properly draw blood as part of his investigation of an accident. Mr. Reynolds testified that he followed his normal protocol in drawing the sample and sending it to SLED. (Id., 11, line 5 – 14, line 6) (Id., 38, line 21 – 40, line 10). Mr. Redmond confirmed. (Tr. 57, lines 14-23). Mr. Reynolds further testified that he had no problems drawing the blood. (Reynolds Dep. 40, lines 18-22).

Appellant's assertion that Mr. Reynolds did not inspect Decedent's body is incorrect. Mr. Reynolds arrived on the scene at 7:30 p.m. (Reynolds Dep., 8, lines 2-4). He inspected Decedent while Decedent was still in the vehicle, (id., 9, lines 11-14), and determined that the cause of death was a broken neck. (Id., 18, lines 16-20). After the Decedent was removed from the vehicle, he was transported to the EMS squad building where Mr. Reynolds drew blood for the sample. (Id., 29, lines 3-8).

Appellant recites and relies heavily on the background and experience of Mr. Redmond, EMS at the scene. (App. Br. pp. 8-9). Mr. Reynolds specifically conferred with EMS as to the cause of death. (Reynolds Dep. 18, lines 12 – 23) (Id., 19, lines 20-

23) (Id., 23, lines 8-14). Given Appellant's confidence in the experience and skill of the EMS personnel, it is curious that he should dispute this conclusion. Furthermore, Mr. Reynolds never denied that he examined the body. Instead, his testimony indicates quite clearly that he examined Decedent at the accident scene. (Id., 18, line 10 – 19, line 3). He remembered taking some personal items out of Decedent's pockets. (Id., 27, lines 18-20).[6] Mr. Redmond estimated that Mr. Reynolds spent approximately 10 minutes with Decedent's body and viewed it both in the vehicle and on the gurney. (Tr. 56, lines 1-10). Furthermore, Mr. Redmond testified that Mr. Reynolds, with whom Mr. Redmond has worked on numerous occasions, followed all the correct protocols. (Id., 57, line 14 – 58, line 4).

B. Much of Appellant's argument is based on speculation whereas the Commission Decision is supported by reliable, probative and substantial evidence.

Appellant would have this Court speculate that Decedent suffered extensive internal injuries in the accident. (App. Br. p. 17). Despite Appellant's insertion of photographs into the body of his Brief, and his reliance on hundreds of photographs taken at the accident scene, (App. Br. pp. 5-6, 7), and despite Appellant's dramatic recitation of events and testimony, his conclusions regarding internal injuries are no more than speculation.

Appellant's assertion that "the testimony from those in a position to judge is that internal injuries were in fact likely," (App. Br. p. 17), apparently refers to this same

[6] Thus, Appellant's assertion that Mr. Reynolds "did not even examine the clothes," (App. Br. p. 13, n.11), is incorrect and contradicted by immediately following testimony. (Reynolds Dep. 27, lines 18-20). In addition, Appellant's assertion that the MAIT team searched Decedent's pockets, (App. Br. p. 7), is not supported by any evidence in the record. (Def. APA pp. 99-133 (MAIT Report)). There is absolutely no indication that the traffic citation Appellant presents as "proof" of such a search was in Decedent's pocket as opposed to, say, in the glove compartment or somewhere else in the cab of the truck.

assertion on page 13 of his Brief. The three witnesses on which he relies for this statement are Dr. Riemer, Mr. Redmond and Mr. Pinkney. First, Dr. Riemer admittedly never even saw Decedent's body, or examined the blood sample first-hand. (Riemer Dep. 18, line 25 – 19, line 5) (Id. 26, line 23 – 27, line 4). Mr. Redmond, who was personally acquainted with Decedent and his family, had worked with Margaret Hamilton's mother, and became visibly emotional at the hearing, (Tr. 48, lines 13-18) (id. 55, lines 7-25), agreed that he was not a doctor. (Id., 44, line 17). Furthermore, Mr. Redmond's testimony that he moved Decedent's head from the EMS gurney to the funeral home gurney, (id. 49, line 19 – 50, line 3), is directly contradicted by Mr. Pinkney's testimony that he moved Decedent's head while Mr. Redmond moved the feet. (Id., 64, lines 14 – 65, line 2) (Id. 75, lines 15-16) (Id. 76, line 16 – 77, line 7). And finally, Mr. Pinkney is a funeral director with no established medical credentials, whose testimony on this subject was objected to, which objection was properly sustained. (Id. 65, lines 5-11). In any event, as noted immediately above, his testimony regarding moving Decedent from the EMS gurney to the funeral home's gurney, which serves as the basis of his speculation about internal injuries, is directly contradicted by Mr. Redmond.

