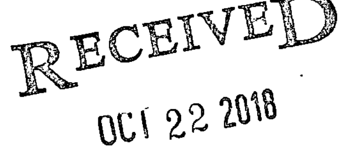
THE STATE OF SOUTH CAROLINA
In The Supreme Court



APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1312352

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

Of whom Yvonne Burns is a .... Respondent,

And Shirley York is the .... Petitioner,

v.

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

APPENDIX

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON
SULLIVAN, LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

Ann M. Mickle # 3522
MICKLE & BASS
1519 Richland Street
Columbia, SC 29201
(803) 929-0029

Attorneys for Petitioner

William E. Jenkinson, III # 2984
John T. Thompson # 81689
JENKINSON JARRETT &
KELLAHAN, PA
P.O. Drawer 669
120 W. Main Street
Kingstree, SC 29556
(843) 355-2000

Attorneys for Respondent
Yvonne Burns

J. Brandon Hylton # 70295
MCANGUS GOUDELOCK &
COURIE, LLC
P.O. Box 7489
Florence, SC 29502
(843) 519-1802

Helen F. Hiser # 76214
MCANGUS GOUDELOCK &
COURIE, LLC
P.O. Box 650007
Mount Pleasant, SC 29465
(843) 576-2930

Attorneys for Respondent
Longlands Plantation

INDEX

Decision of the Court of Appeals, Op. No. 5566
(S.C. Ct. App. filed June 6, 2018) 1

Petition for rehearing 7

Order denying rehearing 10

Brief of Appellant 11

Brief of Respondent 33

Reply Brief 48

Record on Appeal
(record submitted separately)

Amended Decision and Order of Commissioner James, June 5, 2015 3

Order of Full Commission, January 20, 2016 76

Claimant's Form 52 - Notice of Claim, September 11, 2013 149

Claimant's Form 52 - Notice of Claim, February 18, 2014 150

Single Commissioner Transcript of June 1, 2015 151

Opening Statements 152

Vivian Moore
Cross 164

Robert Mims
Direct 166

Gerald Wilder
Direct 168

Althonia Rodgers
Direct 170
Cross 178

Tyrone York
Direct 180
Cross 185

Sam. W. Mouzon, Jr.
Direct 188
Cross 190

Frederick Childers
Cross 191

Kim York Smith
Cross 195

Single Commissioner Transcript of June 18, 2015 197

Shirley York
Direct 198
Cross 199

Pamela Jean Johnson
Direct 207

Mary McLaughlin
Direct 208
Cross 218

Single Commissioner Transcript of June 19, 2015 219

Christopher Jonathan Battle
Cross 220

Yvonne Burns
Direct 222
Cross 242
Recross 247

Javon Terrell Burns
Direct 249

Claimant Tyrone York's APA Exhibits 251

Claimant Yvonne Burns' APA Exhibits 263

Certificate of Counsel 286

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2016-000258

Appeal From The Workers' Compensation Commission

Opinion No. 5566
Heard April 18, 2018 – Filed June 6, 2018

REVERSED AND REMANDED

William E. Jenkinson, III, and John Thomas Thompson, both of Jenkinson, Jarrett & Kellahan, P.A., of Kingstree, for Appellant.

Ann McCrowey Mickle, of Mickle & Bass, LLC, and Blake A. Hewitt, of Bluestein Thompson Sullivan, LLC, both of Columbia, for Respondent Shirley York; and Helen F. Hiser, of Mount Pleasant, and Jonathan Brandon

Hylton, of Florence, both of McAngus Goudelock & Courie, LLC, for Respondent Longlands Plantation.

LOCKEMY, C.J.: Yvonne Burns appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) denying her claim for death benefits. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Timothy York died in a work-related accident on August 26, 2013, when his boat capsized on a pond at Longlands Plantation while he was working within the course and scope of his employment with Knollwood, Inc.

In January 2014, Tyrone York, Timothy's brother and the personal representative of his estate, filed a Form 52 notice of a claim for death benefits and requested a hearing. A hearing was held before the single commissioner in June 2014 to determine the beneficiary of Timothy's statutory benefits. At the hearing, Tyrone sought workers' compensation benefits on behalf of Timothy's mother, Shirley York, as Timothy's next of kin under section 42-9-140(B) of the South Carolina Code (2015). Yvonne Burns sought benefits for herself as Timothy's common law wife under section 42-9-110 of the South Carolina Code (2015); or alternatively, as a dependent under sections 42-9-120 or 42-9-130 of the South Carolina Code (2015).

In June 2015, the single commissioner found Shirley entitled to the full sum of death benefits allowable under the Workers' Compensation Act (the Act)[1]. The single commissioner held the preponderance of the testimony did not support a finding Timothy and Yvonne had a common law marriage. The single commissioner found Timothy and Yvonne "lived together off and on in a tumultuous relationship characterized by separations resulting from either alcohol consumption or arguments regarding finances." In finding Yvonne failed to prove the existence of a common law marriage, the single commissioner relied heavily on (1) the conflicting testimony from family and friends as to whether Timothy and Yvonne planned to get married; (2) Yvonne's testimony she never told her son of any plans to marry Timothy; (3) Yvonne's testimony the couple had not formalized any plans for a wedding; (4) Timothy and Yvonne's individual tax returns

---

[1] S.C. Code Ann. §§ 42-1-10 to 42-19-50 (2015 & Supp. 2017).

indicating they were single without any dependents; and (5) Yvonne's failure to contribute to Timothy's funeral expenses.

The single commissioner further held that although Yvonne's financial dependency on Timothy was greater than Shirley's, such financial dependence was not determinative of the outcome of the case. The single commissioner noted South Carolina's statutory prohibition against fornication and cited *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950), as dispositive. The *Day* court held "it was not the intention of the legislature to permit a woman to be classed and considered as a dependent within the meaning of [the] Act who lives in [an] illicit relationship with a man to whom she is not legally married." *Id.* at 345, 58 S.E.2d at 88. The single commissioner held, as our supreme court held in *Day*, an individual cannot be a dependent if he or she is in an illicit relationship, and if the legislature intended to sanction an illicit relationship as constituting a basis for dependency, a provision for such would have been made in the Act.

Yvonne subsequently appealed the single commissioner's order to the Appellate Panel. The Appellate Panel affirmed the single commissioner's order in full on January 20, 2016. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the [Appellate Panel]." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse whe[n] the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence [that], considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

I. Applicable Statutory Law

Section 42-9-290 of the South Carolina Code (Supp. 2017) provides that if an employee dies as the result of an accident arising out of the course of employment, the employer must provide death benefits to dependents wholly dependent on the decedent's earnings for support.

One may be deemed wholly dependent either through a conclusive statutory presumption under section 42-9-110 or through a factual demonstration under section 42-9-120. *See* S.C. Code Ann. § 42-9-110 (2015) ("A surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee."); S.C. Code Ann. § 42-9-120 (2015) ("In all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident . . . .").

"If there is more than one person wholly dependent, the death benefit shall be divided among them . . . ." S.C. Code Ann. § 42-9-130 (2015). "If the deceased employee leaves no dependents or nondependent children, the employer shall pay the commuted amounts . . . to his father and mother, irrespective of age or dependency." S.C. Code Ann. § 42-9-140(B) (2015).

II. Issues on Appeal

A. Fornication Statutes

Yvonne argues the Appellate Panel erred in finding she and Timothy were engaged in fornication. She contends the record contains no evidence of any acts of fornication or convictions for fornication, and thus, the Appellate Panel's findings are not supported by substantial evidence.

"'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 (2015).

> 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 (2015).

The Appellate Panel found Timothy and Yvonne were engaging in fornication, and thus, based on the *Day* court's holding that an individual cannot be a dependent if they are in an illicit[2] relationship, Yvonne's claim to Timothy's death benefits was denied as a matter of law. We hold the Appellate Panel erred in finding Timothy and Yvonne were engaged in fornication. The record contains no evidence of any acts of fornication or convictions for fornication. Accordingly, we reverse the Appellate Panel as to this issue.[3]

B. *Day v. Day*

Yvonne argues the Appellate Panel erred in finding her claim for death benefits was barred by the supreme court's holding in *Day*.

Yvonne contends *Day* is not applicable because the relationship at issue in *Day*, unlike in the present case, was bigamous, and thus, illegal. Shirley asserts *Day* is a longstanding precedent that holds the legislature did not intend to include an unmarried cohabitant as a dependent under the Act.

