THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

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Appellate Case No. 2014-002366

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Briett Johnson, Employee, ..... Appellant,

v.

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

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# INITIAL REPLY BRIEF OF THE APPELLANT

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Brooks R. Fudenberg
LAW OFFICE OF BROOKS R. FUDENBERG, LLC
1004 Anna Knapp Blvd., Suite 3
Mt Pleasant, SC 29464
(843) 416-2558

Gregory B. Askins
ASKINS, CHANDLER & ASKINS, LLP
P.O. Box 10
Hemingway, SC 29554
(843) 558-2588

Attorneys for Appellant

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It should be undisputed that the heart stick is reliable only if one has first ruled out significant internal trauma. It should also be undisputed that internal trauma was not ruled out in this case. That is enough to decide in Appellant's favor.

It should also be undisputed that it was the Employer's/Insurer's job, as the party bearing the burden of proof under the statute, and as the party promulgating the blood test, to rule out internal trauma so as to make the test reliable. They failed to do so.

It should also be undisputed that significant internal trauma was sufficiently likely here to make the heart draw unreliable.

## I. PRELIMINARY MATTERS

Respondents, Employer and Insurer, continually mis-state the Record. They also mis-state the arguments of Appellant. They do so in matters ranging from the minor to the consequential. It may assist to clarify some of these matters before reaching the core of the analysis.

### A. Respondents Misleadingly Present Appellant's Position.

Respondents write, at page 24 of their Initial Brief, "Given Appellant's confidence in the experience and skill of the EMS personnel, it is curious that he should dispute this conclusion," i.e., the conclusion that the cause of death was recorded as a broken neck. Appellant has not disputed the cause of death. The cause of death is irrelevant to the issues before this Court. The inference Respondents apparently want the Court to make is that if Briett ("Barry") Johnson died of a broken neck, there must not have been any internal injuries to the rest of the body. Their point is spurious: When a vehicle flips over more than once, clips a telephone pole, and comes to rest upside down, with the

driver strapped into a seatbelt, hanging for an hour and a half, it is entirely possible that the neck is broken and internal trauma occurs elsewhere. Indeed, it seems likely.

### B. Respondents Misrepresent the Testimony of EMS Redmond.

Respondents write, three times, that EMS Mr. Thomas E. Redmond "confirmed" that the deputy Coroner followed all the correct protocols. Init. Br. of Resp'ts at 4-5 (citing Tr. Hr'g 57:14-23) (stating that "Mr. Redmond confirmed that he observed Mr. Reynolds follow all of the correct protocols"); *id* at 13 (similar); 14 (same). Actually, asked a leading question as to whether he observed Mr. Reynolds follow all the correct procedures ("you observed him follow all the correct protocols, correct?"), Mr. Reddam answered, "To the best of my knowledge."[1] Mr. Reddam never claimed to know what the proper protocol is for drawing blood; he simply said that for all he knew, everything was done properly.

EMS Redmond testified that he has been to 1,500 to 2,000 wrecks, and often smells alcohol about the person. Defendants attempt to portray Mr. Redmond as saying that this smell of alcohol comes only as a result of spillage. Init. Br. of Resp'ts at 22 (citing Tr. Hr'g 52:2-9). Actually, he made many more than one statement regarding the odor of alcohol, *e.g.*, Tr. Hr'g, 41:12-15, 41:16-25, 46:21-47:3, and these were not limited to alcohol that was spilled.

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[1] 57:18-23:

Q. Okay. And, again, he's testified that he followed all protocols, correct?

A. Yes, sir.

Q. And you observed him follow all the correct protocols, correct?

A. To the best of my knowledge.

Respondents further misrepresent his testimony when they write that he was "a close personal friend of Decedent." The testimony does not establish that. Rather, the testimony was that he knew the family well, but it is a small town where everybody knows everybody, and he was mayor for six years – of course he knows everybody well. Tr. Hr'g 58:12-17.[2]

### C. Respondents Misrepresent the Testimony of Plaintiff's Expert, Prof. Ellen C. Riemer, M.D.

#### 1. Prof. Riemer Should Be Congratulated, Not Criticized, for Limiting Her Testimony to Her Areas of Expertise. Respondents' Argument to the Contrary Is Misleading.

Dr. Riemer's expertise is specialized: blood draws and forensic pathology, especially of the heart. She is not an expert on whether an accident was caused by intoxication, or instead by mechanical failure, or by another vehicle swerving into one's lane. She is not a MAIT team member. She is not an engineer. Accordingly, she does not testify as to whether alcohol was or was not a contributing factor to an accident. Riemer Dep. 31:18-32:8. Yet Respondents find "particularly suspicious" the fact that she does not testify to those issues. They write, in tones of *faux* outrage, "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

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[2] *See, e.g.*, Tr. Hr'g 58:12-17

Q. You – you did indicate – and I just wanted to make this clear for the record – Johnsonville is a small town and you do know everybody?

A. Yes, sir.

Q. You were the Mayor for how many years?

A. Six (6) years.

expert witness."[3] Init. Br. of Resp'ts at 18 (bolding is Respondents'). With perhaps a rare case as an "almost never" exception, whether alcohol caused an accident is simply beyond her world of test-tubes and blood draws and the range of scientific validity for different tests. What Respondents label "particularly suspicious" is simply good practice.[4]

### 2. Respondents' Other Complaints about Prof. Riemer Miss Their Mark.

#### a. Repeating Mr. Sears' Tests Would Not Have Achieved Anything, as the Problem Is in the Source of the Blood, Not the Mechanical Running of the Testing Device.