In addition, Mr. Sears explained that, if there were internal injuries such as a stomach rupture, Decedent's blood alcohol level would have been extremely high. (Sears Dep. 46, line 15 – 47, line 19). In addition, if Decedent's stomach had ruptured, the chromatograms would have produced other peaks that they would not have been able to identify. (Id. 50, lines 9-12). With regard to the chromatograms, Mr. Sears testified as follows:

> In this particular case, **the chromatograms are very clean**. The ethanol is very sharp. I don't, again, see anything. One of the reasons that we did

the head space mass spec, as I mentioned earlier, is to show the ethanol is the only component underneath the - - the peak of interest. There is no medications or anything else there. And in the head space mass I see ethanol and the internal standard and that's it.

(Sears Dep., p. 50, lines 14-22) (emphasis added). Further, Mr. Sears testified as follows:

Q: Okay. But, again, based on your test, you don't have any elevated things other than ethanol that would show a contaminated test?

A: That's - - that's the only thing that we found. You know, the other thing is that we did do a drug screen. And oftentimes if there are other things besides the blood, the drug screen will give us odd readings. In this case, everything was negative on the drug screen. **So you know, again, using what information I had, it appears that this was a valid sample.**

(Sears Dep., 52, lines 4-14) (emphasis added). In short, Mr. Sears testified unequivocally that he didn't, "**see anything that would raise a flag as to something being drawn improperly or submitted improperly to SLED.**" (Id., 26, lines5-7) (emphasis added). Therefore, when using scientific indicators, the sample was clean and, according to Mr. Sears's unbiased expert testimony, the sample was valid.

Although Appellant cites Chandler in support for this argument, that case does not support his assertions. While Chandler involved an automobile accident and the intoxication defense, that is where its similarity to the case present before the Court ends. In Chandler, the Commission awarded benefits but the Circuit Court reversed, finding that the intoxication defense barred recovery. This Court reversed, finding substantial evidence in the record supported the Commission's determination that the employer failed to meet its burden of establishing the intoxication defense.

There, although there was uncontroverted testimony that the "blood sample was taken at the funeral home from the crushed chest cavity of the deceased," the Commission disregarded the blood tests, not because of the manner in which the blood

was drawn or because an EMS attendant and the decedent's wife did not smell alcohol, but because there were questions regarding the chain of custody and because the decedent had been taking an alcohol-based cough medicine, which could have explained the test results. Tests of vitreous eye fluid were discounted because they were not accompanied by any corroborating documentation. Chandler, 288 S.C. at 505-506, 343 S.E.2d at 635. Conversely, here the Commission found the blood test sufficiently reliable and probative. As the finder of fact, the Commission's findings must be upheld on appeal where there are supported by substantial evidence, as they are in this case.

In particular, substantial evidence supports the Commission finding that "Deputy Coroner Reynolds followed the correct protocol in drawing blood from Decedent's heart on the date of the accident," and in "submitting the vial sample of blood to the South Carolina Law Enforcement Division." (Commission Decision p. 6) (Reynolds Dep. 11, line 5 – 14, line 6) (Id., 38, line 21 – 40, line 10) (Tr. 57, lines 14-23 (Mr. Redmond testifying that Mr. Reynolds followed all the correct protocols)); (Sears Dep. 9, line 21 – 11, line 10 (Mr. Sears also testifying that there was nothing unusual about how Decedent's blood sample was transmitted to his office via mail, and that there was no risk of contamination through that process)). In addition, there is evidence in this record that "a blood alcohol level of .208 causes impairments to judgment and motor control," (Def. APA pp. 70-72) (Sears Dep. 18, line 25 – 25, line 3) (Id., 26, line 16 – 28, line 1), and that driving 95 miles per hour is out of character for Decedent. (Tr. 107, lines 5-19) (Id. 123, lines 10-12) (Id. 124, line 23 – 125, line 4) (Id. 55, lines 4-6). Pursuant to its role in judging the weight to be assigned to evidence and of witness credibility, the Commission properly assigned greater weight to the Assistant Coroner report, the SLED toxicology

