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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Op. No. 5566 (Ct. App. filed June 6, 2018)
Appellate Case No. 2018-001877

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

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

And

Shirley York is a..... Petitioner,

v.

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

# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**



**Statutes:**

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant certiorari in this matter because the Court of Appeals decision failed to determine an issue raised on appeal on a matter of Workers Compensation law that is subject to repetition and of great significance to the citizens of our State, in conflict with this Court's prior decisions construing "dependent" and "dependency" for Workers Compensation death benefits under S.C. Code §§ 42-9-110 and -120?

II. Does the Court of Appeals' decision also merit review by this Court as to the constitutional construction of legislative intent with regard to the class of persons who may qualify as dependents under S.C. Code § 42-9-120, in light of constitutional guarantees of protection from government intrusion into personal decisions relating to marriage, family relationships, child rearing and education?

III. Should this Court grant certiorari in this matter because the Court of Appeals decision to remand this matter to the Commission "to determine ... whether Yvonne qualifies as a dependent under the Act" errs on a matter of settled Workers Compensation law, that is subject to repetition and of great significance to the citizens of our State, by conflicting with this Court's prior decisions?

## COUNTER STATEMENT OF THE CASE

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. (R.pp. 77; 253-4) In September 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. (R.p.149) A three-day hearing was held before the single commissioner, Com. Melody L. James, in June 2014 (R.pp. 151; 197; 219) at which seventeen witnesses testified, resulting in over seven hundred fifty pages of transcript, to which Com. James devoted thirty-six full pages in her order. (R.pp. 7-44)

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). (R.p. 56) 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). (R. pp. 157-8)

Com. James' order, entered nearly a year after the hearing, found Shirley entitled to the full sum of death benefits allowable under the Workers' Compensation Act (the Act), S.C. Code Ann. §§ 42-1-10 to 42-19-50 (2015 & Supp. 2017). (R.p. 71) Com. James held the preponderance of the testimony did not support a finding Timothy and Yvonne had a common law marriage. (R.pp. 68-9) Com. James 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) In finding Yvonne failed to prove the existence of a common law marriage, Com. James relied heavily on witness testimony and Yvonne's single status in her income tax records. (R.pp. 57-61)

Relying on witness testimony and Yvonne's and Timothy's income tax returns, Com. James found that both Shirley and Yvonne were financially dependent on Timothy, that Yvonne's dependence was greater and that Yvonne would be entitled to benefits under the Act. (R.pp. 65; 69) Com. James held that Yvonne's greater degree of financial dependence was not determinative because the South Carolina statutory prohibition against fornication and *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) were dispositive. (R.pp. 67-8) Com. James held that the focus in *Day* "is not the immorality of the relationship but is on the legality. This is a matter of statutory construction." (R.p. 70) Further relying on *Day*, Com. James held that "if it had been the intention of the legislature to sanction an illicit relationship as constituting a basis for dependency, express provision would have been made... in the...Act." (R.p. 71)

Yvonne subsequently appealed from Com. James' order to the Full Commission and the Appellate Panel affirmed, including Com. James' order, verbatim in its January 20, 2016 order. (R.pp. 76-148) Thereafter, Yvonne appealed the Commission's order to the Court of Appeals and, on June 6, 2018, the Court of Appeals reversed. *York v. Longlands Plantation*, 424 S.C. 280, 285, 818 S.E.2d 215, 218 (Ct. App. 2018), *reh'g denied* (Sept. 20, 2018). (App. p. 1) It held "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." *Id.* at 285, 818 S.E.2d at 218. (App. p. 5) The Court also remanded the case to the Commission directing it to "determine, based on the evidence in the record, whether Yvonne qualifies as a dependent under the Act." *Id.* at 286, 818 S.E.2d at 218. (App. p. 6)

Shirley moved for and was denied rehearing by order of the Court of Appeals on September 20, 2018. Shirley now petitioned this Court for a writ of certiorari on October 22, 2018. Yvonne now offers this return, joining in the request for certiorari, but on different grounds.

## ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS DECISION FAILED TO DETERMINE AN ISSUE RAISED ON APPEAL ON A MATTER OF WORKERS COMPENSATION LAW THAT IS SUBJECT TO REPETITION AND OF GREAT SIGNIFICANCE TO THE CITIZENS OF OUR STATE, AND IT IS IN CONFLICT WITH THIS COURT'S PRIOR DECISIONS CONSTRUING "DEPENDENT" AND "DEPENDENCY" FOR WORKERS COMPENSATION DEATH BENEFITS UNDER S.C. CODE §§ 42-9-110 AND -120.

"A surviving spouse or a child" are "conclusively presumed to be wholly dependent" per S.C. Code Ann. § 42-9-110. "In all other cases" dependency "shall be determined in accordance with the facts as the facts may be at the time of the accident" and the dependency must have

"existed for a period of three months or more prior to the accident" per S.C. Code Ann. § 42-9-120.

Research reveals only a scant *nine* South Carolina appellate decisions refer to the Workers Compensation statute under which Yvonne qualifies as a dependent, § 42-9-120. The Court of Appeals decision in this case is the only one in which a person legally living with and dependent upon the deceased worker (neither was married to someone else), was nevertheless *denied* death benefits. But, even including this case, no South Carolina decision holds that non-family members are outside the class of persons who may qualify as dependents under the Act.

(1) As to the other eight decisions, beginning seventy-eight years ago, this Court denied death benefits to a dependent woman believing herself to be married to the deceased worker, but actually in bigamous marriages at the time of his death. In doing so, it enunciated the standard for determining dependency in Workers Compensation cases:

> 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.

*Day v. Day*, 216 S.C. at 342, 58 S.E.2d at 86-7 (1950).

(2) *Henley v. Spunkmeyer*, 2016-000509, 2018 WL 2129500, at *1 (S.C. Ct. App. May 9, 2018) affirmed denial of surviving spouse benefits for failure to qualify, but it remanded due to the absence of findings of fact as to Henley's dependency under § 42-9-120, his alternative claim. *Id.*

(3) *Steele v. Self Serve, Inc.*, 335 S.C. 323, 516 S.E.2d 674 (Ct. App. 1999) appears to have referenced the statute in error, intending to refer to § 42–9–110, the conclusive presumption

section. "Eric, his mother, and his brother were all conclusively presumed wholly dependent upon the father. *See* S.C.Code Ann. § 42–9–120 (1976)." *Id.* at 329, 516 S.E.2d at 677.

(4) *Adams v. Texfi Indus. [II]*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) adopted the standard enunciated in *Day* for use in determining dependency in the context of "stepchildren and acknowledged illegitimate children" under 42–1–70. "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.* citing *Day v. Day,* 216 S.C. 334, 342, 58 S.E.2d 83, 86–87 (1950).

(5) After remand and another appeal, *Adams v. Texfi Indus. [IV]*, 341 S.C. 401, 535 S.E.2d 124 (2000) again held that *Day's standard* (as opposed to its holding) 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." Adams v. Texfi Indus. [IV], id.* at 404, 535 S.E.2d at 125 (emphasis added). *Texfi II* and *Texfi IV* placed no limitations on "the class of persons who could claim as dependents" as this Court's decision in *S.C. Second Injury Fund v. Young*, also had not done, some ten years prior.

(6) In that case, *S.C. Second Injury Fund v. Young*, 301 S.C. 524, 392 S.E.2d 807 (Ct. App. 1990) also considered the predecessor statute and followed the standard of *Day*, lamenting "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." *Id.* at 526, 392 S.E.2d at 809. "Until our Act is changed, then, a niece of a deceased employee may ordinarily qualify for compensation as a dependent." *Id.*, at 527, 392 S.E.2d at 809 (citations omitted). Discussing the effect of the 1972 amendment to the Act, the Court held "it in

no way restricted the class of persons who could claim as *dependents." Id. at* 528, 392 S.E.2d at 809 (emphasis in original).