Respondents complain that Dr. Riemer did not herself run a test of the blood drawn from the Decedent. *E.g.*, Init. Br. of Resp'ts at 15, 19. But her objections to the results were not a claim that the material drawn from the chest cavity had been mis-measured; it was that taking blood from the chest cavity of a decedent following a death caused by a violent automotive accident is not reliable.[5]

Moreover, due to the decision by Deputy Coroner Reynolds that no autopsy be done, Reynolds Dep. 35:8-17, a decision based on information he received from the highway patrol, *id.*, the body had been buried a week after the accident (APA 12) (funeral date of May 24, 2012). This was well before the July 16, 2012 date of the SLED

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[3] She actually stated that she "almost never" does so, Riemer Depo, 31:20, leaving open the possibility that in a rare case, it might be appropriate to do so.

[4] Nor was she engaged in this case to opine on whether alcohol caused the accident. She was engaged to explain only one issue: whether the blood test and results are reliable. Her answer was "No." She was hired to give her honest opinion. Riemer Dep., 34:3-9, 40:4-14. She did so.

[5] Reviewing records to determine whether their conclusions are reliable is an entirely proper method of analysis. *See also id.* at 34:3-9 (she is "frequently asked to review materials, to give my opinion. And the opinion is not always favorable to the person who's requesting my opinion.").

toxicology report (APA 17). So there would have been no blood left in the body for Dr. Riemer to do a proper blood draw.

### b. Respondents Mislead in Arguing that Dr. Riemer Was Speculating As to the Likelihood of Internal Injuries.

Respondents' assertion on page 19 of their brief that "Dr. Riemer admitted that she was speculating regarding that Decedent had internal injuries as a result of the accident," citing Riemer Dep. 25:11-12, is misleading-by-omission. More fully, the testimony was, 24:21-25:20 (emphasis added),

Q. Hello, Dr. Riemer. My name is Brian Hylton. In this case, basically, your testimony is conjecture and speculation; is that correct? Because you haven't viewed the body. You haven't viewed the blood sample, correct?

A. Well, I saw the photos of the accident and the body at the scene.[6]

Q. Right.

A. So that's not speculation.

Q. Well, your speculation about potential lacerations in the body, correct. You don't know if they were or not, correct?

A. Well, the details of the collision make it likely there were internal injuries.

Q. Likely, but you don't know.

A. No. I did not do an autopsy. The autopsy is the only way to know for certain.

Q. Right. So at this time, we're all speculating there may be, correct?

A. Right. But it's not – pure speculation doesn't imply that somehow common sense doesn't come into play. And I think that common sense in this case suggests that it's more likely that he had internal injuries that are obscured by not having had an autopsy.

[6] Prof. Riemer had also reviewed the MAIT report; the death certificate; the deposition of Deputy Coroner Reynolds; the deposition of SLED toxicologist Sears; and the toxicology report. Riemer Depo, 9:20-11:1. She reviewed the photographs presented in Appellant's main brief, and more. *Id.* at 12:7-15. In short, she had all the information available in this case.

## II. THE BLOOD DRAW

### A. Preliminary Matter: Two Experts Testified Regarding the Validity of the Blood Draw.

As discussed in Appellant's main Brief, two experts, Prof. Ellen C. Riemer, M.D. of MUSC, and Robert Sears, a SLED toxicologist, testified as to the potential problems with a blood draw from the chest cavity following a traumatic automobile crash. No other witnesses addressed the issue.[7] Appellant writes here to clear up any possible misconception that there was any other expert testimony on the issue.

To the extent, if any, that Respondents intend Dr. Ballenger's report to serve as evidence that the blood draw was proper, they err. He did not address the issue. He assumed the blood draw itself was proper. He is not to be blamed: at the time of his report, Mr. Reynolds, who drew the blood, had not been deposed regarding where the blood had come from.[8] There is no indication in Dr. Ballenger's report that he was even aware of where the blood was drawn from. He simply does not address it.[9]

Deputy Coroner Reynolds had "a week" of training at SLED, and does 16 hours of continuing education each year. Reynolds Dep. 7:4-14. He also received some informal training from an autopsy doctor when he started his job. *Id.* at 32:11-15.

He takes blood from the heart because he simply likes that way.

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[7] As noted in Appellant's main brief, two additional witnesses, EMS Redmond and Funeral Director John Caughman Pinckney, each testified that internal injuries were almost certain. That question relates to the question of the reliability of the blood draw, but they did not testify directly as to the reliability of the blood draw, which would presumably be beyond the scope of their knowledge.

[8] Nor had Mr. Sears nor Dr. Riemer been deposed. Dr. Ballenger's report is dated 8/24/12; Mr. Reynolds would not be deposed until 8/28/12. Mr. Sears was deposed the same day as Mr. Reynolds, 8/28/12. Dr. Riemer was deposed two months later, on 11/5/12.

[9] Indeed, Dr. Ballenger nowhere states where he received the information that "His blood alcohol level was drawn at the morgue approximately three hours later, and the result was 0.208 %," *id.* p. 1; for all that can be determined from his report, that information was provided to him by Defendants' counsel.