report, the testimony of Mr. Reynolds and Mr. Sears than to that of Dr. Riemer as to the validity of the blood sample, and to Mr. Sears regarding the cause of the accident. (Commission Decision pp. 6-7).

In essence, Appellant is asking this Court to second guess the Commission by choosing between experts with conflicting opinions, which is inappropriate. Dozier v. American Red Cross, 768 S.E.2d 222, 2014 S.C. App. LEXIS 261 *20-21 (Ct. App. 2014) (upholding Commission decision in the face of conflicting expert testimony because where "evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive"); Hall v. United Rentals, Inc., 371 S.C. 69, 90, 636 S.E.2d 876, 887 (Ct. App. 2006) (the Commission "determines the weight and credit to be given to the expert testimony," because, "[o]nce admitted, expert testimony is to be considered just like any other testimony"); Grayson, 317 S.C. at 309, 454 S.E.2d at 321-22 (same). Appellant's expert, Dr. Riemer, gave several reasons why she believed that the blood sample was invalid. What is particularly suspicious about Dr. Riemer's position in this case is her frank admission that **she never states that alcohol is a contributing factor** in cases where she has been an expert witness. (Riemer Dep., 31, lines 13-20). Despite testifying that a .208 blood alcohol level would make someone "less capable of operating with good judgment and reaction time," (id., 30, lines 12-15), Dr. Riemer testified:

> Q: All right. And these types of accidents in the past that you have investigated, have those alcohol levels been reasonable to your medical expertise as the cause of those types of accidents?
>
> A: **Well, I don't ever state that alcohol was a contributing factor.**
>
> Q: So, you never state that alcohol is a contributing factor?
>
> A: Almost never.

(Id., 31, lines 12-20) (emphasis added).

Further, Dr. Riemer's testimony is purely speculative. Dr. Riemer did not view or examine a blood sample from the Decedent to determine whether there were any other components other than blood and ethanol in the sample, as was done by Mr. Sears. (Riemer Dep., p. 26, lines 23-25). In fact, Dr. Riemer admits, "I only have the report and other people's interpretations." (Id., 27, lines 3-4). Finally, Dr. Riemer admitted that she was speculating regarding that Decedent had internal injuries as a result of the accident. (Riemer Dep., p. 25, lines 11-12).

Dr. Riemer's position that the blood alcohol level could have been the result of a "false-positive ethanol measurement," (Riemer Dep. 16, line 25 – 17, line 16), is based on three speculative and incorrect theories. First, she suggests there might have been internal trauma that caused blood from other organs to mix with the blood. (Id. 16, line 25 – 17, line 3). However, Mr. Sears testified that the "chromatograms are very clean," (Sears Dep. 50, line 14 – 51, line 7), and that he had no doubts or concerns about the validity of the sample. (Id. 52, lines 4-14). Even Dr. Riemer confirmed that there was no indication in this case that there were any other materials or any other elements found in Decedent's blood sample. (Riemer Dep. 36, lines 6-9). Second, she suggests that the storage of the sample at a warm temperature "could also elevate the postmortem production of ethanol ..." (Id., 17, lines 10-12). However, as Mr. Sears attested, the vials used in this case contained sodium fluoride and potassium oxalate which helps prevent microbial growth and clotting. (Sears Dep. 37, lines 8-24) (Id., 42, line 12 – 43, line 12). And finally, Dr. Riemer speculates that "even the use of a swab to clean the area, that could have contributed also to the increase in ethanol." (Riemer Dep. 17, lines

12-14). However, Mr. Reynolds testified unequivocally that he did not swab the area with alcohol prior to taking the sample. (Reynolds Dep. 21, lines 5-10).

