

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION
WCC File No.: 1312352
Appellate Case No. 2016-000258

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SC Court of Appeals

Tyrone York, as personal representative
for Timothy York (Deceased), Shirley York,
and Yvonne Burns, Plaintiffs,

Of Whom Yvonne Burns is the..... Appellant,

And

Shirley York is a..... Respondent,

v.

Longlands Plantation a.k.a. Knollwood, Inc.,
and Companion Property and Casualty Group,.....Respondents.

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. THE COMMISSION'S RULING IS UNCONSTITUTIONAL.

Respondent's Initial Brief makes no attempt to address the fact that the United States Supreme Court holds that criminalization of consensual sexual relations between adults is unconstitutional government interference with the fundamental substantive due process right to liberty. *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003); *Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367 (2005). "[T]he intimacies of [adults'] physical relationship[s]...are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." *Lawrence v. Texas*, 539 U.S. at 578, 123 S. Ct. at 2483. Respondent's brief ignores that these decisions make S.C. Code Ann. §§ 16-15-60 and -80 unconstitutional, as applied by the Commission in this case.

Respondent cannot escape the law of the case, which comes to us in the *unchallenged* findings of fact by the Commissioner, adopted by the Commission, that Yvonne was partially financially dependent on the Decedent, under the applicable workers' compensation statute, § 42-9-120, more so than his Mother, and that she would be entitled to benefits. (Rp.138, lines 4-5; R.p.142, lines 9-15) These findings, being unchallenged on appeal, *establish* that Yvonne was financially dependent on Decedent and that she is entitled to a larger portion of the death benefits than Mother, if/when this Court overturns the challenged findings and ruling. This is the law of the case and is *binding on this Court* in this appeal. See, e.g. *Reese v. CCI Constr. Co.*, 334 S.C. 600, 604, 514 S.E.2d 144, 145 (Ct.App.1999); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct.App.1993) ("The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full

commission....”). Yvonne has not taken exception to these findings. She “is not required to relitigate unchallenged findings-which are the law of the case”). *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct.App.2005). Respondent's argument downplaying the weight or credibility of Yvonne's evidence of dependency is unavailing and should be disregarded by the Court.

Respondent also cannot escape the fact that the Commission *only* denied benefits to Yvonne because it applied *Day's* unconstitutional *holding*, and South Carolina's unconstitutional fornication statutes. (R.pp.138-143)

In arguing that *Day's* holding controls here, Respondent misunderstands that *otherwise* controlling precedent. In *Adams v. Texfi Indus. [IV]*, 341 S.C. 401, 535 S.E.2d 124 (2000), our Supreme Court reiterated that (two appeals earlier in that same case) it held that *Day's standard* (as opposed to its holding) still controls: “[W]e take this opportunity to reiterate that *the dependency standard to be used in a workers' compensation case is that announced in Adams v. Texfi Industries II.*” *Id.* 341 S.C. at 404, 535 S.E.2d at 125 (emphasis added). That standard is: “Stated generally, a dependent is one who looks to another for support and maintenance; one who is in fact dependent—one who relies on another for the reasonable necessities of life.” *Adams v. Texfi Indus. II*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) (quoting *Day v. Day*, 216 S.C. at 342, 58 S.E.2d at 86–87 (1950)). *Adams, II*, does not limit dependents to family relatives and neither does *Day* nor the statutes in question, nor any other appellate decision in South Carolina.

The *Day* Court applied that *standard* and accepted the Commission's *factual* analysis of Ms. Day's claimed dependency:

The record shows *beyond question that appellant was at the time of the death of*

James Day wholly *dependent upon him for support* and that this situation prevailed throughout their life together. *Id.*, 216 S.C. at 341, 58 S.E.2d at 86.

Day's holding, however, denied benefits to her on the basis of 1950's era social conventions and morals laws, which have since been held unconstitutional: "The fact remains, however, that it was an *illicit relationship under the law*." *Id.* at 342, 58 S.E.2d at 86 (emphasis added). After *Lawrence*, *Martin* and their progeny, we know that denying benefits to Yvonne because of her "illicit relationship" (R.p.142-144) - after *first* legally determining that she "would be entitled" to them (R.p.142, lines 9-15) - violates Yvonne's substantive due process right to be free from governmental interference with her liberty *and* property rights¹.

