THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2015-002417

Tommie Rae Brown, ...Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are the ..... Appellants.

INITIAL REPLY BRIEF OF APPELLANT, DAVID C. SOJOURNER, JR., IN HIS CAPACITY AS LIMITED SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES BROWN, A/K/A JAMES JOSEPH BROWN AND LIMITED SPECIAL TRUSTEE OF THE JAMES BROWN IRREVOCABLE TRUST, U/A/D AUGUST 1, 2000

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I. RESPONDENT BASES HER BRIEF ON INCORRECTLY STATED AND IRRELEVANT "FACTS" AND ASSUMPTIONS.

Hardly a page of Respondent's brief passes without a mischaracterization of the "facts" presented to the lower court or a flawed construction of the LSA's and other appellants' positions in this appeal. The purported "facts" upon which Respondent relies[2] are wholly unsupported and must be ignored by this Court pursuant to Rule 208, SCACR. Rule 208(b)(1)(D), SCACR, requires a party's statement of facts to be "relevant to the issues presented for review" and complete "with reference to the record on appeal." All purported facts that are without support in the record or which were not presented to or considered by the lower court must be disregarded.

Respondent inaccurately asserts the "facts" in the Charleston County Family Court order, granting Respondent an annulment from her first husband, Javed Ahmed ("Ahmed Annulment Order"), are binding and serve as a basis for affirming the lower court's orders in this appeal. Respondent's constant refrain that her first marriage "was never a marriage," Initial Brief of Respondent at pp. 14-15, assumes the findings of fact and conclusions of law in the Ahmed Annulment Order are binding on Decedent, the Estate, Decedent's heirs, this Court, and indeed "all the world." *Id.* at 34. They are not.

Respondent's improper and false assumption that the "findings of fact" in the Ahmed Annulment Order are binding against anyone other than herself places material facts that are actively disputed by the Estate and Decedent's heirs at the heart of the

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[1] The LSA adopts the reply briefs of all Appellants in this matter as if set forth and incorporated herein, pursuant to Rule 208(b)(D)(6), SCACR.

[2] Appellant LSA has contemporaneously with this Initial Brief filed a Motion to Strike regarding the wholly irrelevant and potentially prejudicial statements from Respondent's Initial Brief. A recitation of the statements believed by the LSA to be unsupported, speculative, and irrelevant is set forth on pp. 3-4 of the LSA's Motion to Strike.

appeal rendering the lower court's award of summary judgment in Respondent's favor wholly inappropriate. *See* Rule 56(c), SCRCP (summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law").

It is likewise incorrect for Respondent to assert as "fact" that Decedent "request[ed],"[3] "asked,"[4] "desired,"[5] "support[ed], encourage[d] and insist[ed],"[6] or otherwise "gave full support"[7] in her pursuit of the Ahmed annulment. Decedent was not a party to Respondent's annulment against Mr. Ahmed. Joint Stipulation of Facts at ¶ 12. Decedent did not intervene as a party in the annulment action. *Id.* at ¶ 15. Indeed, as a legal rule, Decedent could not become a party or intervene in the case. *See Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006) (recognizing a non-party to the marriage does not have standing to intervene in an annulment action); *Joye v. Yon*, 345 S.C. 264, 276, 547 S.E.2d 888, 894 (Ct. App. 2001) ("Since Yon had no standing to challenging the granting of the annulment, it was not necessary for Joye to include him as a party to the action."). Respondent's claim that Decedent insisted she file the annulment action or otherwise "gave full support" to the action is wholly unsupported by documentary evidence or testimony. Respondent's attempt to characterize Decedent's mental thoughts or internal opinions and desires is pure speculation.

There is no evidence to support Respondent's allegation that Decedent "gave full support" financially[8] to Respondent's annulment action. The only stipulated fact on this

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[3] Initial Brief of Respondent at p. 31.
[4] *Id.* at p. 55.
[5] *Id.* at p. 32.
[6] *Id.* at p. 51.
[7] *Id.* at p. 33.
[8] Respondent assert's Decedent's payment of legal fees "made the action possible, which

issue is that Decedent gave Respondent "the funds to pay the legal fees for the litigation" and received copies of the filed summons and complaint and filed final order. Joint Stipulation of Facts at ¶¶ 13, 14. Respondent's assertion that Decedent "evidently agreed his interests . . . were represented by [Respondent], as he retained no attorney of his own" is wholly inaccurate and directly contradicted by the Joint Stipulation of Facts. The Joint Stipulation makes clear Decedent was not jointly represented by Respondent's counsel, Robert N. Rosen, Esquire, and had separate legal counsel. Joint Stipulation of Facts at ¶¶ 14, 16 ("Decedent was not Robert Rosen's client in the Ahmed Annulment Action.").