Appellant would have this Court rely on a funeral director's "diagnosis," (App. Br. p. 9), based on the transfer of Decedent's body from the EMS gurney to the funeral home's gurney. (Tr. 64, line 14 – 65, line 7). In fact, upon objection by Respondents' counsel, the Single Commissioner properly and correctly confirmed that "there is no basis for internal injuries." (Id., 65, lines 8-11). Appellant now asserts that "the hearing officer erroneously sustained an objection to [Mr. Pinkney's] testimony on the grounds of lack of basis ..." (App. Br. 13). Whether the objection was correctly or incorrectly sustained is not preserved for this Court's review because Appellant did not raise this issue to the Commission. (Form 30). Only issues raised in the application for review to the Full Commission are preserved for review. *E.g.*, Brunson v. American Koyo Bearings, 367 S.C. 161, 166, 623 S.E.2d 870, 872 (Ct. App. 2005). Even if this issue was preserved, however, the Single Commissioner properly upheld the objection. Mr. Pinkney is a funeral director, not physician or even an EMS. (Tr. 62, lines 5-6).

Additional evidence in this case supports the Commission's determination that Decedent was intoxicated and that that intoxication caused his fatal accident. Both Margaret and Shanice Hamilton testified that they had never known Decedent to drive erratically. Margaret confirmed that it would be out of character for Decedent to drive his company truck 95 miles an hour, as he was very protective of the truck. (Tr., 107, lines 9-14). Shanice testified that the Decedent was a "careful driver" and "defensive driver" and that 95 miles an hour would not be Decedent's normal character. (Tr., 124, line 22 – p. 125, line 4).

Appellant attempts to explain Decedent's uncharacteristic speeding by suggesting that Decedent possibly was trying to arrive in time for an athletic banquet. This theory is nothing more than speculation and should be rejected as such. Margaret was the assistant high school basketball coach; therefore, the Decedent would have expected Margaret and Shanice to attend the banquet. However, both Shanice and Margaret testified that the Decedent did not know the Shanice was going to receive any awards. (Tr. 96, lines 11-19) (Id. 116, lines 14-16). Moreover, the last time Margaret and Shanice spoke with the Decedent, he told them that he was not going to come to the banquet. (Id. 108, lines 6-9) (Id. 125, lines 5-9). Shanice said she would have been surprised if Decedent had appeared at the banquet. (Id. 123, lines 23-25). Furthermore, the drive between Winnsboro and Johnsonville is approximately two hours, and Margaret testified that Decedent had gotten off work that day at around 2 or 3 in the afternoon, (id., 93, lines 20-23), leaving ample time to arrive at the banquet.

C. The Commission properly held that the facts that certain witnesses did not smell alcohol or find alcohol containers at the scene are not dispositive.

A repeated theme of Appellant's argument is that, because none of the witnesses on the scene smelled alcohol and no beer or alcohol containers were found at the crash site, the blood alcohol test is invalid. In essence, Appellant is asking this Court to apply a "smell test" to the evidence that the Commission already weighed. No fewer than nine pages of his Brief are devoted to witnesses who said they did not smell any alcohol on Decedent. (App. Br. pp. 1, 2, 7-12, 18). Appellant posits several times, without any basis in the record, that "if the test had been accurate, the Worker would have reeked of alcohol," and that "no training is needed to detect alcohol at these concentrations." (App. Br. pp. 18; *see also* pp. 1, 2, 12). In truth, the witnesses who testified that they did not

smell alcohol also testified that they were not trained in detection of alcohol by smell. (Tr. 54, lines 7-11 (Mr. Redmond testifying that he is not trained in the detection of alcohol))[7] (Id. 74, lines 3-13 (Mr. Pinkney testifying that he is not trained in alcohol detection)). In addition, Mr. Redmond explained his statement regarding smell as follows: "Normally if somebody is drinking in ... a vehicle like that and alcohol is in there its going to spill all ... over the vehicle, whether it be a cup of a beer can, and ... you're going to smell it and I have got it on me before." (Id. 52, lines 2-9). Therefore, it is not necessarily Decedent's body that would have smelled of alcohol, but whether there was any spillage of alcohol, had any been present in the cab of the truck at the time of the accident. Mr. Redmond specifically acknowledged that often drivers who are drinking sometimes throw the containers out of the window of the truck before an accident occurs, (id. 54, lines 19-22), thus making his observations about smell irrelevant.

