THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Appellant,

v.

Archway Services, Inc., Employer,
and American Fire & Casualty Insurance
Company, Carrier, ... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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PRELIMINARY NON-RESPONSIVE ARGUMENT: CONSTITUTIONAL ESTOPPEL/JURISDICTIONAL ISSUES

The Court should strike and not consider the unresponsive Argument made by Respondents captioned, **"CONSTITUTIONAL ESTOPPEL/JURISDICTIONAL ISSUES"**.

On pages 7 through 11, the Respondents make an entirely separate non-responsive argument to any of the issues raised on appeal; which is not even captioned, set or asked to be considered as being an Additional Sustained Ground. In fact, the entire basis of the argument is not in reference to this appeal or anything decided by the Commission, but is in fact in reference to a separate and distinct Declaratory Judgment Circuit Court action concerning the constitutionality of a part of the Statute.

First, these issues were not appealed from Commissioner Beck's Order to the Full Commission and/or to this Court and are therefore not properly before the Court. Therefore not being raised are waived and are not preserved for appellate review. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438, 459-460 (2012).

Second, and more importantly, the SC Workers' Compensation Commission has absolutely no authority or jurisdiction, nor can the Commission rule on the constitutionality of a Statute. Travelscape, LLC v. SC

Dept. of Revenue, 391 S.C. 89, 705 S.E.2d 28 (2011). The appropriate way, our Appellate Courts have held, to challenge the constitutionality of a Statute before an Administrative Tribunal is either by a Declaratory Judgment action or by appeal.

> "As stated in Video Gaming (Video Gaming Consultants, Inc. v. SC Dept. of Revenue, 342 S.C. 34, 535 S.E.2d, 642 (2000), 'if the sole issue posed in a particular case is the constitutionality of a Statute, a Court may decide the case without waiting for an administrative ruling . . . **requiring** a party to raise an issue which cannot be ruled upon by an ALJ makes little sense' and certainly is not effective or appropriate. Here declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. **The Agency** and the ALJ cannot rule on the constitutionality issue. In fact, requiring the Agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine. Thus, the Statute does not apply in cases where the sole issue is whether a statute or other legislative action is constitutional.
>
> The Circuit Court erred in dismissing the Declaratory Judgment **and injunction causes of action** and the case should be remanded. In doing so, we want to clarify that simply because a party can file a Declaratory Judgment action challenging the constitutionality of a Statute in Circuit Court does not mean that a party does not have to follow the Revenue Procedures Act when applicable." Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).

Because of the extreme immediate effect of the Respondents' actions under §42-9-260 by stopping the Appellant's weekly compensation benefits without a hearing at a time when the Appellant was totally disabled, thus depriving him of the bare necessities of life, the Appellant filed a totally separate distinct action over which the Commission had no jurisdiction in the Circuit Court seeking immediate relief. The Workers' Compensation Commission has exclusive jurisdiction over matters before it under the Workers' Compensation Act, but has no jurisdiction outside of that and the Circuit Court and our Appellate Courts have exclusive jurisdiction over Declaratory Judgment actions, SC Code §15-53-10, 20, 30, et. seq.

Therefore, because the Respondents did not appeal these issues to the Full Commission, and further, and more importantly, because they base this jurisdictional argument on a totally separate and distinct cause of action filed in the Circuit Court over which the Commission had no jurisdiction (but which does not in any way effect the jurisdiction of the Commission over the issues before it), the argument made by the Respondents should be stricken as non-responsive and further should be stricken as being improperly before the Court and further because it is

totally wrong.

ARGUMENTS

I. **WHERE THE RESPONDENTS ARE THE MOVING PARTY UNDER SC CODE §42-9-260, THE COMMISSION ERRED AS A MATTER OF LAW BY HOLDING THAT THE DEFENDANTS/RESPONDENTS DO NOT HAVE THE BURDEN OF PROOF TO PROVE THAT THEY CONDUCTED A GOOD FAITH INVESTIGATION ALLOWING THEM TO STOP BENEFITS WITHOUT A HEARING AND BY SHIFTING THE BURDEN OF PROOF TO THE APPELLANT TO PROVE THAT THE DEFENDANTS/RESPONDENTS DID, "NOT" CONDUCT A GOOD FAITH INVESTIGATION?**

By way of Reply, on p. 11 of the Brief the Respondents state, "there is no dispute that the burden rests with the Respondents in proving that a Good Faith investigation occurred by a preponderance of the evidence."