> Now, different people draw blood different ways. Some draw what – if they can get it out of a vein. Some try to get it out of carotid arteries. Some try to get it out of the feet. Myself, I get it out of the heart because it's direct and straight in . . . .

*Id.* at 32:3-8.

When he first started with the coroner's office, he would do it the wrong way.

> I'd get a nurse down in the autopsy room at McLeod. And they would go in there and they'd prep the arm, and they'd beat it, you know, do all the things that they normally do, which I've learned was wrong.

*Id.* at 39:11-15. That is why he went on "autopsy runs" to Charleston, to learn another way. *Id.* at 39:15-18. Once he learned to do it another way, he stuck with that way: "Q. All right. And since '97, have you been drawing the blood the same way? A. Yes, sir." *Id.* at 40:3-5.

Although he had been shown how to draw fluid out of the eye, *id.* at 15:13-16, he never learned that ocular fluid would be more precise.

> Q So you don't know anything about blood alcohol levels –
>
> A No, sir.
>
> Q – other than just drawing it; is that correct?
>
> A That's correct.
>
> Q As far as drawing blood or extracting blood, did you ever have any – any training on that, particularly?
>
> A The only training that I had was on autopsies in Charleston under a doctor there that showed me how to do it, drawing vistri out the eye and drawing blood out of the heart.

*Id.* at 15:13-16.

> Q All right. And did you learn during your training that – that eye fluid or ocular fluid would be much more precise in – in being able to – the toxicology report?
>
> MR. HYLTON: Object to the form of the question.
>
> BY MR. DEBERRY:
>
> Q Do you have any knowledge that – that ocular fluid would be more –
>
> A No, sir.

*Id.* at 33:15-24.

In fact, Mr. Reynolds disclaims all knowledge of or relevant experience with blood alcohol levels. "Q. All right. Do you have any knowledge or experience in dealing with blood alcohol levels? A. No, sir, I don't." *Id.* at 13:5-8.

Thus, even if Mr. Reynolds had testified to the validity of a "heart stick" following a violent crash, which he did not, he would have been talking of things he knows nothing about.

### B. Respondents Mis-State the Testimony of the Experts.

#### Summary

> "without visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other." – Robert Sears, toxicologist.
>
> "To a reasonable degree of medical certainty, it's not a reliable indicator of ethanol consumption." – MUSC Prof. Ellen Riemer.[10]

#### Discussion

Mr. Sears was insistent throughout his deposition about the limited nature of his knowledge of the facts in this case. He repeatedly stressed that he did not have enough facts to answer the questions in absolute terms – whether the draw was valid.[11] Therefore, a brief survey of the facts he did not have might be appropriate.

Mr. Sears was not allowed to view the documents. Not the MAIT report. Sears Dep., 22:6-10. Not the photographs. In short, he gets the blood. He gets papers showing

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[10] Mr. Sears' quotation is from Sears Dep. 51:3-5; Prof. Riemer's from Reimer Dep. 21:17-18.

[11] In contrast, when asked whether his tests accurately reflect the blood that was in the vial his office received, he had no problem stating unequivocally that the tests were valid in that regard. *E.g.*, Sears Dep. 43:18 -44:21. When asked about the procedures used by his team, he was clear and confident: everything was done right.

how the blood came to him. He gets the one-page "Forensic Sciences Request" form Mr. Reynolds filled out, which does not even state from where in the body the blood was taken. Ex. 3 to Reynolds Dep. That is all he is allowed to look at. Even whether there had been an autopsy, which is stated on the form Mr. Reynolds sent in, is outside of Mr. Sears' analysis. Sears Dep. 34:24-35:3.

He was not informed that the blood was drawn via a "heart stick" until well into his deposition. He was not informed about the violence of the crash until well into his deposition (which was also obviously after his report was done. His deposition was August 28 2012; his report was dated July 16.) He never saw the photographs of the scene.[12]

More specifically, he was not informed the blood was taken via the "heart stick" method until page 15. It was on that page that he stated the need for an examination to rule out internal trauma. He was not informed of the violence of the crash until even later in the deposition. He was never informed that no examination was done to rule out internal trauma.

Nevertheless, Defendants ask the Court to accept that Mr. Sears nevertheless testified that the test was valid. He did not so testify. Even as the deposition was coming to a close, he was asked point-blank to state an expert opinion to rule out a stomach

[12] Respondents question why Appellant's main Brief contained two photographs, showing the position of the vehicle and of the decedent after the accident. Init. Br. of Resp'ts at 10, 14. One reason is that everyone who testified regarding internal trauma – Dr. Riemer, EMS Redmond, Funeral Director Pinckney – either saw the photographs or saw the body. Yet Respondents rely for their proposition that there was no significant internal trauma on the testimony of Mr. Sears, who neither saw the body nor saw the photographs!

Further. as discussed in text, Mr. Sears did not say there was no internal trauma. He said that he does not know – precisely because of his absence of knowledge of matters such as those discussed in the text above.

rupture – which was but one of the ways a test of this blood could be invalid[13] – and he refused.

> Q Okay. So in your expert opinion, is it likely that the stomach ruptured in this case and –
>
> A Without –
>
> Q – affected the sample?
>
> A – without visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other.

Sears Dep. 50:24-51:5 (emphasis added).