Appellant misleadingly asserts that the MAIT team "stated in writing that they found no evidence of alcohol use." (App. Br. p. 7). In fact, the report Appellant points to simply lists "Alc/Drg Info (see back)" and has "No" circled. (Def. APA p. 101). The next page shows the back of the form where the sections in the middle of the page labeled "Alcohol/Drug Test Given," "Test Type," and "Alc Test Results," are simply blank, as no such tests were administered by MAIT at the scene. (Def. APA p. 102). Thus, the most logical reading of the circled "No" is that, at the time MAIT officers filled out the form, they had no test information regarding alcohol or drug use. As a result, it is perfectly logical that the box on the form "Alcohol Related: *(check box for yes)*," (Def. APA p.

[7] In addition, Mr. Redmond did not testify that he **always** smelled alcohol when alcohol was involved in an accident; instead, he simply responded affirmatively when asked if he **ever** was able to "ascertain the use of alcohol by odor **or any other method**." (Tr. 40, lines 12-20) (emphasis added).

132), is unmarked because, at that point in time, the blood alcohol test had not been performed. Again, this does not constitute probative evidence that Decedent had not been drinking prior to the accident.

Appellant also focuses on the fact that there were no alcohol containers found at the scene of the accident. This is not unusual. Appellant's witness, Mr. Redmond, was asked:

> Q: Finding alcohol, the containers, in the car where somebody has had alcohol, that's not always the case either: You don't always find the containers where someone's been drinking do - - do you?
>
> A: No sir.
>
> Q: All right. In fact, people can throw out their containers so they don't keep evidence in their car when they're drinking, don't they?
>
> A: That's correct.

(Tr. 54, lines 12-22).[8] Mr. Redmond confirmed that the reason blood is collected at an accident scene "is to determine if there was alcohol or other substances ... even if they don't find alcoholic containers" at the site. (Id., 57, line 24 – 58, line 4). Therefore, the lack of alcohol containers at the scene of the accident is irrelevant in this case.

D. Case law does not provide any reason to overturn the Commission Decision in this case.

Appellant cites numerous cases that speak generally to the proposition that, "workers' compensation law is to be liberally construed in favor of coverage in order to serve the beneficent purpose of the Act." James v. Anne's Inc., 390 S.C. 188, 198, 701

[8] Although Appellant insists Mr. Redmond "scoured" the accident scene looking for evidence of alcohol use, (App. Br. p. 9), Mr. Redmond testified that EMS does not assist in the examining the accident scene. (Tr. 41, lines 7-9). Mr. Redmond did state that he "walked around the scene" looking for alcohol containers, but that does not constitute "scouring" a scene, nor does it account for the fact that Decedent could have thrown any alcohol containers out the window of the truck before the accident occurred. (Id. 54, lines 19-22).

S.E.2d 730, 735 (2010). Respondents note that James and all but one of the cases cited in the quote in Appellant's Brief on p. 14 concerning liberal construction deal with the jurisdictional reach of or legal issues arising under the Act, and not with the resolution of factual disputes. James involved whether the Commission has statutory authority to order a lump sum payment allocated over an employee's life expectancy. 390 S.C. at 197-98, 701 S.E.2d at 734-35; Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993) and Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993) both involved the exclusivity provision of the Act; Olmstead v. Shakespeare, 345 S.C. 421, 581 S.E.2d 483 (2003) involved the statutory employment doctrine; Shealy v. Aiken Cnty., 341 S.C. 448, 535 S.E.2d 438 (2000) involved the standard for proving unusual or extraordinary conditions of a claimant's employment necessary to prove a "mental-mental injury" under the Act; and Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2wd 639 (1992) involved when the two-year statutory period for filing a claim begins under the discovery rule. None of these cases applied the rule of liberal construction to the resolution of a factual dispute.