In *Day*, our supreme court denied the claimant death benefits finding the marriage of the claimant to the deceased employee was bigamous and void from its inception. 216 S.C. 334, 344-45, 58 S.E.2d 83, 88 (1950). The court held although the claimant believed she was legally married to the deceased, it could not "escape the conclusion that it was not the intention of the legislature to permit a woman to be classed and considered as a dependent within the meaning of [the] Act who lives in [an] illicit relationship with a man to whom she is not legally married." *Id.* at 345, 58 S.E.2d at 88. While the *Day* court found the claimant was dependent on the deceased employee and noted her case appealed strongly to the court's sympathy, it nevertheless found the claimant was not entitled to benefits.

---

[2] "Illegal or improper." *Illicit*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] Yvonne further asserts South Carolina's fornication statutes are unconstitutional. We decline to address this argument. *See Fairway Ford, Inc. v. Cty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996) (holding it is this court's firm policy to decline to rule on constitutional issues unless such a ruling is required).

Id. at 344-45, 58 S.E.2d at 88. The court stated "[t]o hold otherwise might well give rise to great abuses in the administration of the [] Act." *Id.* at 345, 58 S.E.2d at 88.

In light of our reversal of the Appellate Panel's fornication findings, we remand this case to the Appellate Panel to reconsider its holding. *Day* held individuals cannot be dependents under the Act if they are involved in an illicit relationship. Here, no evidence was presented of an illicit relationship. Thus, we ask the Appellate Panel to determine, based on the evidence in the record, whether Yvonne qualifies as a dependent under the Act.

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE 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.

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs petitions for rehearing. Rule 240 governs motions and petitions generally.

The Court issued its decision June 6, 2018. See Op. No. 5566 (Shearouse Adv. Sh. No. 23 at 43). This petition is timely under Rule 221(a).

Shirley York respectfully resubmits the arguments from her brief. She additionally submits the Court may have overlooked or misapprehended these points in its decision:

First, the Court may have overlooked that this case is not about intimate conduct between adults. This case is controlled by the legal question of whether an unmarried romantic cohabitant can be a "dependent" under the Workers' Compensation Act. At least on this record, the answer is plainly "no."

Second, there is no reason to prolong this litigation instead of answering this legal question and ending the parties' disagreement. *Day v. Day* and *Palm v. General Painting Co.* stand for the proposition that dependency under the Act does not include someone who cohabits while not married. *Day*, 216 S.C. 334, 58 S.E.2d 83 (1950); *Palm*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). No South Carolina case has ever recognized dependency under the Act outside the context of a familial relationship. *Adams v. Texfli Industries*, 341 S.C. 401, 535 S.E.2d 124 (2000) (stepchild); *Second Injury Fund v. Young*, 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990) (adult niece). *Day* and *Palm* rest on the assumption that if the legislature intended to include this sort of relationship as a basis for dependency the legislature would have said so. That principle controls.

Third, while this case is not about intimate conduct between adults, it is only fair to also note that the commission discussed intimate conduct in its decision. One can easily imagine less sensational ways the commission could have written the decision, but the way the decision is written makes sense given the language the Supreme Court used in *Day v. Day* and the language the North Carolina Supreme Court used in *Fields v. Hollowell*, 78 S.E.2d 740 (N.C. 1953), which the commission reviewed in preparing its decision. (R.p.142, ¶54).

The language in those cases is dramatic by modern standards, but the reasoning underlying these decisions is straightforward and sound. This was not a conventional relationship. Ms. Burns and Mr. York lived together "off and on." The commission called their relationship "tumultuous."

(R.p.130, ¶11). It is not disparaging this relationship to say that it was different. Being married to someone is different from living together and not being married. Precedent correctly recognizes this as a significant difference when it comes to statutory dependency.

This case is not about proving whether anyone is guilty of statutes that might be antiquated or unenforceable. This case is about someone who claimed to be married to the deceased claimant, who lost that claim, and who now argues that the Workers' Compensation Act allows an unmarried romantic cohabitant to take a deceased individual's death benefits. Ms. Burns could not have sued Mr. York for a divorce or for alimony. She could not have kept him from testifying against her in a criminal trial. Mr. York could have abandoned Ms. Burns at any time and gotten married at any time. Neither party claimed the other as dependents on their tax returns. A fair reading of precedent compels the conclusion that if the legislature intended to include this sort of relationship as a basis for dependency under the Act the legislature would have said so.

For the foregoing reasons, this Court should grant this petition and issue an order affirming the judgment below.

June 21, 2018

Respectfully submitted,

SC BAR 77887

for Blake Hewitt

Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Shirley York

The South Carolina 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.

Appellate Case No. 2016-000258

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

______________________ C.J.

______________________ J.

______________________ J.

FILED
Sept. 20, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC File No.: 1312352

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.

Appellate Case No. 2016-000258

FINAL BRIEF OF APPELLANT

W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
Post Office Drawer 669
Kingstree, SC 29556
(843) 355-2000
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 4

Statement of the Case 4

Facts 5

Arguments

I. STANDARD OF REVIEW 10

II. THE COMMISSION ERRED AS A MATER OF LAW IN FINDING THAT DECEDENT AND YVONNE WERE ENGAGING IN FORNICATION 10

III. SOUTH CAROLINA'S FORNICATION STATUTES ARE UNCONSTITUTIONAL 11

IV. THE COMMISSION ERRED IN FINDING THAT *DAY V. DAY*, 216 S.C. 334, 58 S.E. 2D 83 (1950) BARS YVONNE'S BENEFITS CLAIM 13

V. THE COMMISSIONER AND THE FULL COMMISSION ERRED IN RELYING ON *FIELDS V. HOLLOWELL & HOLLOWELL, ET AL.*, 238 N.C. 614, 78 S.E.2d 740 (1953) 16

VI. S.C. CODE § 42-9-120 DEPENDENCY IN "ALL OTHER CASES" IS NOT LIMITED TO RELATIVES 17

VII. THE COMMISSION ERRED IN DENYING YVONNE BENEFITS AS DECEDENT'S PRIMARY DEPENDENT 20

Conclusion 21

TABLE OF AUTHORITIES

Cases:

Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995)....................17

Bush v. Gingrey Bros., 100 S.E.2d 821, 823, 232 S.C. 20, 23 (1957)....................16

Byers v. Mt. Vernon Mills, Inc., 268 S.C. 68, 231 S.E.2d 699 (1977)....................13, 14

Camp v. Spartan Mills, 302 S.C. 348, 350, 396 S.E.2d 121, 122 (Ct. App. 1990)...........20

Day v. Day, 216 S.C. 334, 58 S.E.2d 83 (1950)....................4, 11, 12, 13, 14, 15, 16, 19

DeBruhl v. Kershaw County Sheriff's Dep't, 303 S.C. 20, 397 S.E.2d 782 (Ct.App.1990)....................20

Duncan v. Duncan, 232 N.C. App. 369, 754 S.E.2d 451, 455 *review den.'d,* 367 N.C. 531, 762 S.E.2d 208 (2014) and *review dis.'d,* 367 N.C. 531, 762 S.E.2d 208 (2014)....................16

Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995)....................11

Fields v. Hollowell et al, 238 N.C. 614, 78 S.E.2d 740 (1953)....................4, 11, 12, 16, 17

Ford v. Allied Chem. Corp., 252 S.C. 561, 167 S.E.2d 564 (1969)....................20

Garrett v. Burris, 224 N.C. App. 32, 735 S.E.2d 414 (2012) *aff'd,* 366 N.C. 551, 742 S.E.2d 803 (2013)....................16

In re J.M., 276 Ga. 88, 575 S.E.2d 441 (2003)....................13

Lawrence v. Texas, 539 U.S. 558 (2003)....................12, 13

Lowe v. AM-CAN Transport Serv.s, Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct.App.1984)....20

Martin v. Ziherl, 269 Va. 35, 607 S.E.2d 367 (2005)....................12

O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995)....21

Palm v. General Painting Co., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)............13, 15

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010)....................10

Sims v. S.C. State Comm'n of Forestry, 235 S.C. 1, 109 S.E.2d 701 (1959)....................17

South Carolina Coastal Council v. South Carolina State Ethics Comm'n, 306 S.C. 41, 410 S.E.2d 245 (1991)....................18

South Carolina Second Injury Fund v. Young, 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990)....................16, 18, 19

State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991)....................18

State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980)....................16

State v. Pilcher, 242 N.W. 2d 348 (Iowa 1976)....................13

State v. Ramsey, 311 S.C. 555, 430 S.E.2d 511 (1993)....................18

State v. Samuel, 19 N.C. 177 (1836)....................16

State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977)....................13

State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897)....................16

Thong v. Andre Chreky Salon, 634 F. Supp. 2d 40, 47 (D.D.C. 2009)....................11

Statutes:

S.C. Code Ann. § 1-23-380(A)(6) (Supp.1994)....................21

S.C. Code Ann. §16-15-60....................4, 10, 11, 13

S.C. Code Ann. §16-15-80....................4, 10, 13

S.C. Code Ann. § 42-1-70 (2013)....................17

S.C. Code § 42-9-120....................*Passim*

S.C. Code Ann. § 42-9-130....................4, 5, 19, 21

S.C. Code § 42-9-140(B)....................4, 17

S.C. Code Ann. § 42-9-290 (2013)....................17, 18

STATEMENT OF ISSUES ON APPEAL

I. DID THE COMMISSION ERR IN BARRING YVONNE BURNS' CLAIM FOR BENEFITS AS A MATTER OF LAW, BY CONCLUDING THAT S.C. CODE ANN. §16-15-60 AND §16-15-80 APPLY (DEFINING AND PUNISHING FORNICATION) TO DECEDENT'S COHABITATION WITH YVONNE BURNS AT THE TIME OF DECEDENT'S DEATH?