In short, Respondents are asking this Court to accept expert conclusions that the expert explicitly refused to draw.

Respondents ignore his refusal to draw this conclusion. Instead, Respondents mischaracterize Mr. Sears' testimony. Respondents repeatedly present Mr. Sears as saying that if the stomach had ruptured, this or that "would" have happened – even though he used words such as "might" or "could" or "chances are." Such problems run throughout Respondents' rendition of this testimony. Respondents repeatedly cite Mr. Sears as saying that a stomach rupture "would" have resulted in unusual peaks; *e.g.*, Init. Br. of Resp'ts at 6, 12, 15; he actually said "could have" and "might." Indeed, he corrected them when they tried to say that he had said "would." Sears Dep., 49:25-50:12.[14]

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[13] Respondents harp on the possibility of a stomach rupture, but inexplicably ignore other problems with taking blood from the heart region stemming from internal trauma following a violent and fatal automotive accident, as outlined by Prof. Riemer, *e.g.*, Riemer Dep. 13:9-17, 14:6-10; 16:25 - 17:9.

[14] When Respondents' counsel tried to characterize a "could" as a would, Mr. Sears corrected him:

> Q Just a quick bounce off. You said that if the stomach would have ruptured, the test would have shown additional –
>
> A There could have been other components found other than ethanol just based on the fact that in alcohol that we consume there are aldehydes and key tones and many other things besides just ethanol that give it flavor.

Respondents similarly repeatedly mis-state Mr. Sears as having said that if a stomach rupture had led to the gastric contents spilling out and contaminating the blood, the alcohol level "would" have been over 0.5. *E.g.*, Init. Br. of Resp'ts at 6 (citing Sears Dep.; 47:6-10); at 12 (same); *see also id.* at 15 (stating that Mr. Sears testified the alcohol level "would have been extremely high") (citing Sears Dep. 46:15-47:19) (emphasis added). In actuality, Mr. Sears said "chances are" and "likely," not would.

Thus, Mr. Sears did not even rule out a significant possibility of stomach rupture causing the results – he explicitly refused to rule it out when asked for an expert opinion – and did not even address any of the other ways internal trauma could make the results unreliable.

Indeed – and Respondents repeatedly leave this out of their rendition of his testimony – he repeatedly emphasized the limited nature of his conclusions. "[W]ithout visualizing the body and being there when the sample was drawn, I would hazard to guess one way or the other." 51:3-5 (emphasis added). "I didn't see the body. I don't know." *Id.*, 52:1-3 (emphasis added) (refusing to rule out even a stomach rupture). "The only information that I have about how the sample was taken was what you [Defendants'

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Q Uh-huh.

A And often times we could see that if there was a stomach rupture and there were large quantities of it there. We might have seen other peaks, other things we couldn't identify.

Sears Dep., 49:25-50:12 (emphasis added).

Nevertheless, in their Brief to the Workers Compensation Commission panel, Respondents represented that Mr. Sears had said that if the stomach ruptured, other compounds "would" have been found. (Resp'ts' Br. to WCC panel, pp. 5-6) (emphasis added) ("Third, Mr. Sears testified that if the sample was contaminated, there would have been components other than blood and alcohol in the sample."). In her Reply Brief to that panel, Appellant pointed out that Mr. Sears had not said "would," he had said "could," and had specifically corrected them when they tried to get him to say "would." Reply Br. to WCC panel, p. 13 & n.10.

Yet here we are again, with Respondents writing that Mr. Sears said such compounds would have been found.

counsel] presented here today. Based on the information that you've given, . . ." *Id.*, 26:2-5 (emphasis added). "[A]ll I can do is base my opinion on what's been provided to me." *Id.*, 52:1-2. "[U]sing what information I have . . ." *Id.*, 52:13.

What information was he not given? Most notably, that no examination was done to rule out internal injuries. The very thing he said should be done if the heart stick were to be valid.

Nor was he told that the vehicle flipped over more than a complete rotation. Nor that the decedent was left hanging upside down, strapped into the seatbelt. Nor did he see the pictures.

He can base his opinion only on the information he had. He did not have the necessary information to validate the blood draw. He said so repeatedly.

## III. THERE WAS NO EXAMINATION TO RULE OUT INTERNAL TRAUMA.

Respondents appear to pin more hope on their claim that an examination was done. But it's a bait-and-switch. Respondents begin the second paragraph on page 13 of their Initial Brief, "Appellant's assertion that Mr. Reynolds did not inspect Decedent's body is incorrect." In that paragraph and the paragraph immediately following, Respondents refer to the Record 13 times. Perhaps they believe that the multiple references, combined with mischaracterizations, will convince the reader that there must be some substance in there somewhere. However, none of their citations can remotely be taken as indicating that Mr. Reynolds conducted an examination to rule out significant internal trauma. (Nor does anything else in his deposition, or elsewhere in the record.)

The strongest statement Respondents make along these lines is "his [Mr. Reynolds'] testimony indicates quite clearly that he examined Decedent at the accident

scene." Init. Br. of Resp'ts, at 14. For this, Respondents cite to Mr. Reynold's deposition at 18, line 10, through 19, line 3. That testimony is quoted below, with few extra lines – ending at line 9 rather than line 3:

Q Did you notice any blood on the victim?

A No, sir.

Q You said in the – or it says in the death certificate severe head trauma due to auto accident. What – what made you think there was head trauma?