Here, Shirley presented no authority limiting the "class of persons who could claim as dependents" so as to exclude Yvonne. Yet, the Court of Appeals remanded this case for a determination of whether Yvonne qualifies, despite the Commissioner having found that she is dependent and "would be entitled" to benefits, as if the issue is a hot potato better tossed back to the Commission.

(7) *Palm v. Gen. Painting Co., Inc.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988), *aff'd as modified (on other grounds*[1]*),* 302 S.C. 372, 396 S.E.2d 361 (1990) addressed the statute when denying benefits to a woman who was married to another man while she lived with the deceased, at the time of his death, relying on *Day. Id.* at 49, 370 S.E.2d at 468. Arguably *Palm* involved a claimant who abandoned her legal duties to her spouse and arguably the State has a legitimate interest in discouraging abandonment of one spouse by another and may legitimately deny benefits to an abandoning adulterer.

No comparable circumstance is presented here. In fact, the opposite is presented because it is the State that is abandoning its duties of equal protection to Yvonne, by denying benefits despite supported findings that she was partially dependent and "would be entitled" them. (R. pp. 65; 69; 138; 142) "[T]he Workers' Compensation Act (Act), S.C. Code Ann. §§ 42-1-10 to -19-10

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[1] Rather than applying an exception to collateral estoppel of the child claimant's paternity, as the Court of Appeals had done, the Court held that paternity had not been "actually litigated" in the prior action, thereby reaching the same end result. *Id.* at 373, 396 S.E.2d at 362.

... is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed." *Bentley v. Spartanburg Cty.*, 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012) (citing *Shealy v. Aiken Cnty.*, 341 S.C. 448, 535 S.E.2d 438 (2000)). "Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Id.* (citing *Mauldin v. Dyna–Color/Jack Rabbit,* 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992)).

A constitutional challenge was raised in *Palm* to § 42–9–120, that the Court declined to consider because it was first raised on appeal. *Id.* at 50, 370 S.E.2d at 468. Importantly, here, there is no challenge to § 42-9-120; instead, the adultery and fornication statutes, S.C. Code Ann. §§ 16-15-60 and -80, are challenged as unconstitutionally applied here. They were referenced for the first time in Com. James' order (R. pp. 65-68); and were timely raised in the appeal from that order to the Full Commission which adopted Com. James' order in its entirety, including the fornication/adultery findings. (R. pp. 138-143) Shirley argues that the statute should be construed by inferring legislative intent to limit "dependents" to family members, which Yvonne contends would be unconstitutional. The Court of Appeals declined to address it, instead reversing on the narrow ground that no evidence supported the fornication findings.

(8) And, lastly, *Bush v. Gingrey Bros.*, 232 S.C. 20, 100 S.E.2d 821 (1957) divided death benefits between deceased worker's wholly dependent mother and spouse, construing the predecessor statutes to those at issue in the present case (§ 72-161 preceding § 42-9-110 and § 72-162 preceding § 42-9-120), noting that they "relate to the same subject matter, are in Pari Materia, and must be construed together, keeping in mind of course the legislative intent[.]" *Id.* at 24, 100 S.E.2d at 823.

> [As to] Section 72–161 ... there is nothing in the Statute that gives such persons a prior or exclusive right over others who are proven to be wholly dependent in fact without regard to any presumption. Had the Legislature intended otherwise, it could easily have provided that such persons ... *shall take to the exclusion of all others.* This was not done, and the absence of such language is significant when considered in the light of the language of the other sections heretofore referred to[.]

*Id.* at 24–25, 100 S.E.2d at 824 (italics in original) (underscore added).