Now, sixty-six years after *Day*, no government entity may interfere with the *fundamental* constitutional right of adults to engage in sexual relationships outside of a legally recognized marriage. After *Lawrence* and *Martin*, *supra*, voluntary sexual relationships between adults² *cannot* be considered *unlawful* or *illicit*. Respondent cites to *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 211 S.E.2d 220 (1975) for its statement of one of the goals of the Workers' Compensation Act, as support for the denial of benefits to Yvonne, and implying that she was not "*lawfully dependent*" on Decedent. But, *Hines* actually supports *Yvonne's* claim:

¹South Carolina has not addressed the question of when benefits become a vested property right, but under these circumstances, where the Commissioner and Commission have determined that Yvonne "would be entitled" to them, but for *Day* and the fornication statutes, it follows that her property rights are protected by 14th Amendment due process, even if they are not yet vested. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty". ...[A]fter finding the deprivation of a protected interest ...we look to see if the State's procedures comport with due process." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59, 119 S. Ct. 977, 989 (1999) (citations omitted) (examining and distinguishing cases where statutorily created property interest in the receipt of benefits when the individual's entitlement to benefits had been established through legal process.).

²It is not argued that such protected relationships would include incest, polygamy, or relationships in which one party is obligated by marriage to a third party.

[I]t is, of course, well settled that our Workmen's Compensation Act is *remedial* legislation which is entitled to a *liberal* construction in order to accomplish the ends and purposes for which it was enacted. It is also settled that one of the obvious, *primary* purposes was to prevent injured employees, or those lawfully dependent upon them from becoming charges upon society and the public generally for support. *Hines v. Hendricks Canning Co.*, 263 S.C. at 405–06, 211 S.E.2d at 223 (1975) (emphasis added).

The relationship between Yvonne and the Decedent is a fundamentally protected and therefore, *lawful* one under *Lawrence* and *Martin*. Yvonne's *dependency* is established for purposes of this appeal by (R.p.138, lines 4-5; R.p.142, lines 9-15) The relevant statute, § 42-9-120, does not *preclude* non-family members or unmarried cohabitants. And, *Hines* shows us that this statute must be *liberally* construed so as to fulfill the purpose of preventing Yvonne from becoming dependent on public support.

In 1950, when *Day* was decided, the United States operated under a much different set of basic premises about individuals' constitutional rights. At that time, for example, racial segregation in public schools was *mandatory* under the constitutions and laws of seventeen states, including South Carolina. It was not believed, then, to violate any fundamental constitutional right. See, e.g., *Briggs v. Elliott*, 98 F. Supp. 529, 537 (E.D.S.C. 1951), *vacated*, 342 U.S. 350, 72 S. Ct. 327 (1952) "[I]t is a late day to say that such segregation is violative of fundamental constitutional rights." *Id.* "It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions." *Id.*

By contrast to *Briggs*, *supra*, we now know that, over time, fundamental constitutional protections evolve, and some of what was once mandated by statute, is no longer even permissible.

See, e.g. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495, 74 S. Ct. 686, 692, (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, (1955) (holding that racial segregation of public schools is unconstitutional and overturning its own long-standing precedents to the contrary, including *Plessy v. Ferguson*, 163 U.S. 537, 538, 16 S. Ct. 1138 (1896)).

As the *Lawrence* Court explained, in overturning its own prior precedent concerning a Texas fornication statute: "*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." *Lawrence v. Texas*, 539 U.S. at 577, 123 S. Ct. at 2483 (2003) (citation omitted).

In all events we think that our laws and traditions in the past half century are of most relevance here. These references show *an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex*. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence v. Texas*, 539 U.S. at 571–72, 123 S. Ct. at 2480 (citations omitted) (emphasis added).

After, *Lawrence*, our own Supreme Court acknowledged this *fundamental substantive* right to liberty.

Our state and federal Due Process Clauses provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. It has been long recognized that the Fourteenth Amendment's Due Process Clause, like its Fifth Amendment counterpart, guarantees more than fair process. *The Clause also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests*. *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 352, 741 S.E.2d 739, 754 (2013) (internal citations omitted) (emphasis added).