A The way the neck is – was positioned and the – when we – when I talked with the E.M.S. personnel they kind of – they have a tendency to kind of move their head around to see if it's broken or anything of that sort.

Q Uh-huh.

A And that was – between the two of us together, that's what we come up with.

Q Okay. But did you notice any – a lot of blood or no?

A There was some blood, but I can't tell you how much. I mean, you've got to bear in mind it's been some time back and there's been –

Q Right.

A – lots of wrecks since then.

Q Okay. So if – if you've got the time of death on the death certificate at – I believe it was 6:05; is that correct, 6:07 p.m.?

A That's correct.

Reynolds Dep. 18:10-19:9.

Similarly, while Respondents claim that Mr. Reynolds "inspected Decedent while Decedent was still the vehicle," Init. Br. of Resp'ts at 13 (citing Reynolds Dep. page 9, lines 11-14), nor do those lines provide any support for the proposition that the requisite examination was done. Rather – and Appellant includes a few additional lines – that testimony was,

Q I'm sorry. I apologize. So you arrived on the scene at 7:30. And, again, just tell me quickly what you saw?

A I saw a pickup lying on top of another vehicle. And looking to my right, there was a utility pole that had been broken down.

Q Okay. Was there anyone inside the vehicle at that time?

A Yes, there was.

Q All right. Tell me what the condition of the individual in the truck was.

A The condition was that he had severe trauma. He was pinned into the vehicle. And it took a little while for the E.M.S., rescue people, to get him out of the vehicle

Reynolds Dep. 8:25-9:14.

The other references are similar.[15] For the convenience of the reader, Appellant has gathered all their citations and quoted the language from the source documents to

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[15] Respondents are reduced to arguing that Mr. Reynolds did at least examine Barry's clothes. Init. Br. of Resp'ts at 14 n.6. They claim they have caught Appellant incorrectly citing the record where Appellant's main brief stated in a footnote that Mr. Reynolds had not even examined the clothes. (*See* Init. Br. of Appellant at 13 n.11.) Even there, Respondents overstate. Mr. Reynolds stated that he did not examine the clothes, other than to check the pockets for drugs and the like. Perhaps Appellant should stand corrected: Mr. Reynolds did not examine the clothes, except for the pockets, but that seems a very minor distinction.

Q Okay. Did you ever examine the clothes of the victim?

A For what?

Q For anything?

A I had no reason to.

Q Okay. Well, I'm not – I'm not trying –

A Yeah, I – I know I had –

Q – I'm not trying to criticize you.

A I know that. I had no reason to – to –

Q Okay.

A – do that.

Q All right.

A Uh-huh.

Q It's pretty obvious –

A The only thing that –

Q – he got in a wreck.

A The only –

Q I understand that.

A – thing that I examine clothes for we pull things out like wallet or keys or whatever. If there's any kind of drugs in that pocket that comes out. Everything is documented.

which Respondents refer. Due to the length, these are assembled in the Appendix at the end of this Brief (pages 21-25).

As argued in Appellant's main brief, it is reversible error for a WCC panel to rely on unreliable evidence. Because the undisputed expert testimony is that this "heart stick" method of drawing blood is reliable following a violent crash such as the one at issue here provided that an examination is done to rule out internal trauma, and because no such examination was done, the Panel erred in relying on an unreliable test. The Panel's decision should be REVERSED.

## IV. OTHER MATTERS

### A. Without Reliance on the Unreliable Blood Draw, Respondents Cannot Satisfy Their Burden of Proof. The Panel Should Therefore Be Reversed.

To state what may be obvious, without the unreliable blood draw, all Respondents have to rely upon is that Barry was speeding, when he was usually a safe and reliable driver. To state what also may be obvious, speeding is not a sufficient basis to overcome the burden of proof of intoxication.

### B. Other Evidence Weighs Heavily Against Intoxication.

1. *The lack of odor of alcohol in the vehicle.*

Even with the blood test, Respondents' and the panel's theory makes no sense. According to the testimony, for a 204-pound man such as Barry to hit even the lower .208

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Q Okay.

A But there was nothing of that sort in there.

Q Okay. All right.

A I have – I – I did get I think some personal items out of his pocket which was turned over to his family.

Reynolds Dep. 26:15-27:20 (emphasis added).

blood alcohol level the blood draw resulted in (to say nothing of the 0.221 the comparison test found), one would have had to have 14 drinks if done in one hour, 15 if done over the course of two hours, 16 drinks if done over three hours, and so on. Sears Dep. 14:2-3 (they took two readings, which would have found 0.208 and 0.221 blood alcohol); *id.,* 39:19-42:1 (a 150-pound man would need ten to eleven drinks over the course of an hour "to get to a .20," which works out to approximately 14 drinks for a 204-pound man such as Mr. Johnson to get to .20, more for a .208 or .221); *id.* at 41-42: (add a drink for each additional hour); 10-year Driver Record (APA 8, p. 28) (Barry weighed 204 pounds).