Conversely, the last case cited in the James quote on p. 14 of Appellant's Brief, Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (1960), which dealt with the resolution of factual disputes, is controlling. Where it comes to factual proof, "the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are." Cross, 236 S.C. at 446, 114 S.E.2d at 831-32. In other words, "the preponderance of evidence rule has been held not to require, as a matter of

law, that doubts arising from the evidence be resolved in favor of one party of the other." Id., at 446-47, 114 S.E.2d at 832. Thus, the facts in this case are subject to the substantial evidence standard of review without favoring one side or the other, but with the appropriate deference paid to the Commission's resolution of contested facts.

Appellant suggests that the Commission Decision embodies a mistaken view of the evidence, and that this Court has expressed an increased willingness to overturn the Commission's factual findings as unsupported by substantial evidence. (App. Br. p. 16). However, neither State Accid. Fund v. South Carolina Second Inj. Fund, 409 S.C. 240, 762 S.E.2d 19 (2014) nor Whigham v. Jackson Dawson Commc'ns, 410 S.C. 131, 763 S.E.2d 420 (2014) prove Appellant's case. First, in Whigham, the Court specifically based its decision on its determination that there were no disputed facts, which made the question of whether the accident was compensable a matter of law. 410 S.C. at 135, 763 S.E.2d at 422. Here, the facts are in sharp dispute. Second, in State Accid. Fund, the Commission misstated the burden of proof that would give rise to the presumption under S.C. Code Ann. 42-9-400, which was legal error. In addition, the Court held that Commission's failure to account for medical records from the claimant's primary care physician that indicated that his diabetes was uncontrolled on several occasions during the treatment of his knee injury constituted reversible error. The Court held that this evidence actually supported the presumption rather than rebutting it. 409 S.C. at 247-48, 762 S.E.2d at 23. Here, Appellant has not even alleged that the Commission applied the wrong burden of proof. Furthermore, the Commission reviewed and weighed conflicting testimony and evidence and made its decision based on the substantial evidence in the record.

Finally, despite Appellant's attempts to categorically disparage the validity of the "heart stick" method of obtaining a blood sample for analysis of alcohol content, other jurisdictions routinely rely on this process and find the results admissible and probative. *See, e.g.*, St. Paul Ins. Co. v. Touzin, 592 S.W.2d 447, 449 (Ark. 1980) (upholding the Arkansas workers' compensation commission finding that the claimant's accident was caused by his intoxication, based on a blood sample taken from the claimant's heart, despite the fact that the claimant had been thrown into the back of his van in the crash); Burns v. Workmen's Comp. Appeal Bd., 654 A.2d 81, 84 (Pa. Commw. 1995) (Court rejected argument that post mortem blood taken from the heart was of questionable scientific value because the hearing officer "is the ultimate fact finder with exclusive province over questions of credibility and evidentiary weight"); *see also* Stong v. Freeman Truck Line, Inc., 456 So.2d 698, 712-13 (Miss. 1984) (wrongful death action, in which the Court found the results of tests performed on blood drawn from the decedent's heart several hours after his death, which was caused by his car plowing headfirst at between 50-60 m.p.h. into a tractor trailer stopped in the road, to be "highly credible evidence of ... intoxication"); Ortego v. Roy Motors, Inc., 635 So.2d 649 (La. Ct. App. 1994) (rejecting argument that blood extracted from the decedent's heart after he sustained massive injuries was unreliable because of "a strong possibility that the sample was contaminated from alcohol from ruptured organs within the chest or abdominal cavity," because, "if the blood extracted was mixed with fluid in the chest cavity, the blood alcohol level would be falsely lowered," however, "if the heart, diaphragm and stomach all had been ruptured and the blood was mixed together, a blood sample would reveal an astronomical level of alcohol, which would be obvious to the person testing it").

CONCLUSION

Because the Commission Decision is supported by reliable, probative and substantial evidence in the record, and because Appellant has provided no legal or factual reason justifying a different result, this Court should affirm the Commission Decision and dismiss Appellant's appeal.

Respectfully submitted,

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March 26, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1205798

Briett Johnson, Employee, ... Appellant,

v.

