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.

Appellant's Motion for Leave to Argue Against Precedent

W. E. Jenkinson, III, Esquire
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MOTION FOR LEAVE TO ARGUE AGAINST PRECEDENT

On information and belief, Appellees contend that Appellant, Yvonne Burns, is urging this Court to abandon precedent relied on by the Commission in "*Day v. Day,* which holds that the legislature did not intend to permit a woman to be classified as a dependent under the Workers' Compensation Act when she lives in an illicit relationship with a man to whom she is not legally married." Appellee's Final Brief p 2. Appellant contends that Appellees misconstrue the *Day* decision as well as Appellant's argument and the basis for this appeal. In an effort to preserve all issues in this appeal, and to the extent that this Court deems necessary, Appellant hereby moves the Court for leave to present oral argument against precedent in this case, pursuant to Rule 217 SCACR. Specifically, Ms. Burns seeks leave to argue against *Day v. Day,* 216 S.C. 334, 58 S.E.2d 83 (1950), and S.C. Code §§ 16-15-60 and 16-15-80. These three authorities form the legal basis for the decisions below; but they were applied unconstitutionally, in violation of Ms. Burns' rights to liberty and privacy. (R pp 69 ¶ 53; 70 ¶¶ 55-58; ¶ 71 59)

MEMORANDUM OF ARGUMENT

"The ability to challenge precedent is a paramount principle of our judicial system." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 450, 790 S.E.2d 763, 770, (2016), *reh'g denied* (Dec. 7, 2016) (citing *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) ("Citizens must be afforded access to the judicial process to address alleged injustices."). On the basis of this principle, the Court should grant Ms. Burns leave to argue against the *Day* decision and the two unenforced fornication statutes applied against her by the Commission.

"[A]dherence to precedent that is wrong serves no [] laudable purpose." *Joseph v. S.C.*

Dep't of Labor, Licensing & Regulation, 417 S.C. at 451, 790 S.E.2d at 770 (citation omitted). "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. ... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Id.* (citation omitted).

Ms. Burns, contends that this Court should reverse the decisions below, because they were based on findings and conclusions of an "illicit relationship" without any evidence of "illicitness". This is no challenge to precedent. In the proceedings below, the Commissioner found (and the Commission adopted the findings) that Ms. Burns was partially dependent on the Decedent, moreso than his Mother, Appellee, Shirley York, and, that Ms. Burns and Decedent lived together, may have intended to marry, but were "engaging in fornication[1]" precluding Ms. Burns' dependency claim. (R pp 68-69)

The Commissioner concluded (and the Commission upheld the conclusion) that the couple's "illicit relationship" barred her recovery pursuant to South Carolina fornication statutes and two bigamy decisions. (R. pp 67-69; 142-144)

The first decision, from North Carolina's Supreme Court, *Fields v. Hollowell & Hollowell, et al.*, 238 N.C. 614, 78 S.E.2d 740 (1953), is undeniably not precedent here. The second, a nearly seventy-year-old South Carolina Supreme Court bigamy decision, *Day v. Day,* 216 S.C. 334, 58 S.E.2d 83 (1950), is inapposite because there is no bigamy or other legal impediment to the relationship in this case. *Day* specifically turned on the facts and evidence of bigamy, in that the wife had a prior existing marriage, making her second marriage, to Mr. Day (the deceased employee under whom wife claimed compensation), "an illicit relationship *under the law*." *Id.*,

[1] "Fornication" is not merely unmarried people living together; it requires proof of "carnal intercourse". See note 3 below and S.C. Code Ann. § 16-15-80.

216 S.C. at 342, 58 S.E.2d at 86 (emphasis added). *Day* denied dependent status (and resulting compensation) due to the bigamy statute and the illegal nature of the relationship. "Undoubtedly, to recognize such a bigamous relationship as coming within the purview of the Compensation Law would be against the public policy of this State." *Id.*, 216 S.C. at 345, 58 S.E.2d at 88. *Day* itself makes no reference to fornication or sexual relations.

In stark contrast here, it is undisputed that there was no bigamy or other legal impediment to marriage between Ms. Burns and Decedent and there was no evidence of "fornication". Ms. Burns contends that the bigamy holding in *Day* does not apply to the facts in evidence here, nor does the North Carolina bigamy decision in *Fields* hold any persuasive effect. But, because the Commissioner and Commission applied the holding in *Day*, by analogy to S.C. Code §§ 16-15-6[2] and 16-15-80[3], which make unmarried sexual relations a crime, Ms. Burns intends to argue that *Day* and the fornication statutes are unconstitutional as applied to Ms. Burns' workers compensation dependency claim.

To clarify, Ms. Burns contends that *Day* does *not* stand for the broad prohibition against dependency by unmarried persons as formulated by Appellees and quoted at the beginning of this motion. She contends that the Commissioner and Commission misconstrued *Day*. A careful reading of that decision shows that the Court based its holding on the applicable constitutional bigamy statute in effect in 1950. Nearly twenty years ago, our Supreme Court recognized that the

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[2]"Any man or woman who shall be guilty of the crime of adultery or fornication shall be liable to indictment and, on conviction, shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court." S.C. Code Ann. § 16-15-60.