There was no odor of alcohol in the vehicle. The Commission speculates that there was no odor of alcohol in the vehicle because Barry tossed the bottles before he crashed – sufficiently far back that none were found by those walking back the road from the wreck. But he was driving a Ford F-250, a huge truck, with a 6-speed manual transmission. MAIT report, pp. 16, 25. He was driving a huge pickup with a manual transmission for hours on winding roads, guzzling 16 drinks, and did not spill a drop?? At three times the legal limit? Sears Dep. 22:3-5 (at .208, he would have been at almost three times the legal limit). The panel speculates that maybe he drank before getting in the truck. Now we need even more drinks. He was working as a supervisor up until the moment he left. Tr. Hr'g 14:20-14, 81:22-25, 118:21-119:12. That job requires interaction with the Defendant's employees. If the drinks were all taken, as the Commission speculates, before he got in the truck, we would need at least 16 drinks before the trip started. Given Defendant Employer's ready access to Decedent's co-workers, it is notable Employer could not find a single co-employee to testify that he

appeared even a bit tipsy that day? If we divide the drinks, such as eight drinks before getting in the truck and eight while driving, we are back to the problem of guzzling drinks while driving a 6-speed manual transmission without spilling.

As these do not work, Respondents try a new speculation: perhaps he did not drop off the co-worker in Denmark. If he did not take that co-worker to Denmark, there is an unaccounted-for hour. Defendants speculate that he was in a bar guzzling sixteen drinks in that hour. Which also makes no sense.

None of this makes any sense for an additional reason. Under any of these ideas, Barry would have been a full-bore alcoholic. Given Defendant Employers' ready access to Decedent's co-workers, it is noticeable that they produced not a single one of their employees to testify that he ever snuck a drink at work, or even had a beer with the boys before driving home.

Nor did the Employer offer any testimony of Barry ever using alcohol while working. If it had the records, it would most certainly have used them. Nor does his driving record show any arrest for Driving While Intoxicated, Driving Under the Influence, or the like. To the contrary, the testimony was that he was never known to drink and drive. Tr. Hr'g 99:13-100:7; 122:23-123:9. Nor is there any evidence of Barry ever being charged with disorderly conduct or the like. Common sense and normal experience tells us one that alcoholism this extreme does not does not appear overnight.

2. *The lack of odor of alcohol about the person.*

Appellant's main Brief described several persons who were up close and personal with the Decedent and smelled no odor of alcohol whatsoever: Margaret, who kissed him; Shanice, who kissed him and laid her head on his chest; EMS Redmond, who was

up in the cab with him, hand on Barry's carotid artery, and then cleaned his face with 2x2 pads and sterile water; funeral director Pinckney; deputy coroner Reynolds whom, according to Respondents, emptied Barry's pockets, and remembers no odor of alcohol whatsoever.

Respondents pooh-pooh this on grounds that these five individuals had no formal training in detection of alcohol. But the question here is not one of detecting an odor of alcohol when someone has had a beer or two, from normal social distance of a few feet away. The question here is of detecting an odor of alcohol at approximately three times the legal limit from intimate contact.[16]

And what about the highly experienced MAIT team, who are trained in alcohol detection? Respondents speculate, Init. Br. of Resp'ts at 22-23, that the MAIT team circling "no" for "Alc/Drug Info" and leaving the box for "Alcohol related" unchecked when the form instructs to "*check box for yes*" was simply because "at that point in time, the blood alcohol test had not been performed" (and presumably never got around to checking the box once the test was performed). However, deputy coroner Reynolds testified, Reynolds Dep. 35:8-17 (emphasis added),

> A I talked with the highway patrol, and from their – we all get our heads together. I asked them, I said, do you need an autopsy? I was told, we don't need one. I said, well, I'll draw fluid. They said that's okay, and that's what I did.
>
> Q Was there any inclination from anybody that you gathered whether or not the individual may have been under the influence?
>
> A Nobody told me anything about that.

[16]Moreover, the testimony was that Barry never drank and drove. Tr. Hr'g 99:13-100:7; 122:23-123:9. The testimony was also that when he did drink, it was beer and brown whisky. *Id.* It is common knowledge that beer has a smell, and that brown whiskey has a strong smell. Each is well-known for odor in comparison to clear whiskeys such as vodka.

If the MAIT team had smelled alcohol, they would not have said "don't do an autopsy," circled "no" for drug/alcohol, left the box for alcohol unchecked, and left it at that. They would have requested an autopsy, done more investigation; perhaps requested an ocular test.

Respondents' argument amounts to a claim that the highly experienced MAIT team, who are trained in the detection of alcohol, refused to check the box for "yes" because they were waiting on the test results, yet told Mr. Reynolds that an autopsy was not needed, and did not tell him about the alcohol they smelled. That is "clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record." *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). *See also Whigham v. Jackson Dawson Communs.*, 410 S.C. 131,763 S.E.2d 420 (2014); *State Accident Fund v. S.C. Second Injury Fund,* 409 S.C. 240, 762 S.E.2d 19 (2014).

### C. The Court Should Follow *Charles Keck Logging.*

A major flaw in Respondents' argument appears in their attempt to distinguish the North Carolina case, *Johnson v. Charles Keck Logging*. Respondents argue that the case is distinguishable because North Carolina law requires that an admissible scientific test must be "'conducted in a manner generally acceptable to the scientific community.'" Init. Br. of Resp'ts at 10 n.5. Respondents urge that South Carolina law differs. *Id.* Appellant respectfully disagrees.