In the Commissioner's Findings of Fact, it is very clear that the Commission shifted the burden of proof and did not require the Respondents to prove anything or submit any evidence in meeting that burden.

In pertinent part, Commission Finding of Fact #6 holds that, "the determination was based on a denial of the claim following an investigation. This is based on the Form 15, Section II dated September 12, 2013." The Form 15 is simply the pleading notifying the Commission that the Respondents have taken the affirmative act of stopping the benefits and the specific statutory allegation upon which that action was taken which was one of the specific subsections that allows the Respondents to take that

drastic action; again, "the allegation" upon which Respondents allege they are entitled to stop payments.

Then in Finding of Fact #10, the Commission makes the following specific Finding:

> "10. Claimant did not provide any evidence at the hearing to indicate that the Defendants acted in anything other than good faith during the investigation and eventual denial of the claim." (Emp. add.)

There is simply nothing in the Findings of Fact consisting of, "evidence" from the Respondents establishing the basis of the denial. There is no testimony from the adjuster or anyone else from the insurance company or employer, nor any documentary evidence stating the basis for the decision. There is not even any medical evidence stating that there is not a causal connection between the Appellant's electrical shock and his injuries (which had been accepted by the Respondents).

Further there is no evidence to support the statement by the Commissioner in Finding of Fact #11 that this is a "medically complex case".

The Hearing Commissioner then goes further and clearly establishes that the Hearing Commissioner transferred the burden of proof to the Appellant as a matter of law in pertinent part from Conclusion of Law #2 and pertinent subsections:

> "(c) Defendants represented to the Commission they conducted a Good Faith investigation of the claim. See Form 15, section II, dated September 12, 2013.
>
> (d) **Claimant did not provide any evidence that Defendants conducted their investigation in anything other than good faith.** See Findings of Fact Nos. 10-11.
>
> (e) The Defendants represented the grounds for denial revealed during their investigation **was a good faith belief** that 'Claimant failed to meet the burden of compensable injury under the SC Workers' Compensation Act." . . .

Then the Hearing Commissioner went on to find in a reinstatement hearing for stop payment without hearing situation wherein the Respondents have the burden of proof, as agreed to by the Respondents in their brief to prove that they have conducted a good faith investigation, that if the, "allegation" upon which they base the stoppage of benefits that the Appellant in that setting and in that type of hearing,

> "bears the burden of proving by a preponderance of the evidence that it is more likely than not that the Claimant suffered an injury by accident arising out of and in the course of his or her employment resulting in disability. . . ."

Then the Commissioner made the specific Finding under subsection (f) that:

> **"Therefore a belief of the Defendants formed following a Good Faith investigation that the Claimant had not**

met his burden of proving compensability is adequate grounds for denial of the claim by the Defendants."

There is no question that the Commission both shifted the burden of proof to the Appellant and that there is simply no evidence, and the Appellant would reiterate no evidence, that would even support, "a belief of the Defendants formed following a Good Faith investigation" much less evidence that supports the Good Faith investigation that conducted and then their basis for denial based on that "alleged" Good Faith investigation.

As admitted by the Respondents and as set forth in the Commissioner's Order, the Commissioner shifted the burden of proof to the Appellant.

II. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT ORDERING REINSTATEMENT OF BENEFITS WHERE THE RESPONDENTS FAILED TO COMPLY WITH THE MANDATORY REQUIREMENTS OF SC CODE §42-9-260.

By way of reply, the Appellant stands by the argument that based on the Record and evidence that the Respondents did not comply with the Act and did not provide documentation. Their failure to comply with the Act in this very restricted situation allowing them to stop benefits without a hearing based on a very limited statutory basis should be strictly complied and the same type of sanctions should apply to them that applies to a

claimant where the claimant fails to comply with SC Code §42-1-560 and the mandatory requirements of that section.