Moreover, it is hardly a new idea that the fornication statutes are no longer enforceable,

considering that *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) recognized the irrelevance of one of the fornication statutes at issue here (S.C. Code § 16-15-60) more than twenty years ago. Respondent even seems to *concede* that S.C. Code Ann. §§ 16-15-60 and -80 are not enforceable: "There was a time when the law imposed criminal liability for adultery and other intimate conduct[.]" If there are remaining constitutional applications of these statutes, *Lawrence* clarifies that denying Yvonne's benefits is not one of them.

Although the laws involved ... purport to do no more than prohibit a particular sexual act, their penalties and purposes have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. They seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. *Lawrence v. Texas*, 539 U.S. at 558, 123 S. Ct. at 2473.

"[The] statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life." *Id.* 539 U.S. at 560, 123 S. Ct. at 2475.

But it is not necessary to strike down the fornication statutes in order to reach a constitutional result here. "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 126 S.Ct. 961 (2006). "We prefer, for example, to enjoin only the *unconstitutional applications* of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." 546 U.S. at 328–29, 126 S.Ct. 961 (emphasis added).

It is undeniable that the Commission unconstitutionally applied fornication statutes through *Day's* "illicit relationship" holding as the sole basis for denying benefits to Yvonne (Findings 39, 52, 55-58). (R.pp.138-143) Ignoring this unconstitutionality, Respondent opposes this appeal with

irrelevant 1976 and 1979 California decisions and a 1949 Indiana decision and its recent workers' compensation statute limiting dependents to "those persons related to the deceased employee by blood or by marriage, except an unmarried child under the age of eighteen (18) years." Ind. Code Ann. § 22-3-3-20. These out-of-state cases can have no impact here because they *pre-date* the U.S. Supreme Court's recognition of the fundamental liberty right to adult sexual relationships outside of marriage in *Lawrence, supra*. But the Indiana statute shows us how easily a legislature can achieve the ends Respondent wants this Court to *impose*.

Respondent's brief concedes the "broad language in *Day* defining dependency", but, fails to comprehend that this "broad language" is the *controlling standard for determining dependency*, first enunciated in *Day* (1950), then adopted in *Adams, II* (1995) and finally reiterated as such in *Adams, IV* (2000).

Respondent peppers its brief with *conjecture* that "unmarried cohabitants are not dependents under the Workers Compensation Act"; "in the eyes of the law, Yvonne and Timothy were strangers"; and, "the law treats marriage differently." These statements, *unsupported by relevant authorities*, are treated as abandoned. See *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that an issue is deemed abandoned when its proponent "fails to provide arguments or supporting authority for his assertion"); *Eaddy v. Smurfit—Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) ("[C]onclusory statements made without supporting authority are deemed abandoned on appeal[.]").

Respondent *mischaracterizes* the decision in *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, (2014), *reh'g denied* (May 7, 2014) citing it for the proposition that "unwed cohabitants have been barred from benefits such as underinsured motorist coverage". In *Bell*, our

Supreme Court *actually* held that UIM insurance coverage did not apply to insured's fiancé because the "contract of insurance unambiguously denies coverage under its plain terms." *Id.* 407 S.C. at 579, 757 S.E.2d at 406. The decision resulted from the plain language of the contract and had *nothing at all* to do morals, public policy favoring marriage, nor with the insureds' status as "unwed cohabitants". After substantial research, not a single post-*Lawrence* appellate court decision was found applying or enforcing a fornication statute, anywhere in the United States, where the facts are not complicated by incest, minors, polygamy, public sex acts, adultery, mental illness or other lack of capacity to consent.

Yet, unconstitutional, government-imposed, morals constitute the sole basis for the Commission's decision from which Yvonne appeals:

39. I find that both Yvonne Burns and Shirley York did have a level of dependency, although Ms. Burns' was greater.

40. I find that the financial dependency of the parties is NOT determinative of the ultimate ruling in this case, as the *statutory authority and case law dictate the results.*

(R.p.138) (emphasis added). As shown throughout this Reply and in Appellant's Initial Brief, the "*statutory authority and case law*" relied on by the Commission are unconstitutional, *as applied.*

52. I find that Section 42-9-120 is applicable to Yvonne Burns in the instant case... Ms. Burns was partially dependent on Deceased because Deceased contributed to household expenses. Therefore, ... Ms. Burns *...would be entitled to benefits pursuant to Section 42-9-130.*

(R.p.142) (emphasis added).