Respondents also attempt to distinguish *Charles Keck Logging* on grounds that the case listed a long set of problems. Init. Br. of Resp'ts at 11. *Charles Keck Logging* may have listed several requirements for a valid test, but these were not in the nature of "if you meet three of five requirements, that suffices." Rather, Respondents concede, that

court found it sufficient to reverse the panel's denial of benefits because of the failure to produce an expert witness who could testify to the validity of the alcohol testing. Init. Br. of Resp'ts at 11. The appellate court there agreed with the dissenting commissioner, who had urged that they "'strike from consideration the Halifax/South Boston Community Hospital test results as being inherently unreliable.'" 121 N.C. App. 598, 600, 468 S.E.2d 420, 422 (N.C. App. 1996). So too here. The Panel should not have centrally relied on an unreliable test.

**Conclusion.**

For the above reasons, and such other reasons as may be apparent to the Court, Appellant respectfully requests that the Court REVERSE the panel of the Workers' Compensation Commission.

Respectfully submitted,

Brooks R. Fudenberg, SC Bar # 72019
LAW OFFICE OF BROOKS R. FUDENBERG, LLC
1004 Anna Knapp Blvd., Suite 3
Mt Pleasant, SC 29464
(843) 416-2558

Gregory B. Askins
ASKINS, CHANDLER & ASKINS, LLP
P.O. Box 10
Hemingway, SC 29554
(843) 558-2588

Attorneys for Appellant

## Appellant's Appendix

(Gathering Respondents' citations regarding the proposition that Mr. Reynolds conducted an examination)

As can be seen, none of these citations come remotely close to constituting evidence that Mr. Reynolds conducted an examination to rule out significant internal trauma.

| | Page of Resp'ts' Brief | Resp'ts cite to | We quote from | |
|---|---|---|---|---|
| a. | 13 | Reynolds Dep., 8, lines 2-4 | Same | Q Okay. And when you got there, what time did you arrive on the scene?<br>A I got on the scene at 7:30 p.m. |
| b. | 13 | *Id.*, 9, lines 11-14 | 8:25 -9:14 | Q I'm sorry. I apologize. So you arrived on the scene at 7:30. And, again, just tell me quickly what you saw?<br>A I saw a pickup lying on top of another vehicle. And looking to my right, there was a utility pole that had been broken down.<br>Q Okay. Was there anyone inside the vehicle at that time?<br>A Yes, there was.<br>Q All right. Tell me what the condition of the individual in the truck was.<br>A The condition was that he had severe trauma. He was pinned into the vehicle. And it took a little while for the E.M.S., rescue people, to get him out of the vehicle. |

| | Page of Resp'ts' Brief | Resp'ts cite to | We quote from | |
|---|---|---|---|---|
| c. | 13 | *Id.*, 18, lines 16 - 20 | 18:12-23 | *See* entry h. (a longer citation to the same material). |
| d. | 13 | *Id.*, 29, lines 3-8 | Same | A Well, he was released from the pressure before the 8:30 period. As I told you earlier, he was -- he was taken out of the vehicle, loaded up in a gurney, and by the vehicle transported to the E.M.S. squad building where I followed along and met them at 8:30 and took the vial. |
| e. | 13 | *Id.*, 18, lines 12 - 23 | Same | *See* entry h. (a longer citation to the same material). |
| f. | 13-14 | *Id.*, 19, lines 20 - 23 | Same | A You know, I get my facts and figures from talking with highway patrol, witnesses on the scene. We all concluded that we feel like he died immediately |
| g. | 14 | *Id.*, 23, lines 8 - 14 | Same | Q All right. Did you talk to any lay witnesses?<br>A I did not.<br>Q E.M.S. personnel or anybody else?<br>A I talked to the E.M.S. personnel on the scene as we were discussing his body in the vehicle, about getting him out and all that. |

| | Page of Resp'ts' Brief | Resp'ts cite to | We quote from | |
|---|---|---|---|---|
| h. | 14 | *Id.*, 18, line 10 - 19, line 3. | 18:10-19:9 | Q Did you notice any blood on the victim?<br>A No, sir.<br>Q You said in the -- or it says in the death certificate severe head trauma due to auto accident. What -- what made you think there was head trauma?<br>A The way the neck is -- was positioned and the -- when we -- when I talked with the E.M.S. personnel they kind of -- they have a tendency to kind of move their head around to see if it's broken or anything of that sort.<br>Q Uh-huh.<br>A And that was -- between the two of us together, that's what we come up with.<br>Q Okay. But did you notice any -- a lot of blood or no?<br>A There was some blood, but I can't tell you how much. I mean, you've got to bear in mind it's been some time back and there's been --<br>Q Right.<br>A -- lots of wrecks since then.<br>Q Okay. So if -- if you've got the time of death on the death certificate at -- I believe it was 6:05; is that correct, 6:07 p.m.?<br>A That's correct.<br>Q Is that correct?<br>A Yes, sir.<br>Q All right. And you got the specimen at 8:30 p.m.; is that right?<br>A Yes, sir. |

