

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Case No. 2006-CP-39-1826

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J. Scott Kunst,

Appellant,

v.

David Loree,

Respondent

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**PETITION FOR REHEARING OF RESPONDENT**

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**SC Court of Appeals**

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**Respondent respectfully requests that its Petition for Rehearing be reviewed *en banc* in order that this Court may secure uniformity in its decision. Rule 219, SCACR.**

1. The Court of Appeals should have held that the trial court interpreted *State v. Bacote* correctly.
2. The facts in the Record on Appeal support the trial court's analysis of *State v. Bacote* in granting summary judgment in favor of Respondent.
3. *State v. Bacote* is not reliable as authority for the premise that collateral estoppel has no preclusive effect in all default judgments.

#### **QUESTIONS PRESENTED**

1. Did the Court of Appeals err in holding that the trial court misinterpreted *State v. Bacote*?
2. Did the Court of Appeals err in holding that the facts in the Record on Appeal did not support the trial court's analysis of *State v. Bacote* in granting of summary judgment in favor of the Respondent?
3. Did the Court of Appeals err in holding that *State v. Bacote* is reliable as authority for the premise that collateral estoppel has no preclusive effect in all default judgments?

#### **STATEMENT OF FACTS**

This case arises out of the construction of a residence in the Reserve in Pickens County. Richard and Barbara Gaby contracted with Kunst for the design and with his now defunct business Kunstwerke Corporation ("Kunstwerke") to construct the residence. Loree worked for the Gabys and acted as their agent in matters related to the

construction. The construction contract provided, "the owner shall pay contractor for materials at the cost paid by the contractor for those materials with no mark up, and for labor costs incurred by the contractor with no mark up on labor costs." The agreement further provided for the payment of a fixed fee to Kunstwerke. In late 2005 and in early 2006, disputes arose when subcontractors complained to Loree about non-payment, but the Gabys' records showed they had fully paid Kunstwerke. (R., p. 18, November 5, 2011 Order of Judge Miller).

On May 2, 2006, the Gabys sued Kunstwerke and Kunst for breach of contract, breach of contract accompanied by a fraudulent act, conversion, and unfair and deceptive trade practices pursuant to S.C. Code Ann. § 39-5-10 *et. seq.* The Defendants failed to timely answer the Gabys' Complaint, and an Order of Default was entered on June 20, 2006. On July 27, 2006, Kunst and Kunstwerke were served with notice of a September 5, 2006 damages hearing. On August 28, 2006, Kunst and Kunstwerke filed a Motion for Relief from Default, claiming that his failure to respond was excusable and that there were meritorious defenses. That motion was heard and denied by Judge Patterson on December 12, 2006. (R. p. 19, November 5, 2011 Order of Judge Miller).

A lengthy hearing on damages in the Greenville action was held on March 13, 2007. On May 16, 2007, the court entered judgment against Kunst and Kunstwerke on all causes of action for actual damages in the amount of \$353,993.91 together with punitive damages of \$70,798.00 and attorney's fees and costs in the amount of \$35,807.41. The testimony at the hearing established and the court adopted at least the following facts:

1. The Gabys paid a total of \$143,000 to Kunstwerke to pay to Paul Anderson Design, but of those funds only \$68,000 had been paid to Paul Anderson;
2. The Gabys overpaid Kunstwerke by \$32,000 because of a duplicate payment of that amount that it made to Paul Anderson Design;
3. The Gabys paid \$164,514 to Kunstwerke to satisfy an obligation to a supplier, Window and Door Concepts, but only \$85,000 of that money was paid to Window and Door Concepts resulting in an overpayment by the Gabys of \$84,835.86. (R., pgs. 19-20, November 5, 2013 Order of Judge Miller).

The trial court's order cited the above statement of facts and further noted that the damages court in the underlying action found Kunst to be in violation of S.C. Code Ann. § 29-7-20(1) which provides that it is a criminal violation for a contractor or subcontractor to not pay vendors. (R., p. 20). The trial court also found that the breach of contract action in which Kunst was found to have failed to pay vendors, duplicated charges to the Gabys and overcharged the Gabys had been established by prior and final adjudication. (R., p. 20). The panel failed to take into consideration the findings of fact contained in the trial court's Order, and in its opinion, would have the trial court adjudicate matters that have already been decided in final adjudication only because Kunst failed to answer in the underlying action. In so doing, the panel fails to take into consideration Kunst's numerous opportunities he had and took to litigate the underlying action.

On December 19, 2006, Kunst brought the *Kunst v. Loree* lawsuit against Richard and Barbara Gaby and David Loree in retaliation for the lawsuit the Gabys had earlier brought against him, that of *Gaby v. Kunst and Kunstwerke*, civil action number 2006-CP-23-2943. The *Gaby v. Kunst and Kunstwerke* lawsuit resulted in a judgment against Kunst, a judgment that has yet to be paid. David Loree is an employee of the Gabys who, at their direction, investigated Kunst's payment history concerning the Gaby project following complaints from vendors that Kunst was not paying them. In the course of his investigation Loree contacted subcontractors and vendors to determine whether or not they had been paid by Kunst and what amount might be owed. As Loree continued his investigation on behalf of the Gabys, he found that while the Gabys had paid Kunst promptly for invoices he submitted, Kunst in turn was not paying the subcontractors and vendors as he was obligated to do under the contract and by law<sup>1</sup>. Loree also learned that in some cases subcontractors and vendors overcharged the Gabys at Kunst's direction. Indeed Kunst's financial speculations were repeated on four of his other residential projects in the Reserve and in Pickens County.