II. DID THE COMMISSION ERR IN FINDING THAT *DAY V. DAY,* 216 S.C. 334, 58 S.E.2D 83 (1950) CONTROLS AND IS DISPOSITIVE OF THIS CASE?

III. DID THE COMMISSIONER AND THE COMMISSION ERR IN RELYING ON *FIELDS V. HOLLOWELL & HOLLOWELL, ET AL.*, 238 N.C. 614, 78 S.E.2D 740 (1953)?

IV. DID THE COMMISSION ERR IN CONCLUDING THAT YVONNE BURNS' BENEFICIARY CLAIM IS NOT WITHIN THE LEGISLATIVE SCHEME OF DEPENDENCY EVEN THOUGH SHE IS A NON-RELATIVE?

V. DID THE COMMISSION ERR IN DENYING YVONNE BURNS' CLAIM TO COMPENSATION AS DECEDENT'S PRIMARY DEPENDENT?

STATEMENT OF THE CASE

Decedent, Timothy "Blue" York **("Decedent" or "Timothy"),** died in a work-related accident on August 26, 2013 when his boat capsized on a pond at Longlands Plantation while he and a co-worker were spraying algae within the course and scope of Decedent's employment with Knollwood, Inc. Yvonne Burns **("Yvonne" or "Common Law Wife"),** who cohabited with Decedent for several years, but was not legally married to him, claimed Workers' Compensation death benefits for herself as his dependent, under S.C. Code § 42-9-120 or § 42-9-130.

Decedent's brother, Tyrone York **("Tyrone" or "P.R."),** the Personal Representative of Decedent's estate, sought Workers' Compensation benefits on behalf of Decedent's mother, Shirley York **("Mother"),** under S.C. Code § 42-9-140(B).

Respondents, Tyrone (as P.R. on Mother's behalf); Longlands Plantation a.k.a. Knollwood, Inc. **("Employer")**; and Companion Property and Casualty Group **("Carrier")** admitted the work-related accident and subsequent death; and Carrier conducted a dependency investigation to determine the beneficiary.

After a hearing held on June 5, 18 and 19, 2014, Hearing Commissioner, Hon. Melody L. James **("Commissioner")** entered an Amended Decision and Order dated June 5, 2015 concluding that Yvonne was a dependent pursuant to S. C. Code § 42-9-120; but that Decedent's Mother is entitled to the full sum of death benefits allowable under the Act. Yvonne appealed to the Full Commission **("Commission")**, which adopted the Order in totality, by its Decision and Order **("Order")**, entered January 20, 2016. This appeal followed.

FACTS

Decedent died in a work-related accident on August 26, 2013 when his boat capsized on a pond at Longlands Plantation while he and a co-worker were spraying algae within the course and scope of Decedent's employment with Employer. (R.p.77, lines 1-3). Respondents admitted the work-related accident and death and conducted a dependency investigation. (R.p.125, lines 1-3). All potential claimants other than Decedent's Mother and his Common Law Wife waived all claims to benefits. (R.pp.152-155). Yvonne claimed benefits as Decedent's Common Law Wife and/or dependent under S.C. Code § 42-9-120 or § 42-9-130. (R.p.157, lines 2-8; R.p.158, lines 12-18).

The Commissioner found and the Commission adopted the finding[1] (R.p.142, lines 9-15)

---

[1] The Full Commission having adopted the Commissioner's June 5, 2015 Amended Decision and

that Yvonne was partially dependent on Decedent who contributed to household expenses; and that her level of dependency was greater than that of his Mother (R.p.138, lines 4-5; R.p.142, lines 9-15). As to Yvonne's theories of dependency, it found (R.p.130, lines 1-26) that Decedent and Yvonne lived together off and on in a tumultuous relationship, representing themselves as a couple; and that they may have intended to get married; but that they were not married as of Decedent's death. (R.p.130, lines 7-17). It found that the couple was "at most, engaged" (R.p.141, lines 13-14); and that the couple was "engaging in fornication" (R.p.143, lines 12-13).

The Commission noted (R.p.137, lines 21-24 – p.138, lines 1-3) Yvonne's testimony that Decedent contributed to payment of her utility bills and that she used his debit card to pay various bills for her vehicle; its insurance and upkeep; groceries; and clothing. (R.p.229, line 1, - p. 233, line 16; R.p.137, line 21 – p.138, line 3). It found that the predominance of lay witness testimony did not support a common law marriage (R.p.130, lines 18-21), noting that Decedent's family did not know about the couple's engagement (Rp.130, lines 18-21) and that Yvonne testified that she did not get along with them (Rp.130, lines 16-17; Rp.225, lines 2-5).

But, the Estate's claimant, Decedent's Mother, testified that the couple lived together in the house on Broomstraw Road (R.p.206, lines 13-15); the couple's neighbor, Pamela Johnson testified that Decedent lived with Yvonne in the house on Broomstraw Road for at least seven years (R.p.207, lines 11-22); and, Decedent's friend of forty-three years, Frederick Childers, testified that Decedent lived with Yvonne for four years before his death. (R.p.190, lines 7-12; R.p.191, line 20 – p.192, line 8). Mother testified, both at deposition and at the hearing that she knew about the arrangement with Yvonne using Decedent's debit card funds, along with Yvonne's

---

Order in full, all references hereafter to "Order" or to "Commission" also mean the

own earnings, to pay the couple's bills over the whole course of their relationship, on a weekly basis; and that Yvonne was dependent on Decedent. (R.p.201, lines 10-18; R.p.205, lines 22 – p.206, line 7).

Further, while the P.R. testified that Decedent's mail went to his aunt's address on McMillan Road[2] (R.p.183, line 8 – p. 184, line 9), Decedent's auto insurance agent, Robert Mims, testified that Decedent changed his address with the insurance agency to the Broomstraw Road address on April 27, 2011 (more than two years before his August 26, 2013 death) (R.p.166, line 19 – p.167, line 4); furniture store employee, Gerald Wilder, testified that Decedent listed his address as the Broomstraw Road address on a purchase agreement on May 11, 2012 (more than one year prior to his death) (R.p.96, lines 23-24); and, documentary evidence showed that Decedent signed a home improvement contract for the Broomstraw Road home on May 17, 2013. (R.pp.266-273) Deceased's long-time friend and twenty-year co-worker, Althonia Rodgers, testified that he saw Decedent seven days per week and that Decedent lived in the Broomstraw Road house, continuously, for at least six or seven years, as if married to Yvonne. (Rp.170, lines 14-21; R.p.171, lines 1-12; R.p.172, line 1 – p.173, line 8). He testified that Deceased helped to fix up the Broomstraw Road house and Yvonne handled the couple's finances using Deceased's debit card. (r.p.174, line 10 – p.176, line 22).

The Commission noted that Gerald Wilder testified that the couple purchased furniture together and that one of the couple represented at the time of purchase, November 13, 2012, that they were getting married. (R.p.131, lines 14-17). (R.p.168, lines 20-23; R.p.169, lines 15-17) It

---

Commissioner's Amended Decision and Order and the Commissioner.

[2]The Order erroneously finds (Finding No. 16) that the mail went to Broomstraw Road; but all related testimony was to the effect that Decedent's bank statements and some other mail went to

noted further that (R.p.132, lines 1-4) convenience store owner, Chris Battle, testified that Decedent asked him for pricing for hosting their wedding reception (R.p.220, line 19 – p.221, line 19); and that (R.p.132, lines 5-8) Deceased's cousin, Towanda Williams testified that Deceased told her he was going to marry Yvonne, but, that she knew that the couple had not married. (R.p.132, lines 5-8).