III. THE COMMISSION ABUSED ITS DISCRETION BY CONSIDERING THE LATE FILED PRE-HEARING BRIEF AND THE LATE FILED APA SUBMISSIONS OF THE RESPONDENTS.

The Respondents did not comply with the Regulations and did not timely file their APA Submissions and/or Pre-Hearing Brief. Upon review, the Court will find that the Commissioner is given no discretion in this regard. Clearly without statutory or regulatory authority, the Commissioner abused his discretion.

First, the Respondents allege that they timely filed. As set out by the Appellant, they are the moving party and therefore all their medical or otherwise expert evidence was due fifteen (15) days before the hearing. That simply was not done.

Further (unfortunately Appellant's Counsel was called on this one time before a Commissioner in reference to the Pre-Hearing Brief), the Regulation requires that the Pre-Hearing Brief must be filed (Rule 67-205 defining file), **"at least ten (10) days"** before the hearing. Rule 67-611(b)(1). Therefore the last date for filing to meet the mandatory ten (10) day requirement was on Friday, and that is not as to the evidence; that is just as to the position of the parties in a Pre-Hearing Brief.

On a final note, the Respondents make the legally and factually unsupported statement, and quite frankly Appellant's Counsel would submit unbelievable argument, that the Respondents did not submit any, "expert" reports. Because of the myriad of cases this Court hears on appeal from the Workers' Compensation Commission, Appellant's Counsel will not bore the Court with citations and to establish that medical records and medical reports are considered expert reports but will simply state that the Commissioner's entire Order and the Respondents' entire case was based on medical reports put into the Record late and the Commissioner's review of those reports and what he thought the Defendants may have, "believed" from those reports. This part of Respondents' argument is completely unsupported.

IV. THE COMMISSION ERRED BY EXCLUDING EVIDENCE FROM THE APPELLANT AFTER SEPTEMBER 15, 2013 WHICH DENIED HIM DUE PROCESS OF LAW.

In response to Respondents' allegation that the Appellant did not raise this issue, the Appellant would specifically point the Court to the Appellant's Form 30 Request for Review filed with the Full Commission, allegation of error #7, and to the Appellant's appellate brief before the Full Commission and the Statement of the Case. (R., p. 275; pp. 296-297).

By way of reply, the Appellant would only set out the following. The Respondents filed a Form 15 II and moving pursuant to the Act and cutting off all weekly monetary and medical benefits to the Appellant without a hearing based on an alleged Good Faith investigation. This was the Appellant's first notice that there was any contest to the accepted benefits for which the Respondents were paying. The Appellant immediately filed to take the adjuster's deposition as the Managing Agent and for the production of the Respondents' file. The Commission chose not to hear those until the date of the Form 15 III reinstatement hearing and then ruled that the Appellant did not have a right to take the deposition of the adjuster, but graciously ordered that the Respondents produce their file after the hearing which was to determine whether or not they had to reinstate his benefits. The Commissioner graciously found in his Order issued twenty-two (22) days afterwards that they had to produce those records, "within thirty (30) days of the date of this Order". (R., p. 5). However, in his Order on the merits as to the Form 15 III hearing, in which remember the Respondents in their brief have now admitted that they have the burden of proof, the Commissioner found specifically that,

> "10. Claimant did not provide any evidence at the hearing to indicate that the Defendants acted in anything other than good faith during the investigation and eventual denial of this claim."

The Motion to Quash had been filed on September 27th and was subject to hearing ten (10) days afterwards. Quite frankly and very simply, if the Appellant had no notice until September 13th of the denial of benefits and was then denied the right to take the adjuster's deposition or to even have Respondents' file in reference to the request for reimbursement hearing in reference to facts on and before September 13th, and again only knew of the denial as of September 13th and could introduce any evidence after the 13th, how in the world could he have submitted any evidence; even assuming that he had any burden of proof in this matter? The absurdity of this ruling speaks for itself.

V. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW BY HOLDING AN UNRECORDED PRE-HEARING CONFERENCE, OVER TWO HOURS IN LENGTH DURING WHICH HE MADE SUBSTANTIVE DECISIONS ON MOTIONS THAT WERE NOT PROPERLY NOTICED FOR HEARING AND DURING WHICH THE PARTIES' STATED AND ARGUED THEIR POSITIONS ON THE ISSUES BEFORE THE HEARING COMMISSIONER.

By way of reply, the Hearing Notice states that the hearing was to start at 1:45 o'clock p.m. (R., p. 57) and the hearing actually commenced at 3:50 o'clock p.m. (R., p. 375). Appellant's math may be wrong but according to the Record that is two (2) hours and five (5) minutes later.

Also Appellant's Counsel hopes that the Court will forgive Appellant's statements referring to the length of this conference especially before the receipt of the Transcript in referring to this being over an hour Pre-Hearing Conference and later after affirmative information noting specifically that it was over two (2) hours in length.

Further, SC Code §1-23-320 specifically provides that upon request any oral proceeding must be transcribed upon the request of a party. The Appellant made that request (and Appellant's Counsel submits that that request was made as an Officer of the Court) and the response was that: even though the Respondents had stopped the Appellant's temporary total disability weekly checks, and is agreed that he is totally disabled, that they had cut off his medications, and that the Commissioner would not consider evidence from his treating doctors that would have established that in his dire condition that failure to provide medical care could have dire consequences up to and including his death (R., p. 160); that his option was to go forward with an unrecorded hearing (and face on appeal not being able to prove what the Commissioner's actual basis was and what was argued to the Commissioner during that conference), or adjourn the hearing and postpone the hearing for additional time to prepare responses to the

Motions filed. It is difficult enough for any party to request that a proceeding be recorded and face the ire of an Administrative Judge, this Hobkin's choice decision and the arguments speak for itself.

VI. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW IN HIS ANCILLARY ORDER CONCERNING THE MOTIONS THAT HAD BEEN FILED.

By way of reply, the Motions to Quash were filed on September 27th and were subject to hearing ten (10) days after that date and it was error for the Commission not to hear these preliminary matters before the hearing on November 13th, almost seven (7) weeks later.

As to the Managing Agent argument, in addition to the previous argument and the plethora of cases on this issue, if the adjuster assigned to a claim who made all decisions, pertinent to the issues on appeal, for the insurance carrier is not the Managing Agent on the claim, the Appellant would only ask the Court to address who is?

VII. THE COMMISSION ERRED AS A MATTER OF LAW BY AFFIRMING FINDING OF FACT #2 THAT THE APPELLANT SUFFERED A MYOCARDIAL INFARCTION, "ON MAY 28, 2013".

The Appellant agrees that this Finding was modified by the Full Commission. However, this Finding by the Hearing Commissioner was an integral part of his decision based on his review of the evidence and the Appellant would submit that it was error for the Commission to sustain the

decision of the Hearing Commissioner but yet modify this Finding. The Appellant would submit that by not completely deleting this Finding and overturning the decision, the Full Commission was sanctioning and finding as a basis for the overall decision which was based on a Commissioner's review of the facts as to what he felt like the Respondents, "could have believed" from a review of the medical records.

VIII. THE COMMISSION ERRED AS A MATTER OF LAW BY MAKING A FINDING OF FACT THAT IS NOT SUPPORTED BY THE EVIDENCE THAT AN INVESTIGATION WAS CONDUCTED AS FOUND IN FINDING OF FACTS #6 AND #10 AND BY MAKING FINDINGS IN FINDINGS OF FACT #4 THROUGH #11 WHICH ARE NOT SUPPORTED BY THE TESTIMONY, STIPULATIONS OR DOCUMENTARY EVIDENCE IN THE RECORD.