[3] " "Fornication" is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried." S.C. Code Ann. § 16-15-80 (emphasis added).

enduring aspect of *Day* is its iteration of a dependency *standard*, as opposed to its holding on the bigamy facts before it. *Adams v. Texfi Indus. [IV]*, 341 S.C. 401, 535 S.E.2d 124 (2000) reiterated that (two appeals earlier in that same case) the Court had held that *Day's standard* 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: "[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)). Ms. Burns has no quarrel with that standard. Indeed, she makes her claim under it.

Ms. Burns seeks leave to argue that the statutes forming the basis for the Commissioner's denial of benefits (and the Commission's adoption thereof) were unconstitutionally applied in this case and that it is widely recognized that such statutes are unconstitutional, due to the United States Supreme Court's decisions holding analogous sister states' laws to be improper incursions into the right to privacy. Our Courts exhort the Commission to construe workers' compensation law *liberally* in favor of coverage - unconstitutional and unenforced criminal statutes should play no part in that process. *See, Nero v. S.C. Dep't of Transp.,* 420 S.C. 523, 529, 804 S.E.2d 269, 272, (Ct. App. 2017) ("We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act[.]" (citation omitted). "The Workers' Compensation Act is a comprehensive scheme created to provide compensation to employees injured by accidents arising out of and in the course of their employment." *Machin v. Carus Corp.*, 419 S.C. 527, 533, 799 S.E.2d 468, 471 (2017) (citation omitted). "[W]orkers' compensation is

founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting [no-fault] liability on the part of the employer ... to compensate the employee [or his dependent] ... for loss of earnings resulting from accidental injury arising out of and in the course of employment." *Machin v. Carus Corp.*, 419 S.C. at 534, 799 S.E.2d at 471 (internal quotation marks and citation omitted).

S.C. Code §§ 16-15-60 and 16-15-80 make "fornication" a punishable criminal act. But, the United States Supreme Court has held that similar state statutes prohibiting fornication and other consensual intimate acts and relationships are unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). The U.S. Constitution protects adults' rights to maintain personal relationships "in the confines of their homes and their own private lives" including "overt expression in intimate conduct" as a part of such relationships. *Lawrence*, 539 U.S. at 567; *Martin*, 607 S.E.2d at 369. The fundamental right infringed by such statutes is the right to enter and maintain a personal relationship without governmental interference. *Id.* This "protection extends to intimate choices by unmarried as well as married persons", *Lawrence*, 539 U.S. at 577-578; *Martin*, 607 S.E.2d at 370, including Ms. Burns and the Decedent.

S.C. Code §§ 16-15-60 and 16-15-80 are unconstitutional as applied by the Commission, for the purposes of narrowly construing the Act, in order to deny Ms. Burns' dependency benefits. South Carolina has not yet addressed these statutes, largely because they are no longer enforced, but other states have recognized that *Lawrence* and *Martin* control. See, e.g., *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003) (Georgia fornication statute unconstitutional); *State v. Saunders*, 75

N.J. 200, 381 A.2d 333 (1977) (N.J. fornication statute unconstitutional); *State v. Pilcher*, 242 N.W. 2d 348 (Iowa 1976) (Constitution voids state statutes prohibiting consensual sexual acts between unmarried adults). Thus, S.C. Code §§ 16-15-60 and 16-15-80 were unconstitutionally applied in this case.

CONCLUSION

Because "[t]he ability to challenge precedent is a paramount principle of our judicial system" (*Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. at 450, 790 S.E.2d at 770), this Court should grant Appellant's motion for leave to challenge precedent at oral argument in this case.

March 28, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Appellant's Motion for Leave to Argue Against Precedent was served on all parties or their counsel by placement into a United States Postal Service mail receptacle with adequate postage affixed, this date, addressed as follows:

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March 28 2018

W. E. Jenkinson, III, Esquire
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No.: 1312352
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Tyrone York, as personal representative
for Timothy York (Deceased), Shirley York,
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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.

PROOF OF SERVICE

I certify that I have served Appellant's *Motion for Leave to Argue Against Precedent* on Respondent Shirley York and Respondents Longlands Plantation a.k.a. Knollwood, Inc., and Companion Property and Casualty Group by depositing a copy of it in the United States Mail, postage prepaid, on March 28, 2018, addressed as follows:

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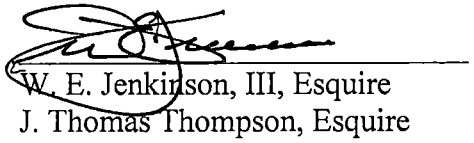
March 28, 2018



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March 28, 2018

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RE: Timothy York v. Longlands Plantation
WCC File No.: 1312352
Appellate Case No.: 2016-000258

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of Appellant's *Motion for Leave to Argue Against Precedent* in the above captioned case. I have also enclosed Proof of Service on counsel of record and our firm's check in the amount of $25.00 as filing fee for this motion.

I would appreciate your returning the clocked copies to me in the envelope provided.

With best regards, I am

Very truly yours,

JENKINSON, JARRETT & KELLAHAN, PA

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WEJ/sm
Enclosure(s): as stated
cc: Ann M. Mickle, Esquire
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