The Commission found that it is undisputed that no civil ceremony took place (R.p.132, line 9) and that the documentary evidence does not support common law marriage (R.p.132, lines 10-11). It emphasized the couple's representations of themselves as single or head of household for income tax purposes (R.p.133, line 5 – p.134, line 9; R.p.137, lines 7-9). And it found "compelling" (R.p.142, line 18 – p.136, line 21) that Yvonne had not informed her son of the couple's engagement, though he could see the engagement ring on her finger (R.p.243, line 17 – p.244, line 12); and, that the couple had not set a date or formalized the plans for the wedding. (R.p.135, line 15 – p.136, line 19; R.p.245, line 10 – p.246, line 16).

At the hearing, Yvonne still possessed Decedent's debit card that she had used for years prior to and up to his death. (R.p.226, lines 10-25). Decedent kept about $50 cash for weekly spending, of which his Mother claimed she received a small amount. (R.p.203, line 23 – p.204, line 7). The rest of the money from Decedent's paychecks was used to pay their joint living expenses; and, Decedent could have gotten his card back from Yvonne but he didn't. He let her keep it. (R.p.201, line 10 – p.202, line 18). Yvonne customarily took the combined cash from both their paychecks and paid their bills, including the Duke Energy electric bill ($180-$450/month); the gas and water bills for the Broomstraw house (about $40/month); the payment

---

his aunt's address on McMillan Road.

for the furniture they purchased at Wilder Brothers ($130/month); her SUV payment ($350/month); house and vehicle insurance ($158.14 to $165.05/month); real estate taxes; groceries; clothes; her work uniforms; and gas, oil and maintenance for the vehicles she alone drove. (R.p.164, line 21 – p.165, line 6; R.p.165, lines 13-19; R.p.218, lines 5-22; R.p.226, line 6 – p.227, line 13; R.p.228, line 2 – p.233, line16; R.p.247, line 15 – p.248, line 21; R.p.249, line 10 – p.250, line 9; R.p.265; R.p.275; R.p.276-277; R.p.283-285).

Mary McLaughlin testified that she is Yvonne's second or third cousin and had known Decedent for fourteen years; and that Decedent gave Yvonne the PIN code for his card and the witness and Yvonne were often together when Yvonne used it to get cash for bills and groceries; that Decedent would sometimes call Yvonne to remind her to get certain items for him on these occasions; and that the couple had lived together for five or six years this way. (R.p.208, line 16 – p.209, line 1; R.p.218, line 22; R.p.210, lines 2-4). Decedent's friend, Althonia Rodgers, testified that Decedent permitted Yvonne to use his debit card to withdraw his payroll money to use in paying bills that supported the couple's household. (r.p.178, line 15 – p.179, line 3).

Decedent also paid for improvements to the Broomstraw Road house. (R.p.177, lines 6-16; R.p.185, line 16 – p.187, line 20; R.p.211, line 19 – p.217, line10; R.p.239, line 15 – p.241, line 13; R.pp.266-274). He bought furniture for the house (R.p.234, line 11 – p.239, line 14; R.pp.278-283); he transferred title to his 1999 Oldsmobile to her on October 29, 2011 when he could no longer drive, and the Oldsmobile was still at the Broomstraw Road house at the time of the hearing. (R.p.222, line 13 – p.224, line 20; R.pp.263-264). (This evidence contradicts the Order at Finding No. 19, which indicates that the Commission considered a certificate of title for a 1996 Lincoln Town Car titled solely in Decedent's name. (R.p.126, line 15-18). Finding No. 23

also makes reference to a car title, but does not describe or identify the vehicle. (R.p.133, line 1)

ARGUMENTS

I. STANDARD OF REVIEW.

"An appellate court can reverse or modify the Commission's decision if it is affected by an error of law or 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, 689 S.E.2d 615 (2010). "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

II. THE COMMISSION ERRED AS A MATER OF LAW IN FINDING THAT DECEDENT AND YVONNE WERE ENGAGING IN FORNICATION.

The Commission found the fornication statutes to be applicable and to bar Yvonne's claim to benefits as a dependent. (R.p.143, lines 8-14).

> 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.

"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. It is undisputed that Decedent and Yvonne were not

legally married. Yvonne contends that the preponderance of evidence established that they lived together in the Broomstraw Road house for many years. (R.p.130, lines 3-8) However, no evidence was presented of *acts* of fornication (carnal intercourse), nor any evidence of a *conviction* for fornication, under S.C. Code §§ 16-15-60 and 15-16-80; and the Order makes no reference to any such act or conviction that could possibly support its findings. (R.p.141, line 12 – p.144, line 3) The three-volume Hearing Transcript is devoid of any such evidence, reference or argument. Thus, these findings are not supported by substantial evidence.

Additionally, statutes criminalizing private, consensual, sexual intercourse are irrelevant for the purposes of civil litigation. See *Thong v. Andre Chreky Salon*, 634 F. Supp. 2d 40, 47 (D.D.C. 2009). Although South Carolina case law has not explicitly held such statutes to be irrelevant for purposes of civil litigation, *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) effectively recognized the irrelevancy of S.C. Code § 16-15-60 for purposes of civil litigation.

For these reasons, the Commission erred, as a matter of law, in applying the fornication statutes and finding that the Decedent and Yvonne were engaging in fornication and in concluding that this "fornication" barred Yvonne's claim. (R.p.143, lines 8-14)

III. SOUTH CAROLINA'S FORNICATION STATUTES ARE UNCONSTITUTIONAL.

On the basis of its "fornication" finding, the Commission found the couple to have been engaged in an "illicit relationship" (R.p.142, line 16 – p.144, line 3). The Commission found that, even though Yvonne was Decedent's dependent (R.p.142, lines 9-15), the legal analysis of two bigamy decisions - a North Carolina Supreme Court decision (*Fields v. Hollowell & Hollowell, et al.*, 238 N.C. 614, 78 S.E.2d 740 (1953)) and a South Carolina Supreme Court decision *(Day v.*

Day, 216 S.C. 334, 58 S.E.2d 83 (1950)) - bar Yvonne's recovery. (R.p.142, line 16 – p.144, line 3). But, it is undisputed that there was no bigamy or other legal impediment to marriage between Yvonne and Decedent that could support the conclusion that their relationship was "illicit", because unrefuted evidence showed that Yvonne's two prior marriages legally ended through valid divorces in 1987 and 1993 - many years prior to Decedent's relationship with Yvonne. (R.pp.251-257).

Moreover, more than fifty years after the Day and Fields decisions, the United States Supreme Court held that state statutes prohibiting fornication and other consensual intimate acts and relationships are unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003). See also, *Martin v. Ziherl*, 269 Va. 35, 607 S.E.2d 367 (2005). The U.S. Constitution protects the liberty interests of persons to maintain a personal relationship "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 (emphasis added).

> The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. *Id.*

State interests in the protection of marriage and family are insufficient to warrant intrusion upon a person's liberty interest exercised in the form of private, consensual sexual

conduct between adults. *Id.* Thus, S.C. Code §§ 16-15-60 and 16-15-80, making "fornication" a punishable criminal act, are unconstitutional. See also *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).

The (unproved) extent of Decedent's and Yvonne's private, intimate, adult relationship is protected by *Lawrence* and its progeny. It was not illegal or "illicit" because they had a fundamental right to enter and maintain a personal relationship without governmental interference and they had no legal marital obligation to anyone else. The Commission's conclusions to the contrary and resulting benefits denial are illegal government interference which must be reversed as errors of law. (R.p.142, line 16 – p.144, line 3)

IV. THE COMMISSION ERRED IN FINDING THAT *DAY V. DAY*, 216 S.C. 334, 58 S.E. 2D 83 (1950) BARS YVONNE'S CLAIM BOR BENEFITS.

There are only three decisions where South Carolina courts have denied workers compensation benefits to a woman living with and dependent upon a deceased worker at the time of death. They are: *Day v. Day*, 216 S.C. 334, 58 S.E. 2d 83 (1950) (relied upon as dispositive by the Commission) (R.pp.142-143); *Byers v. Mt. Vernon Mills, Inc.*, 268 S.C. 68, 231 S.E.2d 699 (1977); and, *Palm v. General Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). All were decided at least 15 years before the U.S. Supreme Court decision in *Lawrence* recognized constitutional protection of private, intimate, adult relationships. In each case, the relationship was "illicit" or illegal, because one of the parties was still married to someone else when they

entered into the relationship on which the claim was based. Thus, there was a legal impediment to the relationship in each of the three cases - a crucial distinction absent in this case.