Some of the Gabys' money paid to Kunst went to fund personal disbursements to himself, Kunst's family and Kunst's girlfriend Tracey Hilton as well as restaurant expenses, cash withdrawals, airfare, hotels, travel expenses, auto expenses, investments and other personal expenses, none of which were related to the Gaby project and this money should have been paid to vendors on the Gaby project.

Loree's findings led to the *Gaby v. Kunst and Kunstwerke* lawsuit, the summons and complaint of which were served on Kunst on May 3, 2006. (R. p. 1). Kunst chose not to file an answer to the Gaby complaint. He later petitioned to have the order of

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<sup>1</sup> See S.C. Code Ann. § 29-7-10.

default set aside. Kunst's petition to set aside the default was denied on December 6, 2006 by Judge Patterson. Kunst then retaliated by bringing a lawsuit against the Gabys and David Loree on December 19, 2006 alleging tortious interference with contract, defamation and intentional infliction of emotional distress. (R. pgs. 35-45). David Loree's findings from his investigation of Kunst's malfeasance were among the evidence presented at the damages hearing of the *Gaby v. Kunst and Kunstwerke* case held before the Honorable G. Edward Welmaker on March 13, 2007. Judge Welmaker in his Order noted that counsel for Kunstwerke and Kunst, representing himself *pro se*, were given the opportunity to conduct extensive cross-examination and that the trial court granted Kunst "broad leeway beyond the customary cross-examination." (Order of Judge Welmaker, R. pgs. 3-5) Kunst therefore had the opportunity to cross-examine Loree and review his findings. Judge Welmaker found all facts pertaining to the pertinent causes of action brought by the Gabys were admitted and had been proven with clear and convincing evidence. The Gabys' causes of action in their pleadings included the following:

1. Kunst failed to pay vendors and subcontractors as called for in the contract with the Gabys;
2. Kunst performed defective work;
3. Kunst diverted the Gabys' funds for his own personal use;
4. Kunst engaged in unfair and deceptive trade practices; and
5. Kunst breached his fiduciary duty to the Gabys.

Thus, Judge Welmaker's findings, based on clear and convincing evidence, establish that it is true that Kunst committed the above-referenced actions as alleged in the Gabys' complaint. Further, in arriving at his findings, Judge Welmaker deliberately excluded

testimony from the Gaby' expert Bill Larkin because Larkin had not located the ultimate location of the misappropriated funds. (R. p. 4, footnote 1). Judge Welmaker did consider the testimony of Respondent David Loree and subcontractors Kevin Goad and Paul Anderson and he relied on their testimony to reach the conclusion in his order "that the Plaintiffs have presented sufficient evidence to establish their claims fully." (R., p. 4).

Judge Welmaker also found the Gabys had proven their damages claim and awarded \$353,993.91 with attorney's fees and costs in the amount of \$35,807.41.

Thus, the court found items 1-5 above to be true, otherwise it would not have granted judgment in favor of the Gabys. Kunst in his retaliatory lawsuit claimed that he had been defamed by the Gabys and Loree, however, based on the court's findings in the damages hearing, the statements Kunst claims are defamatory are not because they are true. Thus, Judge Welmaker's findings of fact and conclusion of law provide Respondent David Loree with the affirmative defense of truth to Kunst's allegations of defamation.

Kunst claimed that he was defamed by Loree when Loree allegedly made the following statements:

- (a) Scott Kunst has been caught commingling his client's money.
- (b) Scott Kunst has embezzled money from all his clients.
- (c) The money was hidden somewhere and that's why I'm here to investigate where it went.
- (d) I do know that some of it went to a luxury car and foreign trips.
- (e) I would just like to get my hands on him.
- (f) Scott is going to jail.

- (g) Scott Kunst took \$400,000 from the Gaby project and had left his other clients in a similar situation.
- (h) Scott Kunst provided his clients with dummy invoices from dummy companies to take money from his clients.
- (i) Kunst took out an insurance policy, billed the Gabys, then canceled the policy and kept the money.

(R. pgs. 21-22, November 5, 2010 Order of Judge Miller).

Even if these allegations were made, they are true because of undisputed evidence presented at the March 12, 2007 damages hearing by Loree, Kevin Goad and Paul Anderson establishing that Kunst broke the law, overcharged the Gabys, and pocketed money which rightly belonged to the Gabys' vendors. Kunst, though he had the opportunity at the damages hearing, never once contradicted any evidence presented by Loree, Goad or Anderson. All Kunst would have had to do is present cancelled checks showing that he had paid the entire amount owed on invoices to Messrs. Goad and Anderson and their testimony would have been destroyed. However, despite being given wide latitude in cross-examination, Kunst did not do so.