By way of reply, simply the Appellant would submit that the Court will find no evidence to support these Findings of Fact in the Record. There was no testimony submitted from any adjuster, any representative of the insurance company, or the employer, and there were only medical records submitted which do not contain evidence of the conclusions made. The Respondents stopped the Appellant's benefits under a very limited statutory right and they have the burden of proof at least to put forward a prima facie; and specifically where only medical records are relied upon and contain no statement that the Appellant's injuries did not stem from the already accepted

injury or that this was a medically complex case, there is simply no evidence to support such a prima facie case and the Commission's decision on these issues is surmise, speculation and innuendo.

The Respondents continue to fail to understand that the burden of proof means that you have to at least establish a prima facie evidentiary case. Their burden in this case was to establish that they had performed a Good Faith investigation. Where they have accepted an injury as being compensable and paid benefits, and then seek to stop those benefits without a hearing alleging that they have complied with the limited statutory basis and they must prove the statutory basis that they conducted a Good Faith investigation. At a minimum they had a responsibility to put up the prima facie case that they had conducted a Good Faith investigation; especially where the medical records upon which they only relied do not say or make any statement on causation that his injuries were unrelated to the electrical injury. Due process requires the same.

IX. THE HEARING COMMISSIONER ERRED AS A MATTER OF LAW BY DELAYING A DECISION FROM NOVEMBER 13, 2013 UNTIL DECEMBER 5, 2013.

By way of reply, the Appellant would simply submit that a decision on this issue specifically depends upon what this Court feels as a matter of law what was

contemplated by the General Assembly and the Act. For over sixty (60) years prior to the amendment to and the creation of SC Code §42-9-260, once an employer and its insurance carrier accepted a claim they could never go back and deny that. The General Assembly, rightfully or wrongfully, constitutionally or not, saw fit to allow them a 150 day period to stop an injured worker's benefits without a hearing. However, included within that very limited statutory right is the right for a worker to have a hearing on whether or not benefits are to be reinstated within sixty (60) days of that stop payment and that hearing is limited to one singular issue: whether or not there is evidence that the defendants have complied with the Act; in this case, whether they conducted a Good Faith investigation. The Appellant would submit that the limitation and the provision of this hearing for this strictly limited purpose contemplates a prompt decision and that taking 22 days and incorporating all of these other issues into that decision is not what is contemplated by the Act.

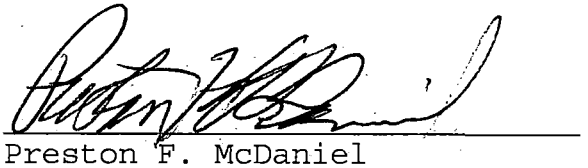
The Act was created for the benefit of injured workers and to prevent them and their families from becoming charges on the public welfare. The workers' right to trial by jury and to sue has been taken away and this Court will

find numerous, and the Appellant would reiterate numerous, decisions by this Court and the Supreme Court that hold that in exchange for the injured workers' right to a trial by jury being taken away, that he is entitled to swift, sure benefits under the Act. It is simply up to this Court to review the fundamental principles of the Act and the intent of the Legislature in allowing an employer this very limited exception to stop benefits as to whether or not the decision was untimely.

CONCLUSION

By way of reply and in addition to the arguments made in Appellant's Initial Reply Brief, the relief requested by the Appellant should be granted.

Respectfully submitted,



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September 28, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellate Case No. 2014-001815

Clarence Winfrey, Employee, ... Appellant,

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Company, Carrier, ...Respondents.

PROOF OF SERVICE

I certify that I have served the **INITIAL REPLY BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on September 28, 2015 addressed to: Brett H. Bayne, Esquire, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211.

Dated: September 28, 2015

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SEP 30 2015

SC Court of Appeals

September 28, 2015

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

RE: Clarence Winfrey, Employee, v. Archway Services, Inc., Employer, and American Fire & Casualty Insurance Company, Carrier.
Appellate Case No. 2014-001815

Dear Ms. Kitchings:

Please find attached the original and two (2) copies of the **INITIAL REPLY BRIEF OF APPELLANT** in the above-referenced matter. I would appreciate your returning the clocked-in copies to me in the enclosed self-addressed, stamped envelope.