In *Day v. Day*, 216 S.C. 334, 58 S.E. 2d 83 (1950), Maggie Day claimed compensation as decedent's widow, or, alternatively, as his dependent. Maggie went through a marriage ceremony with the decedent while her first husband was still alive and living nearby, and without making any effort to obtain a divorce. Her alleged marriage to the decedent was void from its inception. The Commission awarded her benefits. The Circuit Court reversed, holding:

> [T]he word 'dependent' as used in our Workmen's Compensation Law, refers to those lawfully dependent, and ... it is against the public policy of our State to make an award to one in a bigamous relationship with a deceased workman.

Id. Our Supreme Court affirmed explaining:

> An examination of the record shows that for fourteen years she and the deceased lived together as husband and wife in the city of Greenwood, conscientiously and above reproach in accordance with the putative marital relationship. The fact remains, however, that it was an illicit relationship under the law.

Id.

The court went to great lengths in explaining the breadth and lack of limitation in the actual dependency provisions of our Act. *Id.* When deciding that Maggie was nevertheless not entitled to compensation, the court repeatedly emphasized the bigamous and **illegal** nature of her relationship with the Decedent. *Id.*

Byers v. Mt. Vernon Mills, Inc., 268 S.C. 68, 231 S.E.2d 699 (1977) also involved a bigamous relationship. There, decedent married his first wife, Helen, in 1945. Five years later, without obtaining a divorce and while his first wife was still alive, he married a second woman, Martha, with whom he lived, as man and wife until 1967. Six years after the second wedding, the

first wife, Helen, divorced decedent. In 1967, decedent left the second wife, Martha, and legally married the third wife, Dorothy, with whom he lived until his death in 1973. Dorothy and Martha claimed death benefits as the surviving spouse. Martha's argument was that when Helen divorced the decedent, it removed the impediment to her marriage and her marriage ripened into a legitimate common law marriage that did not dissolve when the decedent left her to marry Dorothy. The Supreme Court held Dorothy was the legal spouse and Martha was the alleged spouse in a bigamous relationship because there was no evidence that the decedent and Martha entered into a new agreement to a common law marriage after the decedent's first wife divorced him. Without such a new agreement, Martha's relationship with the decedent did not ripen into a legitimate marriage. Therefore, there was no impediment to the decedent's marriage to Dorothy in 1967.

In 1988, the Court of Appeals decided *Palm v. General Painting Co.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). The facts in *Palm* are similar to those in *Day*. Julia, the mother of the decedent's illegitimate children was married to a man who was in prison. While still married to her incarcerated husband, Harvey, Julia lived with the decedent for two years and had two children with him. The Commission found that the evidence showed she was actually wholly dependent upon the decedent for her support at the time of the decedent's death even though she was still married to Harvey. Relying on *Day*, the Commissioner denied Julia's claim for benefits. The Court of Appeals upheld that ruling, relying on *Day*.

But, because there was no legal impediment to the relationship (common law marriage) of the couple, and because the Commission found that Yvonne was dependent upon Decedent (R.p.142, lines 9-15), these cases are inapposite to Yvonne's benefits claim as Decedent's

dependent. The Commission thus erred, as a matter of law, in concluding otherwise.

V. THE COMMISSIONER AND THE FULL COMMISSION ERRED IN RELYING ON *FIELDS V. HOLLOWELL & HOLLOWELL, ET AL.*, 238 N.C. 614, 78 S.E.2d 740 (1953).

Likewise, the Commission erred in relying on *Fields v. Hollowell & Hollowell, et al.*, 238 N.C. 614, 78 S.E.2d 740 (1953) as persuasive authority in this case. When there is no South Carolina case law interpreting a provision of our Workers' Compensation Act, decisions from other jurisdictions with **identical or similar provisions** should be given careful consideration. *Bush v. Gingrey Bros.*, 100 S.E.2d 821, 823, 232 S.C. 20, 23 (1957) (emphasis added). North Carolina cases, like cases from other states, are not controlling. *Id.* In fact, South Carolina courts have not looked to North Carolina case law in past cases involving dependency under our "in all other cases" statute, § 42-9-120. Instead, on questions of dependency under that section, South Carolina courts have looked to cases from Colorado (*Bush,* 232 S.C. at 25); Virginia (*Day,* 216 S.C. at 342-343), and New York (*Young*, 301 S.C. at 528).

Additionally, North Carolina does not have "identical or similar" provisions relevant here, because it does not recognize common law marriage. Its Supreme Court has held that "[a] common law marriage or marriage by consent is not recognized by this State." *Duncan v. Duncan*, 232 N.C. App. 369, 373, 754 S.E.2d 451, 455 *review denied,* 367 N.C. 531, 762 S.E.2d 208 (2014) and *review dismissed,* 367 N.C. 531, 762 S.E.2d 208 (2014) (citing *State v. Lynch,* 301 N.C. 479, 487, 272 S.E.2d 349, 354 (1980)). Common law marriages cannot be created in North Carolina. *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012) *aff'd,* 366 N.C. 551, 742 S.E.2d 803 (2013) (citing *State v. Wilson,* 121 N.C. 650, 28 S.E. 416 (1897); *State v. Samuel,* 19 N.C. 177 (1836)).

For these reasons, *Fields* has no bearing whatsoever on the law of South Carolina as applied in this case.

VI. S.C. CODE § 42-9-120 DEPENDENCY IN "ALL OTHER CASES" IS NOT LIMITED TO RELATIVES.

The Workmen's Compensation Act was adopted for the benefit of the employees and their dependents, and it should be liberally construed in order to accomplish this humane purpose. *Sims v. S.C. State Comm'n of Forestry*, 235 S.C. 1, 9, 109 S.E.2d 701 (1959) The Act directs that benefits be paid to the "dependents" of the deceased worker. S.C. Code Ann. § 42-9-290 (2013). It does not define dependents. *Adams v. Texfi Indus.*, 320 S.C. 213, 216, 464 S.E.2d 109 (1995). It prescribes how dependence is to be established.[3] Those who meet the specific statutory definitions of surviving spouse and children[4] are conclusively presumed to be wholly dependent. S.C. Code Ann. § 42-9-110 (2013) All other claimants are required to factually prove some level of actual dependence and may lose their right to compensation if other claimants establish total dependence and they fail to prove actual total dependence. S.C. Code Ann. § 42-9-120 (2013). *Adams v. Texfi Indus.*, 320 S.C. 213, 216, 464 S.E.2d 109 (1995).

Only in one very specific circumstance, not applicable here, the Act limits the definition of dependents who can recover death benefits to very close relatives: Where the claimants are not citizens or residents of the United States or Canada, the Workers Compensation Act limits

---

[3]It also directs how the award is to be divided among total dependents, partial dependents and nondependent children and parents. The total death benefit is to be divided among those who are wholly dependent unless there are none, in which case partial dependents are to be paid a portion of the award in accordance with the amount of support provided by the decedent. S.C. Code Ann. § 42-9-290 (2013). If no claimants establish total or partial dependency or if partial dependents can claim only part of the death benefit, the Law directs payment of the remaining death benefits to nondependent children, or if there are none, to the decedent's parents irrespective of age or dependency. S.C. Code Ann. § 42-9-140 (2013).

[4]Partially dependent claimants other than minor legitimate children of the decedent may be bumped up to the level of wholly dependent claimants if they meet the statutory definition of children in S.C. Code Ann. § 42-1-70 (2013).

recovery of death benefits to those meeting the statutory definition of surviving spouse or children, who are conclusively presumed wholly dependent, or in the absence of statutory surviving spouse or children to those meeting the statutory definition of surviving parents. S.C. Code Ann. § 42-9-290 (2013) There is no similar limitation for claimants who are citizens or residents of the United States or Canada (as Yvonne undisputedly is).

The absence of such limiting language in S.C. Code Ann. § 42-9-120 demonstrates legislative intent not to limit "dependents" to relatives, where such claimants are able to prove total or partial dependence. Clearly, had the legislature intended to limit this section to relatives, it was fully capable of doing so, having done so in S.C. Code Ann. § 42-9-290. In interpreting a statute, this Court's primary function is to ascertain the intent of the legislature. *E.g., State v. Ramsey,* 311 S.C. 555, 430 S.E.2d 511 (1993). Of course, where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. *E.g., State v. Blackmon,* 304 S.C. 270, 403 S.E.2d 660 (1991). We should consider, however, not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *E.g., South Carolina Coastal Council v. South Carolina State Ethics Comm'n,* 306 S.C. 41, 410 S.E.2d 245 (1991). *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779, 70 A.L.R.5th 723 (1997).