Pike Electric, Inc., Employer, and
Liberty Mutual Insurance Company, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that on the 26th day of March 2015, I served the **Initial Brief of Respondents** and Respondents' **Designation of Matter** on Briett Johnson and other counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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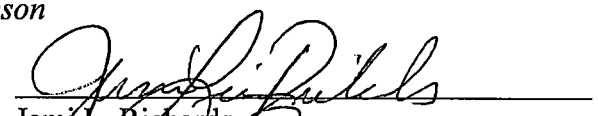

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March 26, 2015

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Briett Johnson, (Deceased) vs. Pike Electric and Liberty Mutual Insurance Company
Date of Accident: May 17, 2012
WCC File No.: 1205798
Our File No.: 2095.14119
Claim No.: WC555-A59137
Appeal No.: 2104-002366

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Brief of Respondents;
2. original and one copy of the Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Brooks R. Fudenberg, Esq.
H. Steven DeBerry, IV, Esq.

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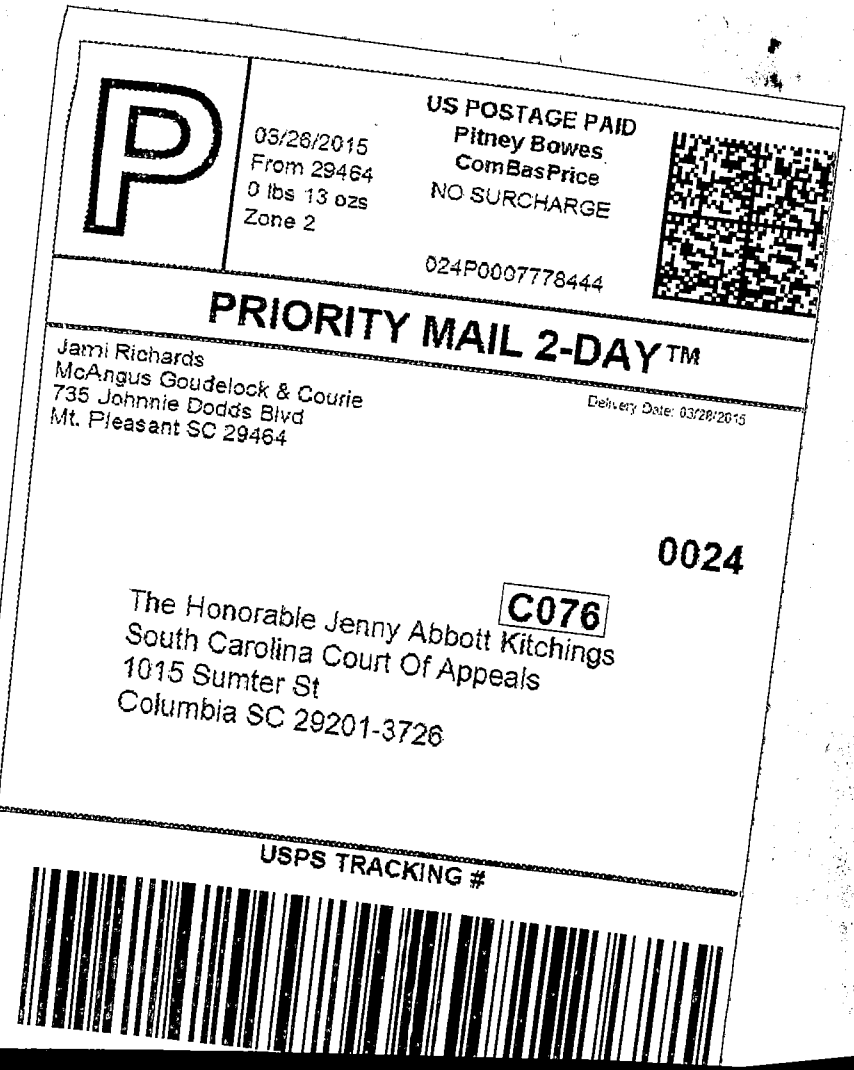
SC Court of Appeals



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The Honorable Jenny Abbott Kitchings
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