The Gabys brought a motion to dismiss the *Kunst v. Gaby and Loree* allegations pursuant to Rules 12(b)(5), 12(b)(7), 12(b)(8) and Rule 13(a), SCRCF. The trial court granted the motion on April 14, 2007. Judge Hill in his Order found that Kunst's claims against the Gabys were actually compulsory counterclaims that should have been brought in the *Gaby v. Kunst and Kunstwerke* action. (Order of Judge Hill, R. pgs. 6-10) As a result, the Gabys were now removed as defendants from the *Kunst v. Gaby and Loree* case. On February 3, 2009, Judge Miller heard Loree's motion for summary judgment.

In his Order of March 9, 2009, Judge Miller granted summary judgment as to the tortious interference and intentional infliction of emotional distress claims, but denied summary judgment as to defamation. (March 3, 2009 Order of Judge Miller, R. p. 16) Thus, the only issue remaining in the *Kunst v. Loree* lawsuit is defamation. All other causes of action brought by Kunst have been dismissed by the trial courts and have not been appealed by Kunst.

On September 20, 2010, after the South Carolina Supreme Court denied Kunst's petition for writ of certiorari, Kunst's final opportunity in a series of opportunities to fully and fairly litigate the underlying action as well as his last attempt to overturn the Gabys' judgment and Judge Welmaker's findings, Loree again moved for summary judgment, arguing that because the issue of truth concerning allegedly defamatory statements had been argued all the way to the South Carolina Supreme Court and was now final, the claim for defamation should be dismissed. The trial court found for Loree and granted its order granting summary judgment. (November 5, 2010 Order of Judge Miller, R. pgs. 18-30).

The panel reversed the judgment of the trial court, *J. Scott Kunst v. David Loree*, Appellate Case No. 2011-199507, Opinion No. 5163, filed August 14, 2013. Respondent seeks a rehearing *en banc* to review the panel's decision on the grounds that consideration of the full court is necessary to secure or maintain uniformity of its decisions.

### **ARGUMENT**

The Court should reconsider the panel's decision because the trial court's analysis of *State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998) was correct; similarly, the panel

in adopting a bright line rule in distinguishing the litigation in the underlying action from that in *State v. Bacote* overlooked or did not consider key facts contained in the Record on Appeal that support the trial court's conclusions and Respondent's Petition for Rehearing. The trial court's interpretation of *Bacote, id.* is correct for the following reasons:

- (1) The damages hearing of March 12, 2007 was an evidentiary hearing and not an administrative hearing as was the case in *Bacote*.
- (2) Kunst's default did not prevent him from fully and fairly litigating the underlying case and he was not deprived of due process.
- (3) *Bacote*, citing Restatement (Second) Judgments, stands for the proposition that collateral estoppel promotes judicial economy. The trial court's order prevents Kunst, who has made twelve attempts to bring a defamation action concerning his performance as a builder, from relitigating yet another defamation action and in so doing, promote judicial economy.
- (4) *Bacote* stands for the proposition that collateral estoppel should not be rigidly applied for reasons of fairness. It does not erect a bright line rule barring collateral estoppel in all default cases. In this case it would be unfair to allow Kunst to relitigate issues that were tried and proven in the underlying case and to continue to bring yet another defamation action in the long list of defamation actions he has already brought.
- (5) *Bacote* is not reliable as authority supporting the denial of the application of collateral estoppel in cases of default judgments.

For these reasons, set out more fully below, the Court should affirm the trial court's Order.

**1. Damages Hearing, *Gaby v. Kunst and Kunstwerke*, March 12, 2007**

In adopting its bright line rule, the panel did not take into consideration the crucial differences between the administrative hearing described in *Bacote* and the evidentiary hearing in *Gaby v. Kunst and Kunstwerke*. The differences between the two hearings demonstrate why the trial court correctly determined that *Bacote* does not apply in this case.

The hearing in *Bacote* was an administrative hearing held for the purpose to determine if Bacote's driver's license should remain suspended due to his refusal to take a breathalyzer test. The officer who arrested Bacote did not appear at the hearing, therefore, in a ministerial act, the convening authority rescinded the suspension. It is important for the Court to note that no evidence concerning Bacote's alleged driving under the influence was ever admitted at the hearing. Because no such evidence was admitted, the underlying DUI issue was never tried. *State v. Bacote*, 503 S.E.2d 161, 162.

At the damages hearing of March 12, 2007, an evidentiary hearing that took most of the day, the underlying issue and affirmative defense of whether it was true that Kunst had stolen money or failed to account for missing funds from the Gabys was tried when the trial court heard evidence presented by the Plaintiff and challenged in cross-examination by Kunst. In fact, one of the witnesses Kunst cross-examined at length was David Loree, the Respondent in this action. (R. pgs. 144-176). Kunst also cross-examined Paul Anderson, one of the vendors on the Gaby project. During both cross-

examinations Kunst was never able to contradict testimony that he had overcharged the Gabys for invoices. All Kunst would have had to do is present to Mr. Anderson cancelled checks showing Kunst had paid Anderson the entire amount claimed on Anderson's invoices and he would have established and Loree and Anderson's allegations were wrong, yet Kunst never did so. Kunst also had the opportunity to cross-examine Kevin Goad, another vendor on the Gaby project, but chose not to do so. It should also be noted that Judge Welmaker did not take into consideration testimony of Plaintiffs' expert Bill Larkin because Mr. Larkin was unable to locate the ultimate location of the funds. (R. p. 4, footnote 1). Unlike the convening authority in *Bacote*, the damages hearing court took several hours to hear testimony, weighed the testimony carefully, granted great leeway in cross-examination to Kunst and his counsel, and even refused to consider testimony it felt unfair to Kunst. These circumstances establish that Kunst had a full and fair opportunity in the underlying action to litigate the issue of defamation and the affirmative defense of truth.