South Carolina Second Injury Fund v. Young, 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990) demonstrates that "dependent" is broader than the specific relatives (spouse, parents, children) named in various parts of the Act. In *Young*, a wholly dependent niece claimed a right to death benefits. The Second Injury Fund argued that she could not be a dependent under the Act because she was not one of the relatives specifically mentioned by the Act. The Court of Appeals

rejected that argument:

> This contention has no merit whatever. Indeed, the Supreme Court put it to rest in *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950). There it said:
>
> It is generally held that unless a Workmen's Compensation Act specifically sets forth who shall be considered wholly or partially dependent on the earnings of an employee, dependency and the extent thereof are to be determined as questions of fact in accordance with the facts as they exist at the time of the injury to the employee.
>
> Our Act does not define dependency, and does not specifically indicate who are dependents, except the designated persons who are conclusively presumed to be wholly dependent upon the deceased employee. 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. *Id.*
>
> In the forty years since *Day* was decided, our Act still does not define dependency, still does not list who may be dependents, and still only designates those persons who are conclusively presumed to be wholly dependent upon a deceased employee. See S.C. Code Ann. § 42-9-110 (1976) ("A surviving spouse or a child shall be conclusively presumed to be wholly dependent for support on a deceased employee."); id. § 42-9-120 ("In all other cases questions of dependency . . . shall be determined in accordance with the facts as the facts may be at the time of the accident ..."). Until our Act is changed, then, a niece of a deceased employee may ordinarily qualify for compensation as a dependent. ...
>
> Because no hard and fast rule can be laid down as to what constitutes actual dependency and because the question of dependency, as the *Day* case says, is one of fact, each case must rest and be determined on its own particular facts and circumstances.

Young, 301 S.C. at 526-529.

S.C. Code § 42-9-120 thus does not limit "dependents" to relatives and the Commissioner and Full Commission erred in concluding that it and S.C. Code § 42-9-130 are immaterial. (R.p.142, line 9-15).

VII. THE COMMISSION ERRED IN DENYING YVONNE BENEFITS AS DECEDENT'S PRIMARY DEPENDENT.

The Commission found that Yvonne was dependent on Decedent and had a greater level of dependency than Decedent's Mother. (R.p.130, lines 9-19; R.p.138, lines 4-5). These findings are amply supported by the evidence that Decedent's entire weekly paycheck, but for approximately $50.00 spending money (which he shared with his Mother), went to paying Yvonne's household bills and expenses. (See Statement of Facts above). There was no substantial evidence from which to conclude otherwise. Decedent had an average weekly wage of $567.27 (Stipulation 2). (R.p.77). Of this amount, the unrefuted evidence showed that after subtracting $50.00 for spending money shared with Mother, $517.27 per week went to Yvonne's expenses.

The Commission noted that Mother testified that she received a total of $50.00-$60.00 monthly from Decedent (R.p.198, lines 4-9), which translates mathematically to approximately $15.00 per week; and it noted that she also received financial help from her other son, the P.R., and also receives social security benefits (R.p.198, lines 10-25). (R.p.94). Mother testified to other facts showing her substantial dependence on the P.R.: She lives in a home owned by the P.R. and he helps her with her water bills. (R.p.199, line 17 – p.200, line 2).

Judicial review of the commission's order is limited to determining whether the findings are supported by substantial evidence. *Lowe v. AM-CAN Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct.App.1984). Substantial evidence is that evidence which would allow reasonable minds to reach the conclusion the full commission reached. *Camp v. Spartan Mills*, 302 S.C. 348, 350, 396 S.E.2d 121, 122 (Ct. App. 1990) (citation omitted). The determination of witness credibility and the weight to be accorded evidence is reserved to the commission. *Ford v. Allied Chem. Corp.*, 252 S.C. 561, 167 S.E.2d 564 (1969); *DeBruhl v. Kershaw County Sheriff's*

Dep't, 303 S.C. 20, 397 S.E.2d 782 (Ct.App.1990). This court cannot substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. S.C.Code Ann. § 1-23-380(A)(6) (Supp.1994). *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 30, 459 S.E.2d 324, 327 (Ct. App. 1995).

Thus, in light of the Commission's errors of law addressed in argument above, the matter must be remanded for apportionment of Decedent's benefits, primarily to Yvonne, in accordance with the statute and the findings as to Yvonne's dependency. "If there is no one wholly dependent and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency." S.C. Code Ann. § 42-9-130.

CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that the Orders of the Commissioner and Full Commission be reversed on the issue of the beneficiary of death benefits and that the matter be remanded for further Orders allocating those benefits primarily to Yvonne Burns in accordance with statutory and case law of South Carolina.

Respectfully submitted,

October 12, 2016

W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett & Kellahan, PA
Telephone: (843) 355-2000
Facsimile: (843) 355-2010
Email: Billy@Jenkinsonlaw.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE 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.

BRIEF OF RESPONDENT SHIRLEY YORK

Ann McCrowey Mickle # 3522
MICKLE & BASS
1519 Richland Street
Columbia, SC 29201
(803) 929-0029
(843) 839-2501 (facsimile)
amickle@mickleandbass.com

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Shirley York

TABLE OF CONTENTS

Table of Authorities ii

Counter-Statement of Issue on Appeal 1

Whether the Workers' Compensation Commission correctly held, consistent with controlling precedent, that an injured worker's unmarried romantic cohabitant is not a "dependent" under the Workers' Compensation Act.

Statement of the Case 1

Arguments 3

A. This case is controlled by *Day v. Day* and *Palm v. General Painting Co.* "Dependent" does not include an injured worker's unmarried romantic cohabitant 4

B. The legislature's prolonged silence suggests this Court should continue following these precedents 6

C. Even if the Court was writing on a blank slate, and it is not, the better view is the one articulated by precedent 8

Conclusion 11

TABLE OF AUTHORITIES

South Carolina

Adams v. Texfli Indus.,
341 S.C. 401, 535 S.E.2d 124 (2000) 10

Bell v. Progressive,
407 S.C. 565, 757 S.E.2d 399 (2014) 8

Callen v. Callen,
365 S.C. 618, 620 S.E.2d 59 (2005) 6

Day v. Day,
216 S.C. 334, 58 S.E.2d 83 (1950) . . . . *passim*

Hines v. Hendricks Canning Co.,
263 S.C. 399, 211 S.E.2d 220 (1975) 8

Palm v. General Painting Co.,
296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988) . . . . *passim*

Second Injury Fund v. Young,
301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990) 10

Wehle v. South Carolina Ret. Sys.,
363 S.C. 394, 611 S.E.2d 240 (2005) 7

Wigfall v. Tidelands Utils.,
354 S.C. 100, 580 S.E.2d 100 (2003) 7

Other Jurisdictions

Dep't of Indus. Relations v. Workers' Comp. Appeals Bd.,
156 Cal. Rptr. 183 (Cal. Ct. App. 1979) 8

Guevara v. Inland Steel Co.,
88 N.E.2d 398 (Ind. Ct. App. 1949) 9

Marvin v. Marvin,
557 P.2d 106 (Cal. 1976) 8

Statutes and Other Authorities

S.C. Code Ann. § 42-1-70 (2015) 4

S.C. Code Ann. § 42-9-110 (2015) 4, 7

S.C. Code Ann. § 42-9-120 (2015) 4, 7

S.C. Code Ann. § 42-9-140 (2015) 4

S.C. Code Ann. § 42-9-290 (2015) 4

Act No. 92, 1983 S.C. Acts 189 7

Ind. Code Ann. § 22-3-3-20 9

COUNTER-STATEMENT OF ISSUE ON APPEAL

Whether the Workers' Compensation Commission correctly held, consistent with controlling precedent, that an injured worker's unmarried romantic cohabitant is not a "dependent" under the Workers' Compensation Act.

STATEMENT OF THE CASE

This is a dispute over the proceeds of Timothy York's workers' compensation claim.

Timothy worked at Longlands Plantation until he drowned on August 26, 2013, after his boat capsized while he and a co-worker were spraying a pond. (R.pp.253-254) (Sheriff's Incident Report). He was 39 years old when he died. (R.p.256) (death certificate).

In September of 2013, the personal representative for Timothy's estate initiated a claim with the Workers' Compensation Commission by filing a Form 52, giving notice of a claim in a death case. (R.p.149). The PR filed an additional Form 52 in February of 2014, requesting a hearing. (R.p.150).

The parties with competing claims are Shirley York and Yvonne Burns. Shirley is Timothy's mother. Yvonne claimed to be Timothy's common law wife.

The case was tried over three days—June 5th, 18th, and 19th—in 2014. Seventeen witnesses testified. The total transcript exceeds 750 pages.

The parties discussed their arguments at the beginning of the trial. (R.pp.156-163). Yvonne claimed she was Timothy's common law wife and, alternatively, that she was nevertheless Timothy's "dependent" under the Worker's Compensation Act even though they were not married. (R.p.158). Shirley said Yvonne was not Timothy's common law spouse and that Shirley was the sole beneficiary under the Act as Timothy's next of kin. (R.pp.158-159). The hearing commissioner recited these arguments in her order. (R.p.4).