Shirley argues for the opposite conclusion. While conceding that the Act itself does not limit dependents to family members, and without pointing to any authority for doing so, she argues that this Court should certify the case and hold that the legislature clearly intended to deny benefits to non-family members. (Petition p. 6) The *Gingrey Bros.* precedent and similar decisions of this Court, do not support her. See, e.g., *Grier v. AMISUB of S. Carolina, Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) ("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.") (emphasis added) "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). "[W]hen 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).

It seems that the best invitation to the legislature to narrowly define "dependent" - if that is

its intention - would be for this Court to certify the question and to build on *S.C. Second Injury Fund v. Young*, by holding that the current legislation does not limit the "class of persons" who may qualify as dependents to family members.

## II. THE COURT OF APPEALS' DECISION MERITS REVIEW BY THIS COURT DUE TO THE CONSTITUTIONAL ISSUES OF PROTECTION FROM GOVERNMENT INTRUSION INTO DECISIONS OF MARRIAGE, FAMILY RELATIONSHIPS, CHILD REARING AND EDUCATION, THAT THE COURT OF APPEALS DECLINED TO ADDRESS, BUT WHICH ARE SIGNIFICANT AND SUBJECT TO REPEATED ERROR ON REMAND IN THIS CASE AND IN FUTURE CASES.

The Court of Appeals declined to consider whether the Commission unconstitutionally applied the adultery and fornication statutes as a vehicle for denying death benefits to Yvonne, an unmarried dependent life partner of twenty-plus years with the deceased worker, and instead, it reversed because the Commission's "fornication" and "illicit relationship" findings are unsupported by the voluminous evidence presented. *York v. Longlands Plantation*, 424 S.C. at 285, 818 S.E.2d at 218. (App. p. 5) The Court of Appeals remanded the case to the Commission to determine what it has already twice determined in this case - that "based on the evidence in the record" "Yvonne qualifies as a dependent under the Act." *York v. Longlands Plantation*, 424 S.C. at 286. 818 S.E.2d at 218. (App. p. 6) Yvonne contends that her qualifications under the Act were determined under the facts and that *Texfi IV, Young,* and *Gingrey Bros.* all hold that the statute does not limit who may be dependent.

Com. James and later the Full Commission, *both,* determined that Yvonne was financially dependent on Timothy, more so than Shirley, and that Yvonne "would be" entitled to benefits, but for the "illicit relationship" holding in *Day*. (R. pp. 65; 69; 138; 142) These unchallenged findings are the law of the case. Yvonne's dependency was never challenged nor was it within the scope of

her challenge. Shirley concedes that unchallenged findings are the law of the case and she asserts that only findings related to "intimate contact" were challenged on appeal. (Petition p 5)

The Court recently explained the law of the case in Workers Compensation cases:

> "Only issues raised to the Commission within the application for review of the single commissioner's order are preserved for review." *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (holding that all findings of fact and law by the Hearing Commissioner became and are the law of the case, unless within the scope of the appellant's exception to the Full Commission); *Brunson v. American Koyo Bearings,* 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the single commissioner become and are the law of the case unless excepted to by appellant) *abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the single commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order) *abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). This Court has also held that general exceptions, such as "the commission erred in making an award," are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review. *See Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944).

*Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249–50, 791 S.E.2d 719, 721–22 (2016) (italics in original) (underscore added). The record does not support remand as to Yvonne's dependency.

Thus, the Court of Appeals decision remands without resolving a constitutional issue that is subject to repeated error on remand here and in future cases. There can be no denying that adults in modern society sometimes make their lives together without being legally married, but while nevertheless being financially dependent on one another for more than three months, meeting the requirements of § 42-9-120. If our legislature intends to deny death benefits to such non-family members *as a class*, as Shirley contends, is it permissible? It is time for the Court to answer.