The panel incorrectly asserts in its opinion that Kunst was not afforded the opportunity to call witnesses or to take the stand in his defense. There is nothing in Judge Welmaker's order (R. pgs. 3-5) that indicates Kunst was not allowed to call witnesses or take the stand. Indeed, Judge Welmaker in his order stated that he had allowed broad leeway beyond the customary cross-examination. (R. p. 3). The inference contained in the record is that Kunst did not take the opportunity to testify or call witnesses, not that he was prevented from so doing. The Court should also note from the hearing transcript (R. pgs. 68-200) that while Kunst represented himself, his concern Kunstwerke was

represented by James Carpenter, Esq. Kunst therefore had the opportunity, and indeed did, confer with counsel during the course of the hearing.

Most damages hearings resulting from a defendant's default usually take place with only the plaintiff appearing and offering evidence of its damages. In Kunst's case, he made an appearance at the damages hearing where he cross-examined Plaintiffs' witnesses extensively, including Respondent David Loree and vendors Goad and Anderson. This means that Judge Welmaker had to weigh all evidence, including evidence challenged in cross-examination, when he prepared the order.

These facts demonstrate that in this case, *Bacote* does not establish a bright line rule precluding the application of collateral estoppel based on a default judgment matter. The default in the Kunst case bears no similarity to the default that occurred in *Bacote* because unlike *Bacote*, litigation took place in the underlying action. Kunst had every opportunity to contest the testimony of each of the four witnesses who testified. For example, Paul Anderson, a vendor on the Gaby project, testified that he billed \$68,000 for an invoice that according to David Loree's testimony, Kunst charged \$140,000. (R. pgs. 182-183). Kunst could have discredited this testimony with cancelled checks showing that Anderson made a mistake, but Kunst did not do so. Kunst did not discredit the testimony because he could not and not because he was not afforded the opportunity.

In *Bacote*, p. 164, the South Carolina Supreme Court quoted 50 C.J.S. Judgments § 797 (1997) and stated that "in the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." What the panel did not consider was that in the *Gaby v. Kunst and Kunstwerke* case, the

claim sought to be precluded, that of whether Kunst was defamed by Loree during Loree's investigation of Kunst's theft, was litigated in the underlying action. Because the issue was previously litigated with the service of pleadings, a hearing to set aside the default, and an evidentiary damages hearing, the Kunst default is not the type of default contemplated in *Bacote*, thereby making *Bacote* inapplicable to the facts of the case.

**2. Kunst's default did not prevent him from fully litigating the underlying case and he was not deprived of due process.**

The panel on p. 111 of its opinion stated that the exception of participating in litigation after the default is not recognized under South Carolina case law. This is in error. Though South Carolina case law is silent concerning the applicability of the exception, it can be deduced from other authorities cited in *Bacote* and in the panel's opinion.

First, case law such as *State v. Bacote* holds that in the context of a default judgment, collateral estoppel does not apply because an essential element of that doctrine requires that the claim sought to be precluded *actually has been litigated in the earlier litigation*. *State v. Bacote*, 503 S.E.2d 161, 163 citing 50 C.J.S. Judgments § 797 (1997). Unlike the facts in this matter, these authorities assume that there can be no "actual litigation" where a judgment is entered based upon a failure to appear. However, in Kunst's case he did appear to challenge the default judgment and the award of damages and to challenge the evidence offered in the damages hearing. He later argued before this Court that the order resulting from the damages hearing should be reversed, and when this Court affirmed the order of the damages court (2009-UP-02B) Kunst petitioned the South Carolina Supreme Court for a writ of certiorari, which was denied. (R. p. 33).

Quite simply this matter is not the type of default contemplated in the cited South Carolina authorities because the party, Kunst, did later appear to participate in the litigation.

Further, there is precedent for allowing exceptions to the default judgment rule and allowing the application of collateral estoppel. The panel stated in its opinion that the Restatement (Second) Judgments is followed and relied upon by South Carolina courts in determining the applicability of collateral estoppel. Comment B of the Restatement (Second) Judgments §29 (1982) defines the full and fair opportunity to litigate as when “a party who has had a full and fair opportunity to litigate an issue has been afforded the elements of due process.” Kunst was afforded due process when he challenged the default judgment, when he took part in the damages hearing, and when he litigated the results to the appellate courts. Kunst also received the benefits of due process when he confronted his alleged defamer David Loree at the damages hearing as well as at a subsequent deposition. (R. pgs. 308-315). Kunst claims in the present action that he was defamed when Loree, in the course of his investigation, informed people that Kunst had stolen from his employer Richard Gaby. The transcript of the damages hearing shows that Kunst took advantage of his ability to confront Loree during cross-examination and address whether or not he had paid vendors as obligated under contract. (R. pgs. 68-200).<sup>2</sup> Kunst’s questioning of Loree was an important part of the due process he received, establishing that he had a full and fair opportunity to litigate as defined by the Restatement. In the provisions of Comment B, Section 29 of the Restatement (Judgments), a recognized South Carolina authority on the application of collateral

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<sup>2</sup> On page 146 of the Record on Appeal, the court overrules the objection of Plaintiffs’ counsel that Kunst cannot introduce evidence at a damages hearing and allows Kunst leeway.

estoppel, this Court has precedent to rule for an exception concerning subsequent litigation after default.