The hearing commissioner issued her final order on June 5, 2015; nearly a year after the trial concluded. The order is 73 pages long. It includes an extensive summary of the evidence, see (R.pp.7-56), as well as 63 findings of fact, see (R.pp.56-72), and a number of conclusions of law. (R.p.72-75).

The hearing commissioner found there was no common law marriage. She found Timothy and Yvonne "lived together off and on in a tumultuous relationship characterized by separations resulting from either alcohol consumption or arguments regarding finances." (R.p.57, ¶11). There was trial testimony that although Timothy often stayed at Yvonne's house, which she owned, Yvonne also threw Timothy out frequently and he would stay with friends, sometimes for 5 to 7 days at a time. (R.pp.188-189; pp.193-196). The hearing commissioner cited this testimony in her order. (R.pp.13, 15, 19). There was also conflicting testimony about whether Timothy and Yvonne planned to get married. Yvonne and some of her witnesses claimed they did. Timothy's witnesses disputed this.

The order's analysis on the dependency argument spans several pages. (R.pp.64-70). The hearing commissioner rejected Yvonne's dependency argument by relying on precedent. The commissioner explained that both Shirley and Yvonne had some degree of financial dependence on Timothy. (R.pp.64-65, ¶¶37-39). Indeed, the hearing commissioner found Yvonne's level of dependency was greater. *Id.* But this did not control the outcome; the hearing commissioner cited the Supreme Court's decision 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. (R.p.69, ¶53).

The hearing commissioner cited other things as well. She viewed a North Carolina case with a similar holding as persuasive, see (R.p.69, ¶54), and she noted South Carolina still has a statutory prohibition against "fornication." See (R.p.70, ¶56). That said, the order explicitly instructs that the Supreme Court's decision in *Day* "is dispositive." (R.p.69, ¶53). The order cited many things, but it also recites that *Day* controlled.

The commission's appellate panel affirmed. Yvonne asked the commission to review the hearing commissioner's order and the panel heard the case in September of 2015. In January of 2016, the panel issued an order that closely resembled the hearing commissioner's decision, with no noteworthy variances. (R.pp.76-148).

ARGUMENT

This case is not about statutes penalizing fornication or adultery. It is also not about North Carolina law or impairing anyone's freedom to engage in intimate conduct. It is, however, about a ruling that is supported by the evidence and that follows settled law.

Two longstanding precedents hold that the legislature did not intend to include an unmarried cohabitant as a "dependent" under the Workers' Compensation Act. These precedents control this case. They are not distinguishable in any way that matters.

The legislature's prolonged silence suggests the Court should continue following these precedents. And even if the Court was writing on a blank slate, which it is not, there are significant risks to a contrary holding: Opening up the status of "dependent" to non-relatives creates an opportunity to dilute the meager benefits payable to loved ones by inviting dishonest claims from people the law regards as strangers. The better view is to follow precedent. This Court should affirm.

A. This case is controlled by *Day v. Day* and *Palm v. General Painting Co.* "Dependent" does not include an injured worker's unmarried romantic cohabitant.

When someone dies as the result of an on-the-job injury, the death benefit must be divided among the injured worker's dependents. S.C. Code Ann. § 42-9-290 (2015). When there are no dependents, the benefit goes first to the decedent's nondependent children, and if there are none, to the decedent's mother and father. S.C. Code Ann. § 42-9-140 (2015).

The Code does not define "dependent." One statute lists the persons who are conclusively presumed to be dependents: the decedent's surviving spouse and "child." S.C. Code Ann. § 42-9-110 (2015). "Child" is separately defined. S.C. Code Ann. § 42-1-70 (2015). The final relevant statute is section 42-9-120 (2015), which explains "[i]n all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts as the facts may be found at the time of the accident[.]"

Yvonne's dependency argument is the same argument the Supreme Court considered in *Day v. Day*. As Yvonne did here, the *Day* appellant claimed benefits first as the injured worker's widow, and alternatively, as a non-spousal dependent. 216 S.C. 334, 336, 58 S.E.2d 83, 84 (1950). In support of her argument, the *Day* appellant pointed to the same statutory language; the language instructing that dependency should be determined "[i]n all other cases"—meaning, cases where the person claiming to be a dependent is not a surviving spouse or child—"based on the facts." *Day*'s language recites this argument explicitly. *Id.* at 341, 58 S.E.2d at 86.

The Supreme Court rejected this argument, explaining "we cannot escape the conclusion that it was not the intention of the legislature to permit a woman to be classed and

considered as a dependent within the meaning of our Compensation Act who lives in illicit relationship with a man to whom she is not legally married." *Id.* at 345, 58 S.E.2d at 88. The Court finished by reciting its view that if the legislature had intended to include such a relationship as constituting a basis for dependency, the legislature would have made an express provision to that effect in the relevant statutes. *Id.* at 345, 58 S.E.2d at 88.

Several things are noteworthy about *Day* beyond the case's holding. First, the record showed "beyond question" that the appellant was dependent on the deceased worker. *Id.* at 341, 58 S.E.2d at 86. Second, the Court recited that the facts of the case appealed "strongly" to the Court's sympathy on behalf of the appealing party, who genuinely believed she was married to the decedent. *Id.* at 344, 58 S.E.2d at 88. In spite of having these things in her favor, the appealing party nevertheless lost her claim to dependency. Unanimously.

The facts are not as favorable to Yvonne. Yvonne owns her own home, has a job, and appears to be able-bodied. (R.p.114). She also has no good faith claim to a marital relationship—the commission said that at best, Yvonne and Timothy *may* have planned to get married at some point in the future. (R.p.130, ¶11). The commission did not view as credible Yvonne's contention that the wedding was set to occur the week after Timothy died; specifically noting Yvonne never told her son about any upcoming wedding, no invitations were sent, and there were no plans for any sort of celebration. (R.pp.134-136, ¶29). The commission recited that Timothy's mother, brother, other family and friends were unaware of any wedding *or any engagement*. (R.p.130, ¶13). Yvonne's story seemed dubious.

Yvonne's argument is also the same argument this Court rejected in *Palm v. General Painting Co.* See 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988). As in *Day*, the cohabitant

in *Palm* was found to be wholly dependent on the injured worker while at the same time, she was married to another person. *Id.* at 43, 370 S.E.2d at 464. There is at least one material difference between *Palm* and *Day* that has relevance here: The *Day* appellant believed herself married to the decedent, but the woman in *Palm* did not claim she was a spouse. *Id.* at 49, 370 S.E.2d at 468. *Palm* relies heavily on *Day*, and this Court explained if "dependent" does not include someone with a good faith but mistaken belief of marriage, it obviously does not include someone who knowingly cohábits while not married. *Id.* at 49-50, 370 S.E.2d at 468.

There are no material differences between these cases and the present case. There are factual differences of course: *Day* and *Palm* both involve marriages that would have been bigamous because one of the cohabitants was married to someone other than their roommate, but the controlling legal principle is not distinguishable. Unmarried cohabitants are not "dependents" under the Workers' Compensation Act. There is no claim of bigamy here, but there is still an impediment to this marriage: The commission found Yvonne and Timothy were not married at common law, which means, as *Callen v. Callen* explains, Timothy and Yvonne did not intend to secure themselves in a "legally binding" relationship. 365 S.C. 618, 626, 620 S.E.2d 59, 63 (2005). As the Supreme Court explained in *Callen*, "South Carolina does not impose marriage upon a couple," even if the couple intends to be together forever. *Id.* at 626, 620 S.E.2d at 63. *Day* and *Palm* follow this same principle and control.

B. The legislature's prolonged silence suggests this Court should continue following these precedents.

The Supreme Court has explained that the doctrine of *stare decesis* is especially important to challenges concerning the judicial construction of statutes and determinations

about the legislature's intent. *Wehle v. South Carolina Retirement System*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005). A recent application of this principle to the Workers' Compensation Act occurred in *Wigfall v. Tidelands Utilities*; a challenge to an earlier Supreme Court decision about the different methods an injured worker may use to establish total disability.

In rejecting that challenge in *Wigfall*, the Supreme Court specifically noted the legislature's 40 years of inactivity since the court decided the precedent in question. The court explained "[t]he Legislature is presumed to be aware of this Court's interpretation of its statutes[,]" and that "[w]hen the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation." 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003).