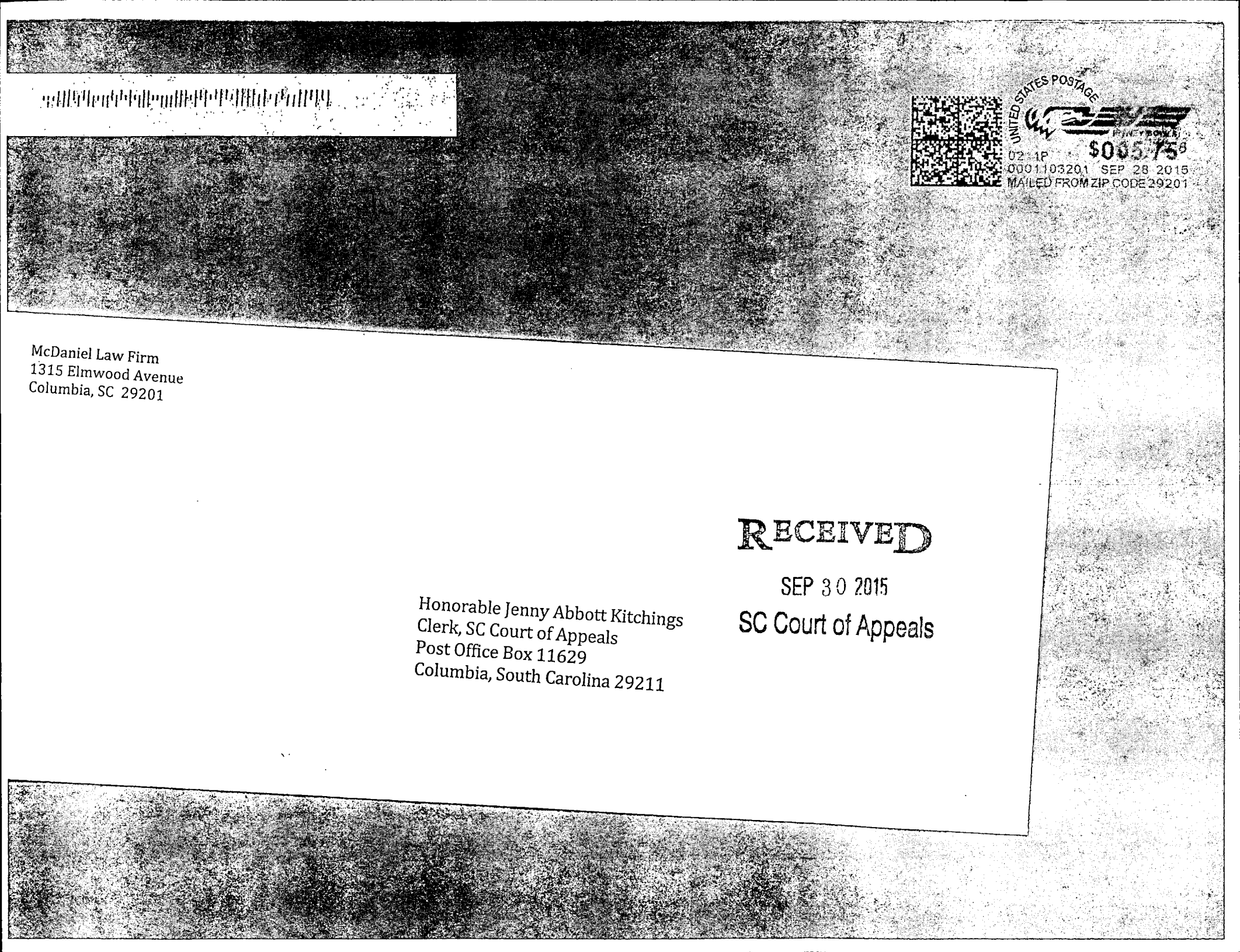
By copy of this letter I am hereby serving Counsel of Record with a copy of this document.

Sincerely yours,

Preston F. McDaniel

PFM/kth
Enclosures

cc: Brett H. Bayne, Esquire



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