"[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Moore v. City of E.*

*Cleveland, Ohio*, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935, 52 L. Ed. 2d 531 (1977) (citation omitted). There is "a private realm of family life which *the state cannot enter.*" *Id.* (citation omitted) (emphasis added). "When a [state] undertakes ... intrusive regulation of the family ... the usual judicial deference to the legislature is inappropriate." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935 (1977).

"[O]ur laws and tradition afford *constitutional protection to personal decisions relating to marriage,* procreation, contraception, family relationships, child rearing, and education. *Lawrence v. Texas*, 539 U.S. at 574, 123 S. Ct. at 2481 (emphasis added). "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575, 123 S. Ct. at 2482. Thus, Yvonne's and Timothy's choices to make a life together and raise Yvonne's child as their child, are entitled to "respect" as protected substantive liberty rights. Yvonne is entitled to be free from a State penalty for her choice not to become legally married to Timothy, as of the date of his death. Likewise, Timothy is entitled to the protections his employment guaranteed for his dependents, including Yvonne. "Unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. at 501, 97 S. Ct. at 1936.

"[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice[.]" *Lawrence v. Texas*, 539 U.S. at 577, 123 S. Ct. at 2483. "[I]individual decisions

by married persons... are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment [that] ... extends to ... unmarried as well as married persons." *Lawrence v. Texas,* 539 U.S. at 578, 123 S. Ct. at 2483.

Timothy's and Yvonne's choice not to be married before his untimely death "is a realm of personal liberty which the government *may not enter.*" *Id.* at 578, 123 S. Ct. 2484. (citation omitted) (emphasis added). And the "statute furthers no legitimate state interest which can justify its *intrusion* into the personal and private life of the individual." *Id.* (citation omitted) (emphasis added). Here, Com. James' and the Commission's findings relied on testimony describing their long relationship; how they renovated Yvonne's house where they lived; how they each contributed financially to the household; how they raised Yvonne's child together as a family, such that the child did not know Timothy was not her biological father until the death benefits claim was litigated; and that Yvonne and Timothy made plans to marry and intended to marry at some point, but hadn't got around to it before he died. (R. pp. 8-66; 80-136) This does not describe a temporary or uncommitted relationship. The fact that they argued over alcohol use and finances and that Timothy sometimes had to sleep at his mother's house if they were arguing (id.) does not distinguish this relationship from many "tumultuous" marriages. The State has no legitimate interest in penalizing Yvonne for being in this relationship.

The State does have legitimate interests in protecting deceased workers' dependents, like Yvonne, from financial catastrophe originating on the job, and in protecting the public from the risk of becoming financially responsible for those dependents. And those are the humane purposes behind the Act. "S.C. Code Ann. §§ 42–1–10 to –19–10 ... is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for

which it was designed." *Bentley v. Spartanburg Cty.*, 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012) (citing *Shealy v. Aiken Cnty.*, 341 S.C. 448, 535 S.E.2d 438 (2000)). "Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Id.* (citing *Mauldin v. Dyna–Color/Jack Rabbit,* 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992)).

It seems that the second-best invitation to the legislature to define "dependent" for Workers Compensation purposes would be for this Court to hold that the Courts may not infer the unconstitutional intent to limit the class of persons who may be "dependents" so as to deprive unmarried workers or their dependents of benefits.

## CONCLUSION

On the basis of all of the above and foregoing it is respectfully requested that the Court grant a writ of certiorari to review the questions presented herein.

Respectfully submitted,

November 19, 2018.

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THE STATE OF SOUTH CAROLINA
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Tyrone York, as personal representative
for Timothy York (Deceased), Shirley York,
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Of Whom Yvonne Burns is the..... Respondent,

And

Shirley York is a..... Petitioner,

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PROOF OF SERVICE

I certify that I have served Respondent's *Return to Petition for Writ of Certiorari* on Petitioner Shirley York and Respondents Longlands Plantation a.k.a. Knollwood, Inc., and Companion Property and Casualty Group by depositing a copy of it in the United States Mail, postage prepaid, on November 19, 2018, addressed as follows:

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