The panel on p. 112 of its opinion cited *Powell v. Lane*, 289 S.W.3d 440 (Ark. 2008) for the proposition that *Bacote* is cited and relied upon by courts in other jurisdictions. However, it was the dissent, and not the majority, in *Powell* that relied upon *Bacote*. The *Powell* majority held that in the context of collateral estoppel, “actually litigated” means that the issue was raised in pleadings, or otherwise, that the defendant had a full and fair opportunity to be heard, and that a decision was rendered on the issue. *Powell*, p. 186. In other words, the *Powell* court looked to see whether the defendant had been afforded due process. In the *Kunst* case, *Kunst* was afforded due process as set out in *Powell*. The issue of whether *Kunst* had paid vendors, overcharged invoices and had stolen funds was raised in the *Gaby v. Kunst and Kunstwerke* pleadings in the breach of contract cause of action. *Kunst* was duly served with the summons and complaint and chose not to answer. *Kunst* later made an appearance to petition for removal of the default judgment. *Kunst* subsequently appeared at the damages hearing and litigated the issue of whether he had paid vendors, overcharged for invoices and stolen funds when he cross-examined witnesses including the Respondent. Despite that opportunity, the court still found the evidence “clear and convincing”. (R. p. 4). The order resulting from the damages hearing found that the Plaintiffs had established their claim for breach of contract accompanied by a fraudulent act, thus finding by clear and convincing evidence that it was true *Kunst* failed to pay vendors and had stolen from the *Gabys* and establishing the affirmative defense to *Kunst*’s allegations of defamation. (R. pgs. 3-5) As set out in *Powell*, because *Kunst* had received due process, the default

judgment does not protect him from the application of collateral estoppel. Kunst should not be afforded yet another opportunity to contest the evidence of his misconduct, which despite Kunst's cross-examination, Judge Welmaker found to be clear and convincing.

The panel and *Bacote* also cited 50 C.J.S. Judgments § 797 (1997) as the basis for South Carolina law concerning the applicability of collateral estoppel to default judgments. However, in 50 C.J.S. § 1049 (2013) the bright line rule was qualified by the possibility of exceptions:

On the other hand, exceptions exist where the quality, extensiveness and fairness of the procedures followed in the prior litigation are comparable to full adversary contests. The court may grant preclusory effect to issues determined in a default judgment if it finds that a party's reasons for not litigating are such that the interests of fairness militate against the non-preclusion of issues already raised but not litigated.

The panel did not consider the possibility of exceptions, opting instead for a bright line rule that would obviate the need for an analysis of what actually happened in the underlying case. 50 C.J.S. § 1049 cites *In re Limbaugh*, 155 B.R. 952, 955-56 (Bankr. N.D. Tex. 1993) as support for the possibility of exceptions. The *Limbaugh* Court wrote:

Though, generally, default judgments are not entitled to issue preclusive effect, exceptions exist where the quality, extensiveness and fairness of the procedures followed in the prior litigation are comparable to full adversary contests. 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4442 (1981); *Montana v. United States*, 440 U.S. 147, 164n 11, 99 S.Ct. 970, 979n 11, 59 L.Ed.2d 10 (1979). The term "default judgment" has been used loosely to describe a variety of litigation ranging from one-sided prove up hearings, after default for failure to answer, to full-scale contests on the issue of damages, following a post-answer default. Consideration of those procedural distinctions involved in prior litigation dictates that courts reject attempts to uniformly categorize default judgments where circumstances indicate some measure of preclusion is warranted.

The *Limbaugh* Court, therefore, looked to evidence of what actually occurred in the default litigation in determining whether or not collateral estoppel could be applied

instead of assuming, as the panel did, that default judgments and the phrase “actually litigated” are mutually exclusive. In *Limbaugh*, this Court, through its reliance on Restatement (Second) Judgments, has precedence and support to affirm the trial court’s order. *Limbaugh* also supports the trial court’s conclusion that the underlying default litigation warranted a finding that the issue of truth as an affirmative defense was actually litigated.

Another authority cited in 50 C.J.S. § 1049 to support the possibility of exceptions is *Dein Host, Inc. v. Pignato*, 86 B.R. 318, 323 (D.N.H. 1988). The *Dein Host* Court wrote:

Thus, the following rule is culled from Restatement (Second) of Judgments §27, comment *e*: In determining whether default judgments are accorded collateral estoppel effect, the general rule is that issue preclusion is inappropriate if the prior action results in a default judgment. However, the court will not be inflexible in applying the above general rule and may grant preclusory effect to issues to be determined in a default judgment if it finds that a party’s reasons for not litigating are such that the interests of fairness militate against the non-preclusion of issues already raised but not litigated. In applying the above rule to the facts of any given case, the court must be cognizant of the strong presumption in favor of nonpreclusion.