The same principle applies to the present case. In the 66 years since the Supreme Court decided *Day*, there has been precisely one (1) amendment to the statutes discussing dependency. Act No. 92 of 1983 substituted "surviving spouse" in section 42-9-110 for "widow or widower." 1983 S.C. Acts 189, 190. There have been no amendments to the "in all other cases" statute; section 42-9-120. This silence is particularly noteworthy given that both *Day* and *Palm* looked to the legislature to tell the court if the court was reading the statute incorrectly. *Palm*, 296 S.C. at 50, 370 S.E.2d at 468; *Day*, 216 S.C. at 345, 58 S.E.2d at 88. It is also noteworthy to consider *Palm*'s rationale: *Palm* was not based on the idea that the romantic relationship was illegal. Instead it reasoned that if "dependent" did not cover someone who had a good faith belief of marriage, it surely did not cover someone who knowingly cohabits while not married. *Id.* at 50, 370 S.E.2d at 468.

C. Even if the Court was writing on a blank slate, and it is not, the better view is the one articulated by precedent.

California cases contain helpful articulations of the reason for holding as Yvonne would have this Court hold. There *was* a time when the law imposed criminal liability for adultery and other intimate conduct, and when California considered this dependency issue in 1979, it noted a previous decision observing "the prevalence of nonmarital relationships in modern society and the social acceptance of them." *Dep't of Indus. Relations v. Workers' Comp. Appeals Bd.*, 156 Cal. Rptr. 183, 186 (Cal. Ct. App. 1979) (quoting *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976)). The court believed this justified California abandoning a rule that—in the court's view—improperly equated all nonmarital cohabitation with prostitution. The court said "[t]he mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." *Id.*

There are strong counter-arguments to this reasoning, moral judgments aside.

We might begin by noting the Workers' Compensation Act's goal of preventing "the injured employee and those *lawfully* dependent on them for support from becoming charges on society." *Hines v. Hendricks Canning Co.*, 263 S.C. 399, 406, 211 S.E.2d 220, 223 (1975) (emphasis added). Yvonne could not have divorced Timothy or sued him for separate maintenance or support. In the eyes of the law, Yvonne and Timothy were strangers. Unwed cohabitants have been barred from benefits such as underinsured motorist coverage. *Bell v. Progressive*, 407 S.C. 565, 757 S.E.2d 399 (2014). It is not surprising that precedent involving other benefits like workers' compensation benefits would follow a similar rule.

Timing also hurts this argument's persuasiveness. California announced its decision in 1979. This was after the South Carolina Supreme Court decided *Day* but before this Court decided *Palm*. It was also before the legislature amended the dependency statutes in 1983. *Palm* explained this Court was already "well aware of cases elsewhere" that supported someone like Yvonne's right to recover, yet this Court nevertheless held if "dependent" does not include someone with a good faith but mistaken belief of marriage, it obviously does not include someone who knowingly cohabits while not married. *Id.* at 49-50, 370 S.E.2d at 468. Yvonne's argument has already been litigated and rejected.

Then there is Indiana's experience, which provides useful insight. After the Indiana court followed the same approach as California, the Indiana legislature changed the law to explain that a common law wife would not qualify as a dependent unless the common law marriage had been open and notorious for at least 5 years. *Guevara v. Inland Steel Co.*, 88 N.E.2d 398, 401 (Ind. Ct. App. 1949). Indiana law now limits total or partial dependents to persons related to the decedent by blood or marriage. Ind. Code Ann. § 22-3-3-20.

Day articulates the reason the law views these relationships skeptically—people who are consciously living together in a nonmarital relationship may endeavor to take advantage of the situation for their own gain. 216 S.C. at 345, 58 S.E.2d at 88. People who cohabit and do not marry may have any number of reasons for doing so, but one of the foremost would seem to be an unwillingness to assume the obligations associated with marriage. If the parties wanted to assume those obligations, they would have gotten married.

Sure, there is broad language in *Day* defining dependency and it does not expressly limit dependency to relatives. *Id.* at 342, 58 S.E.2d at 87. Yet, in the six decades since *Day*,

there are no decisions recognizing dependency outside the relational context. The dependent in *Adams v. Texfli Industries* was a stepchild. 341 S.C. 401, 535 S.E.2d 124 (2000). The dependent in *Second Injury Fund v. Young* was an adult niece who was entirely dependent on the decedent; she quit work because of poor health, and the record reflects that her uncle told her he would take care of her. 301 S.C. 524, 528, 392 S.E.2d 807, 810 (Ct. App. 1990). If the legislature intended the sort of relationship at issue to come within the ambit of dependency, it would have broadened the statute's language after *Day* and *Palm*. It did not.

This is the correct result. Yvonne may have "depended" on Timothy in the technical sense of that term, but not as the term is used in the Worker's Compensation Act. Dependency means relying on someone for the basic necessities of life. *Day*, 216 S.C. at 342, 58 S.E.2d at 87. Yvonne has a job and owns her own home. (R.p.114). She said Timothy bought a television and the couple bought furniture together, but pooling resources for luxuries is not dependency. Timothy's mother had an insurance policy covering the funeral expenses. (R.pp.180-181). Yvonne did not. Timothy's brother, not Yvonne, applied to handle Timothy's estate; a significant point because Timothy had no assets but he *did* have debts. (R.p.182). Tax returns indicate Timothy had no dependents. (R.pp.259-262). Yvonne's 2012 return indicates no one could claim her as a dependent. (R.p.258).

There is a reason the law treats marriage differently. Marriage necessarily involves mutual recognition of partnership and support. It is not a criticism of nonmarital cohabitation to say that when cohabitants elect not to marry, the law presumes they do not intend the partnership and dependency marriage involves. That is their choice. The law wisely honors that choice, before death and after.

CONCLUSION

Precedent holds that the legislature did not intend to include an unmarried cohabitant as a "dependent" under the Workers' Compensation Act. This Court should affirm.

Respectfully submitted,

October 13, 2016

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Shirley York

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 FINAL REPLY BRIEF

W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett, & Kellahan, P.A.
Post Office Drawer 669
Kingstree, SC 29556
(843) 355-2000
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE COMMISSION'S RULING IS UNCONSTITUTIONAL 1

II. THE COURT DOES NOT RE-WRITE STATUTES 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Adams v. Texfi Indus. [II], 320 S.C. 213, 464 S.E.2d 109 (1995) .... *passim*

Adams v. Texfi Indus. [IV], 341 S.C. 401, 535 S.E.2d 124 (2000) .... *passim*

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977 (1999) 3

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S.Ct. 961 (2006) 6

Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399, (2014) 7

Branche Builders, Inc. v. Coggins, 386 S.C. 43, 686 S.E.2d 200 (Ct. App. 2009) 9

Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951) 4

Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 74 S. Ct. 686 (1954) 5

Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992) 12

Brunson v. Am. Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct.App.2005) 2

Day v. Day, 216 S.C. 334, 58 S.E.2d 83 (1950) .... *passim*

Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) 6

Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct.App.2003) 7

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) 7, 9

Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct.App.1993) 1

Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693 (2012) 11

Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220(1975) 3, 4, 13

Lawrence v. Texas, 539 U.S. 558 (2003) .... *passim*

Martin v. Ziherl, 269 Va. 35, 607 S.E.2d 367 (2005) ....*passim*

McMahan v. S.C. Dep't of Educ.-Transp., __ S.C. App. __, __S.E.2d __, 2014-002294, 2016 WL 3342240 (Ct. App. June 15, 2016) 12

Palm v. General Painting Co., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)..............8, 11

Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993) 12, 13

Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138 (1896) 5

Reese v. CCI Constr. Co., 334 S.C. 600, 514 S.E.2d 144 (Ct.App.1999) 1

S.C. Dep't of Soc. Servs. v. Sarah W., 402 S.C. 324, 741 S.E.2d 739 (2013) 5, 9

State v. Price, 289 S.C. 32, 344 S.E.2d 605 (1986) 10

Statutes:

S.C. Code Ann. §16-15-60..1, 6

S.C. Code Ann. §16-15-80... 1, 6

S.C. Code § 42-9-120.. *passim*

S.C. Code Ann. § 42-9-130 .... 8, 10, 13

S.C. Code Ann. § 42-9-290 13

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. Ziherl*, 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

2

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 rights[1].

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 adults[2] *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:

---

[1]South 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.).

[2]It 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 <u>sole</u> 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 <u>sole</u> 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. § 42-9-290[3]. 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.

W. E. Jenkinson, III, Esquire
J. Thomas Thompson, Esquire
Jenkinson, Jarrett & Kellahan, PA
120 W. Main Street
PO Drawer 669
Kingstree, SC 29556
Telephone: (843) 355-2000
Facsimile: (843) 355-2010
Email: Billy@Jenkinsonlaw.com
Attorneys for Appellant