| | Page of Resp'ts' Brief | Resp'ts cite to | We quote from | |
|---|---|---|---|---|
| i. | 14 | *Id.*, 27, lines 18 - 20 | 26:15-27:20 | Q Okay. Did you ever examine the clothes of the victim?<br>A For what?<br>Q For anything?<br>A I had no reason to.<br>Q Okay. Well, I'm not -- I'm not trying --<br>A Yeah, I -- I know I had --<br>Q -- I'm not trying to criticize you.<br>A I know that. I had no reason to -- to --<br>Q Okay.<br>A -- do that.<br>Q All right.<br>A Uh-huh.<br>Q It's pretty obvious --<br>A The only thing that --<br>Q -- he got in a wreck.<br>A The only --<br>Q I understand that.<br>A -- thing that I examine clothes for we pull things out like wallet or keys or whatever. If there's any kind of drugs in that pocket that comes out. Everything is documented.<br>Q Okay.<br>A But there was nothing of that sort in there.<br>Q Okay. All right.<br>A I have -- I -- I did get I think some personal items out of his pocket which was turned over to his family. |

| | Page of Resp'ts' Brief | Resp'ts cite to | We quote from | |
|---|---|---|---|---|
| j. | 14 | Hr'g Tr. 56, lines 1 - 10 | Same | Q. Okay. And, again, you don't know how long the Deputy Coroner spent with the body at all, do you?<br>A. Probably ten (10) minutes, max.<br>Q. Okay. were you with it back at the EMS Squad --<br>A. Yes.<br>Q. -- as well?<br>A. Yes.<br>Q. Okay. So, he had viewed the body though out on the --the gurney as well?<br>A. On the gurney; yes, sir, and the unit. |
| k. | 14 | Hearing Tr., 57, line 14 - 58, line 4 | Same | Q. Okay. And Don Reynolds has also investigated numerous accidents across Florence county, correct; have you worked with him on numerous occasions?<br>A. I've worked with Don on numerous occasions.<br>Q. Okay. And, again, he's testified that he followed all protocols, correct?<br>A. Yes, sir.<br>Q. And you observed him follow all the correct protocols, correct?<br>A. To the best of my knowledge.<br>Q. All right. And, again, the reason why they collect blood and send it off to SLED is to determine if there was alcohol or other substances; isn't that correct?<br>A. That's correct.<br>Q. Even if they don't find alcoholic containers, correct?<br>A. That's correct. |
| l. | 14 n.6 | Reynolds Dep. 27, lines 18 - 20 | 26:15-27:20 | *See* entry i. (identical citation). |

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Case No. 2014-002366

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Briett Johnson, Employee, ..... Appellant,

v.

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

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**PROOF OF SERVICE**

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I certify that I have served Appellant's Initial Reply Brief, Designation of Matter and Rule 209 certification in this case on the Respondents by placing a copy in the US Mail, sufficient postage prepaid, addressed to:

| | |
|---|---|
| J. Brandon Hylton, Esq.<br>PO Box 7489<br>Florence, SC 29502 | Helen F. Hiser, Esq.<br>McANGUS GOUDELOCK. & COURIE, L.L.C.<br>P.O. Box 650007<br>Mount Pleasant, South Carolina 29465 |
| Weston Adams, III, Esq.<br>McANGUS GOUDELOCK. & COURIE, L.L.C.<br>P.O. Box 12519<br>Columbia, South Carolina 29211-2519 | H. Steven DeBerry, IV, Esq.<br>129 S. Coit St.<br>Florence, SC 29501 |

May 7, 2015

Brooks R. Fudenberg, SC Bar No. 0072019
Law Offices of Brooks R. Fudenberg, LLC
1004 Anna Knapp Blvd., Suite 3
Mt. Pleasant, SC 29464
Tel. (843) 416-2558
BRF@Fudenberglaw.com

**LAW OFFICE OF BROOKS R. FUDENBERG, LLC**
1004 Anna Knapp Blvd., Suite 3
Mt Pleasant, SC 29464
Tel. (843) 416-2558
BRF@Fudenberglaw.com



May 7, 2015

Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Briett Johnson, Employee, Appellant, v. Pike Electric, Inc., Employer, and Liberty Mutual Insurance Company, Carrier, Respondents*

Appellate Case No. 2014-002366

Dear Ms. Kitchings:

Enclosed please find:

- Appellant's Initial Reply Brief;
- Appellant's Designation of Matter with accompanying Rule 209 certification;
- A proof of service upon the Respondents;
- A copy of the proof of service; and
- A return envelope.

It would be appreciated if you would return a clocked copy of the proof of service in the enclosed envelope.

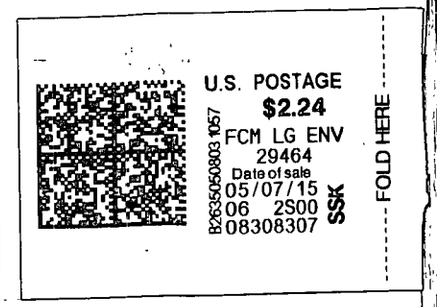
Should you require further information, please do not hesitate to contact me.

Yours very truly,

Brooks R. Fudenberg

cc: J. Brandon Hylton, Esq.
Weston Adams, III, Esq.
Gregory B. Askins, Esq.
Helen F. Hiser, Esq.
H. Steven DeBerry, IV, Esq.

Brooks R. Fudenberg, Esq.
Law Office of Brooks R. Fudenberg, LLC
1004 Anna Knapp Blvd, Suite 3
Mt. Pleasant, SC 29465






HONORABLE JENNY ABBOTT KITCHINGS
CLERK of SOUTH CAROLINA COURT OF APPEALS
P.O. BOX 11629
COLUMBIA SC 29211