Therefore, the *Dein Host* Court, while allowing for the “strong presumption in favor of nonpreclusion”, still took into account the possibility that in the interest of fairness, collateral estoppel may be applied in a default judgment setting. While it is true that there is no South Carolina case law allowing or disallowing exceptions to the lack of preclusive effect on default judgments, the authorities relied upon by the panel and cited in the *Bacote* decision do allow for exceptions. Because Kunst was afforded due process despite his default, this Court should allow an exception as set forth in *Powell v. Lane*.

**3. The panel's opinion does not allow for judicial economy.**

In *State v. Bacote* the South Carolina Supreme Court wrote, “the doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided. Since it is grounded upon concepts of fairness, it should not be rigidly or mechanically applied.” *Bacote*, p. 163. *Bacote* is an unusual opinion in that the Supreme Court held that for reasons of judicial economy in the context of the particular facts, collateral estoppel should not be applied. *Bacote*, p. 164. That is because *Bacote* concerned an administrative hearing held prior to Bacote’s criminal trial for DUI. The Supreme Court reasoned that if collateral estoppel were to apply to administrative hearings such as the one in *Bacote*, the State would have to appear at all such hearings to protect its interests and the effect would be to slow down hearings that are meant to be quick. *Bacote*, p. 164.

The above-described reasons for denying the application of collateral estoppel in *Bacote* do not exist in the Kunst case. One, the Kunst default did not concern an administrative matter of any kind nor did it concern a criminal matter. Two, for reasons of judicial economy, collateral estoppel should be applied in the Kunst case.

Kunst was afforded due process despite his default. Kunst’s access to due process ensured that he had the opportunity to try the issue of defamation and truth as a defense during the underlying action. Kunst was served with the summons and complaint and knew of the causes of action alleged against him. During the damages hearing Kunst had the opportunity to confront the Respondent David Loree and question him extensively

about allegations that he took money from his clients the Gabys, that he did not pay vendors and that he paid vendors less than he claimed to the Gabys was actually due. In its order (R. pgs. 3-5) the damages hearing court found that the Gabys proved their case of breach of contract accompanied by fraudulent act against Kunst with clear and convincing evidence. In order to do so, the court would have had to evaluate the testimony of all witnesses including Loree and decide who it believed. The fact that the court decided in favor of the Gabys shows that it found to be true allegations that Kunst stole money from his clients, that he overbilled vendors and kept the difference for himself and that he failed to pay vendors and kept that money for himself as well. Because a court of law found it to be true that Kunst did the very things he claims are examples of defamation, it follows that Respondent Loree did not defame Kunst because what he allegedly said of Kunst was found by a court of law to be true. To try the case of *Kunst v. Loree* the trial court would be retrying issues that have already been litigated and have been decided by a court of law. That is the very instance collateral estoppel is designed to avoid for reasons of judicial economy.

The *Bacote* court found that for reasons of fairness, collateral estoppel should not be rigidly applied. *Bacote*, p. 163. In this case, for reasons of fairness, collateral estoppel should not be rigidly or automatically denied in all cases of default. To do so in the Kunst case would mean that the panel is undermining the very purpose for collateral estoppel, that of judicial economy, and is forcing the trial court to retry issues that have already been tried and decided. For this reason, this Court should affirm the decision of the trial court.

**4. Denial of collateral estoppel in a default setting should not be rigidly applied for reasons of fairness.**

*Bacote* p. 163, defines collateral estoppel as being grounded on upon concepts of fairness. The *Bacote* court stated that because collateral estoppel is grounded upon concepts of fairness, it should not be rigidly or mechanically applied. Because collateral estoppel is based on the concepts of fairness, it follows that for reasons of fairness, it also should not be rigidly denied. The effect of the panel's ruling is to allow a serial and judgment proof<sup>3</sup> *pro se* litigator yet another bite of the apple, all the while wasting the limited judicial resources of the Thirteenth Judicial Circuit.

As set forth on page 1 of Respondent's brief, Kunst has brought twelve other defamation actions, most of which were dismissed and one of which received a jury verdict in favor of the defendant. None of Kunst's actions have brought him success. Most cases were brought in the time frame of November 2006 through January 2007. All are centered on Kunst's construction of custom homes at the Reserve on Lake Keowee and Pickens County and on the issue of whether he was defamed when his former clients during their investigations spoke of how he stole their money. Kunst has had twelve opportunities, thirteen counting this present case, to bring defamation actions. It would be unfair for the panel to allow Kunst to try yet another defamation case that is likely to end the same way as the previous actions at the expense of Respondent David Loree whom Kunst has already confronted in the underlying case.

*Bacote*, p. 163, adopts from Section 28 of the Restatement (Second) Judgments (1982) instances in which collateral estoppel can be denied even when the issue is validly

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<sup>3</sup> R., p. 23 from Judge Miller's November 5, 2011 order contains a list of nine judgments against Kunst that have yet to be satisfied. One of the judgments is the judgment obtained by the Gabys in the underlying action.

litigated and a valid final judgment is obtained. It is worth reviewing these instances set forth in *Bacote*, p. 163, to show that it would not be unfair to Kunst to allow the application of collateral estoppel to the instances of his default.