55. ...[T]he basic ruling in [*Day and Palm*] is simple; where a would-be dependent, such as [Yvonne] is involved in an *illicit relationship* ...with a deceased worker, *she shall not be eligible* for workers' compensation benefits.

(R.p.143) Again, as Appellant's materials show, Yvonne's relationship was not "*illicit*" as a matter

of constitutional law.

57. "I find... that Deceased and [Yvonne] were *engaging in fornication*. Therefore, *based on the Day case*, [Yvonne's] claim to the workers' compensation benefits in question is *denied as a matter of law*."

(R.p.143)

Notably, in all three volumes of the transcript, there is not one question, nor any testimony that Deceased and Yvonne engaged in fornication. Finding 57 is, therefore, unsupported by any evidence and would, thus, be reversible error, even if the fornication statutes were applicable. See *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (Reversal may result when findings of fact are unsupported by evidence). Yvonne's Argument on this issue in point II of her Initial Brief is *unrefuted* in Respondent's brief. Respondent's opposition to this ground for reversal is, thus, *waived*. See, e.g., *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

58. "I find that... *an individual cannot be a dependent if they are in an illicit relationship*. The focus is ...on the *legality*. This is a matter of statutory construction... and the assumption that General Assembly...intended to reward parties in a relationship deliberately entered into in open defiance of the *penal laws*... would be a violation of ...statutory construction. ...[T]o honor the claim would *create a legal right* out of an *illicit relationship*."

(R.p.143) Yvonne's right is not created by "honor[ing] the claim" - it is created by the substantive due process clauses of the Constitutions of the United States and South Carolina. See, e.g. *Lawrence v. Texas*, 539 U.S. at 571-72, 123 S. Ct. at 2480; *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. at 352, 741 S.E.2d at 754.

I find...*as...in the Day case*, if it had been the intention of the legislature to sanction an *illicit relationship* ...express provision would have been made therefor[.]

(R.p.144)

These findings show, without a doubt, that the Commission would have ruled in Yvonne's favor, properly applying the controlling *standard* of *Day* and the plain language of §§ 42-9-120 and -130 *but for* its findings as to the "illicit relationship" *holding* of *Day, supra*, and the application of the "penal laws" regarding fornication.

The Commission and this Court "are bound by the rulings of the United States Supreme Court[.]" *State v. Price*, 289 S.C. 32, 34, 344 S.E.2d 605, 607 (1986). Neither may enforce unconstitutional infringements on fundamental liberty. If the legislature wishes to limit the dependency statute (other than by denying benefits to those in "illicit relationships" who otherwise meet the requirements of dependency) it is empowered to do so. Indeed, it is the *only* body empowered to limit the statute. But, because it has *not* limited the statute defining dependents, benefits may *not* be denied to Yvonne because of "fornication" or an "illicit relationship" with the Decedent. That denial is unconstitutional government interference with her fundamental right to liberty. Thus, the Court should apply the *standard* enunciated in *Day, supra*, and its progeny, without the unconstitutional focus on the morals of a bygone era and without an unconstitutional application of the fornication statutes.

II. THE COURT DOES NOT RE-WRITE STATUTES.

Section 42-9-120 is clear and unambiguous in directing the Commission, and now this Court, to determine dependency on the basis of the facts existing at the time of Timothy York's death.

In all other cases questions of dependency, in whole or in part, shall be

determined in accordance with the facts as the facts may be at the time of the accident; but no allowance shall be made for any payment in lieu of board and lodging or services and no compensation shall be allowed unless dependency existed for a period of three months or more prior to the accident.

S.C. Code Ann. § 42-9-120.

[A] dependent is one who looks to another for support and maintenance; one who is in fact dependent—one who relies on another for the reasonable necessities of life.

Day v. Day, 216 S.C. at 342, 58 S.E.2d at 86–87; *Adams, II*, 320 S.C. at 217, 464 S.E.2d at 112; *Adams, IV*, 341 S.C. at 404, 535 S.E.2d at 125.