Restatement Instance No. 3 - A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. Restatement (Second) Judgments § 28 (1982).

The Record on Appeal does not contain any instances of differences in the quality or extensiveness of the procedures followed by the courts. If anything, the court at the damages hearing bent over backwards to accommodate Kunst and allowed him extensive leeway in cross-examination. (R., p. 3). Indeed, the court disallowed testimony from the Gabys' expert Bill Larkin. (R., p. 4). The panel incorrectly noted that Kunst was not allowed to take the stand. A careful review of the damages hearing transcript (R., pgs. 148-149) show that the court admonished Kunst and informed him he could not testify while cross-examining a witness, which is also true for other lawyers. That is not the same thing as denying Kunst the ability to take the stand on his own behalf and testify. In the section of the damages hearing transcript cited above Kunst, who chose to act as his own lawyer, was reminded by the court that he could not testify and cross-examine at the same time, not that he could not testify at all.

In both the underlying case and the case before this Court, Kunst had the opportunity to confront and question Respondent David Loree. In addition to the cross-examination of David Loree at the damages hearing, on September 27, 2007, Mr. Kunst deposed Mr. Loree. (R., pgs. 308-315). Oddly enough, even though the purpose of the

deposition was to examine Mr. Loree concerning the issue of defamation, opposing counsel had to admonish Kunst and remind him the action concerned defamation. (R. p. 313). In both the underlying case and in the case before this Court, Kunst had the opportunity to confront Respondent Loree and question him. Given these facts, it is clear that there is no need for a new determination of the issues based on a difference in the quality of procedures and therefore collateral estoppel can, and should, be applied in this case.

There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action or (c) because the party sought to be precluded, as a result of the conduct of the adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Restatement (Second) Judgments § 28 (1982).

The underlying issues, that of defamation and truth as a defense, do not have a potential adverse impact on public interests or other persons not named as parties. Further, these issues in the context of Kunst's overcharging the Gabys and failure to pay vendors were raised in both cases. Finally, Kunst had an adequate opportunity and incentive to obtain full and fair adjudication in the initial action. The Record on Appeal shows that on May 3, 2006, Kunst was served with the summons and complaint of the underlying action. (R., p. 1). The default order was issued on December 7, 2006. (R., p. 2). Kunst had seven months between the date of service and the date of the default

hearing to take action, yet, other than appearing at the default hearing, he did not do so until the damages hearing held on March 12, 2007. Kunst has claimed in this action that his reputation suffered due to allegations made when Loree investigated the Gaby project. If so, then he certainly had the incentive to respond to the allegations in the underlying action which concerned his breach of contract with the Gabys, which Loree investigated. None of the exceptions in the circumstances contemplated by the Restatement (Judgments) and referenced in *Bacote* apply to the circumstances in the Kunst case. Kunst will not be treated unfairly by this Court if it affirms the trial court, but if it reverses the trial court, Loree will be treated unfairly because he will have to relitigate an issue that has already been adjudicated. For the reason of fairness, this Court should affirm the decision of the trial court.

**5. *State v. Bacote* is not reliable for the premise that all default judgments are denied preclusive effect under collateral estoppel.**

The panel stated in its opinion that *State v. Bacote* has been cited by both federal and state courts as establishing that default judgments cannot be used to preclude subsequent litigation under the doctrine of collateral estoppel. However, a closer review of the record shows that *Bacote* has been cited in a total of ten cases, both state and federal, and that the majority of citations have been for reasons other than the effect of collateral estoppel on default judgments. Only three cases cite *Bacote* to show that default judgments cannot preclude subsequent litigation and none of these are South Carolina state cases. These cases are described in more detail below.

The first case to cite *State v. Bacote* concerning the effect of default judgments on the application of collateral estoppel is *Powell v. Lane*, 289 S.W.3d 440 (Ark. 2008),

which has been examined earlier in this brief. The important fact to note is that it was the dissent in *Powell* that cited *Bacote*, not the majority, therefore *Bacote* does not support any case law from Arkansas, including *Powell*. Indeed, *Powell* stands for the opinion that collateral estoppel can apply to default judgments as to any other judgment given by a court.

The second case is *In re Pujdak*, 462 B.R. 560 (Bankr. D.S.C. 2011). On page 572 of the opinion, the Bankruptcy Court held that the default judgment was not entitled to collateral estoppel effect because the underlying state court action of fraud was not actually litigated. Later on p. 579 of the opinion the Bankruptcy Court did hold that the default judgment pertaining to the underlying state court action of violation of the S.C. Securities Act was granted preclusive effect because that action had been litigated in the state court action. Thus, the *Pujdak* court interprets *State v. Bacote* to hold that default judgments are denied preclusive effect only if the underlying issues had not been previously litigated. The panel held that all default judgments are denied preclusive effect, regardless of whether or not the issue has been previously litigated, which is not how the Bankruptcy Court for the District of South Carolina has interpreted *Bacote*.

The panel cited *In re Springhart*, 450 B.R. 725 (Bankr. S.D. Ohio 2011) as support for its holding that all default judgments are not subject to preclusive effect, however, in its opinion the *Springhart* court on p. 630 stated, “In *Bacote*, ...the court concluded that a judgment obtained by default does not collaterally estop the litigation of any issues in a subsequent lawsuit because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation.”

*Emphasis added.* This puts the *Springhart* court in line with the *Pujdak* court in that the federal courts are looking to see if the underlying issues had been actually litigated before deciding whether or not the default judgment is granted protection from collateral estoppel. In all three cases that cite *Bacote* concerning the effect of collateral estoppel on default judgments, all courts look to see whether the underlying issue has been actually litigated rather than holding that all default judgments bar the application of collateral estoppel.

The remaining seven cases citing *Bacote* cite it for reasons other than the effect of collateral estoppel on default judgments. See *Carolina Renewal, Inc. v. South Carolina Dept. Trans.*, 385 S.C. 550, 684 S.E.2d 779 (2009) (*Bacote* cited to show collateral estoppel can be denied in interest of fairness), *Mr. T. v. Ms. T.*, 378 S.C. 127, 662 S.E.2d 413 (2008) (*Bacote* cited to show collateral estoppel can be denied in interest of fairness), *Cook v. State*, 921 S02d 631 (Dist. Ct. App. Fla. 2<sup>nd</sup> Dist. 2005) (*Bacote* cited concerning issue of preclusive effect of administrative proceedings), *Nelson v. QHG of South Carolina, Inc.*, 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003) (*Bacote* cited for definition of collateral estoppel), *Richland-Lexington Airport Dist. v. American Airlines, Inc.*, 306 F.Supp.2d 548 (D.S.C. 2002) (*Bacote* cited to show issue must have been previously litigated), *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) (*Bacote* cited concerning issue of preclusive effect of administrative proceedings), and *Swain v. State*, 552 S.E.2d 880 (Ct. App. Ga. 2001) (*Bacote* cited to show lack of preclusive effect for driver's license suspension hearings). When only three of ten cases citing *Bacote* cite it concerning the effect of collateral estoppel on default judgments and when all three look to see if the underlying issue has been previously litigated before denying preclusive

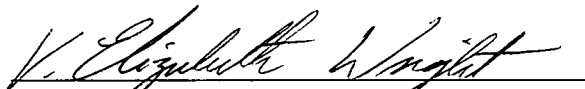
effect to default judgments, the panel is misguided in relying on *Bacote* to deny collateral estoppel to all default judgments. This Court should affirm the trial court's decision in not relying on *Bacote* because the underlying facts show that the issue of defamation and truth as a defense were litigated in the underlying action and therefore the Kunst default is subject to the application of collateral estoppel.

### CONCLUSION

This Court should affirm that the trial court is correct in its determination that *State v. Bacote* is not controlling precedent and that it is not applicable to the facts contained in the Record on Appeal. This Court should also affirm that the trial court is correct in granting Respondent summary judgment based on the doctrine of collateral estoppel because the affirmative defense of truth as a defense to a claim for defamation has been fully and fairly litigated to a conclusion in the underlying action.

Respectfully submitted.

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Greenville, South Carolina  
August 29, 2013

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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Case No. 2006-CP-39-1826

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AUG 29 2013

SC Court of Appeals

J. Scott Kunst,

Appellant,

v.

David Loree,

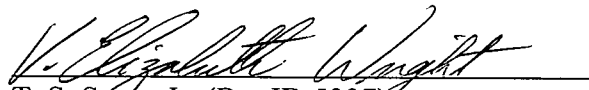
Respondent

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**PROOF OF SERVICE**

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I certify that I have served the **PETITION OF REHEARING OF RESPONDENT** by depositing a copy of it in the United States Mail, postage prepaid on **AUGUST 29, 2013**, addressed to Appellant *Pro Se*, J. Scott Kunst, at his mailing address 130 Arabian Way, Simpsonville, SC 29681.



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AUG 29 2013

SC Court of Appeals

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August 29, 2013

## HAND-DELIVERED

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**RE: J. Scott Kunst v. David Lore**  
**Case No. 2006-CP-39-1826**

Dear Ms. Kitchings:

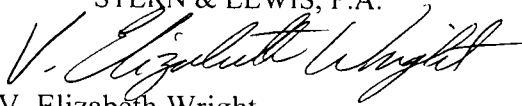
Please find enclosed for filing one unbound original and seven copies of **RESPONDENT'S PETITION FOR REHEARING** and **PROOF OF SERVICE** in connection to the above-referenced matter. Please note that the Respondent is requesting that its Petition for Rehearing be reviewed *en banc*.

Please return a clocked-in copy to me via our courier. By copy of this correspondence, I am serving *pro se* Appellant at his last known address.

Please do not hesitate to contact me if you have any questions or comments.

Very truly yours,

COVINGTON, PATRICK, HAGINS,  
STERN & LEWIS, P.A.

  
V. Elizabeth Wright

VEW/kmb  
Enclosure(s)

cc: J. Scott Kunst, *pro se* Appellant

**RECEIVED**

AUG 29 2013

**SC Court of Appeals**