The Commission adopted the Commissioners' findings that Yvonne was a dependent under § 42-9-120 at Decedent's death (Findings 39 and 52). (R.p.138 and 142) These unchallenged findings bind this Court to apply them, according to the statutes and precedents of our State, *constitutionally*. Respondent argues that the statute should be judicially limited so as to define "dependent" as family relatives only, or, at least to define it as excluding unmarried cohabiting adults, because the legislature has been silent on this point, since *Day* (1950) and *Palm* (1988). Respondent argues that both of these decisions "looked to the legislature to tell the court if the court was reading the statute correctly" and "there are no decisions recognizing dependency outside the relational context." (*Id.*) But, this statute is clear and unambiguous - even Respondent does not argue otherwise - and the Courts apply unambiguous statutes *as written*.

"Quite apart from considerations of the legislative policy which influenced the adoption of this statute, we have consistently held that where a statute is clear and unambiguous, it must be applied according to its literal meaning." *Grier v. AMISUB of S. Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012). "We cannot construe a statute without regard to its plain and ordinary

meaning, and we will not resort to subtle or forced construction in an attempt to *limit* or expand the scope of a statute." *Id.* (Citation omitted) (emphasis added). "[W]e are confined to what the statute says, not what it *ought* to say, for *we have no right to modify a statute's application* under the guise of judicial interpretation." *Id.* (Citation omitted) (emphasis added). "In other words, when a statute is clear on its face, *it is improvident to judicially engraft extra requirements* to legislation just because doing so may further the *intent* behind the statute." *Id.* (Citation omitted) (emphasis added). "[I]mposing requirements which are not clearly intended to be in it violates this rule." *Id.* (Citation omitted).

See also, *McMahan v. S.C. Dep't of Educ.-Transp.*, __ S.C. App. __, __, __ S.E.2d __, __, 2014-002294, 2016 WL 3342240, at *5 (S.C. Ct. App. June 15, 2016) ("[The] General Assembly specifically chose the language ...when it drafted this statute, and we hold any different conclusion would run afoul of legislative intent.") (citing and quoting *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."); and *Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation statutes are construed liberally in favor of coverage. It follows that any exception to workers' compensation coverage must be narrowly construed.") (brackets omitted).

Respondent blurs the roles of appellate courts and the legislature. It fails to address, for example, the legislature's proven ability to enact statutes that *do* limit benefits to relatives, such as S.C. Code Ann. § 42-9-290³. Given *Lawrence's* controlling precedent; the inclusive, *unambiguous*

³"[D]ependents in any foreign country are limited to a surviving spouse and child or children or, if there be no surviving

language of § 42-9-120; and the requirement of *Hines* and *Peay, supra*, that workers' compensation statutes must be construed liberally *in favor of coverage*, this Court must reverse the Commission's holding and apply the findings of financial dependency (R.p.138, lines 4-5; R.p.142, lines 9-15) according to the S.C. Code Ann. § 42-9-120 and -130.

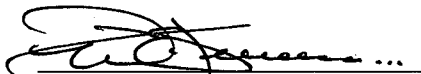
CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that the Court disregard Respondent's argument contradicting the Commission's unchallenged findings of fact 39 and 52; that it disregard Respondent's unsupported and conclusory arguments; and that it reverse, as unconstitutional, the Orders of the Commissioner and Full Commission as to findings of fact 53-63 (R.pp.142-145) and conclusions of law 12-15 (R.pp.146-147); and, that it remand this matter for further Orders allocating those benefits primarily to Yvonne Burns in accord with findings of fact 39 (R.p.138) and 52 (R.p.142) and conclusions of law 1-11 (R.pp.145-146).

spouse or child, to a surviving father or mother whom the employee has supported, either wholly or in part, for a period of three years before the date of the injury[.]" S.C. Code Ann. § 42-9-290.

Respectfully submitted,

October 12, 2016.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No.: 1312352
Appellate Case No. 2016-000258

Tyrone York, as personal representative
for Timothy York (Deceased), Shirley York,
and Yvonne Burns, Plaintiffs,

Of Whom Yvonne Burns is the..... Appellant,

And

Shirley York is a..... Respondent,

v.

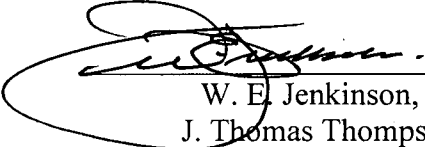
Longlands Plantation a.k.a. Knollwood, Inc.,
and Companion Property and Casualty Group,.....Respondents.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the **Final Brief of Appellant** and **Appellant's Final Reply Brief** comply with all requirements of Rule 211(b), SCACR.

October 20, 2016


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