Respondent's assertion as "fact" that Decedent "clearly accepted the benefits"[9] of her annulment should be rejected by this Court. As set forth in its Initial Brief, pp. 14-27, the Estate denies Decedent accepted or became legally bound by any factual allegation or conclusion of law in the Ahmed Annulment Order. Decedent's assertion of the Ahmed Annulment Order against Respondent in Decedent's Aiken County Family Court annulment proceeding against Respondent, a party to the Ahmed Annulment Action, through offensive non-mutual collateral estoppel does not make such findings or conclusions binding on Decedent. *See* Infra at § II.

Respondent also references alleged "facts" from her 2007 affidavit in support of her legal position in this appeal. Initial Brief of Respondent at p. 62. Citation to alleged facts in Respondent's affidavit is inappropriate based on the circumstances and procedural posture of this case. Specifically, in March 2014, the parties were before the lower court on the Estate's motion to modify or lift certain protective orders which barred

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suggests he had a strong interest in the subject matter of the action." Initial Brief of Respondent at p. 32; *see also id.* at p. 52 ("Mr. Brown evidently agreed that his interests in the annulment action were represented by Mrs. Brown, as he retained no attorney of his own, filed no claim of his own, and paid Mrs. Brown's attorney.").

[9] *Id.* at p. 2, 31, 51, 52, 53.

Respondent's diaries from being produced in discovery. *See* Hearing Transcript, March 31, 2014, generally. At the hearing, Respondent took the following position:

> There are motions to limit the discovery in this case. You know, seven years ago, [on December 26, 2007], I filed a motion for summary judgment [and filed a supporting affidavit of Tommie Rae Brown]. And my position then and my position now is the same; she's either married to James Brown or she isn't. And that's a decision for you to make and maybe ultimately for the Supreme Court to make. **Whether she's married or not really depends on the law and not the facts. It doesn't really matter what anybody says.**

Id. at p. 54, lines 3-12 (emphasis added); *see also* pp. 54-56. As a result of Respondent's arguments, the lower court stayed all discovery in the case pending a decision on the anticipated summary judgment motions. In accordance with the lower court's order, the parties have not pursued written discovery, taken depositions, or gathered affidavits from parties or other potential witnesses since March 31, 2014.[10]

The vast majority of "evidence" Respondent asserts in support of her position in this appeal has not been stipulated by the parties or cross-examined by the Estate or any other party. Respondent succeeded in having the lower court bar the parties' access to her diaries, limit the scope of discovery, and preclude access to taking her deposition in this case. In summary, Respondent has bound the Estate and other parties' hands from rebutting the alleged "facts" she asserts in support of her claims.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In reviewing a grant of summary judgment motion, the [appellate court] applies the same standard as the trial court . . . ." *Id.* at 69, 580 S.E.2d at 438.

[10] Cross motions for summary judgment were filed in April and June of 2014. *See* Respondent's Motion for Summary Judgment, filed April 28, 2014; LSA's Motion for Summary Judgment, June 2, 2014.

(citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991)). When determining whether the lower court's grant of summary judgment was appropriate, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Id.* at 69, 580 S.E.2d at 439 (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545).

Respondent's improper assertion of this large quantity of material and disputed evidence makes clear the lower court's orders granting summary judgment in Respondent's favor were premature and inappropriate. She asserts in her brief that this Court can use evidence of her marriage ceremony to Decedent alone as a "presumption" she is Decedent's surviving spouse and the LSA can only rebut this presumption with "strong evidence." Initial Brief of Respondent at p. 67, 68-69, 72. Respondent claims Appellants can only overcome this presumption "by *disproving every reasonable possibility*." *Id.* at p. 67. Respondent boldly asserts she is entitled to win because "Appellants cannot disprove every reasonable probability that Mrs. Brown is the surviving spouse of Mr. Brown." *Id.* at p. 68.

Our Supreme Court recognizes "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (summary judgment is "an extreme remedy to be cautiously invoked"); *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975) (summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues"). To the extent the lower court's orders are based, even in

part, on disputed material facts, summary judgment was premature and inappropriate.

The lower court strictly ruled upon the parties' cross motions for summary judgment on the stipulated facts and application of the law.[11] Before issuing its final ruling, on October 26, 2015, the lower court specifically ruled:

> Let me make myself clear: I only consider stipulations of facts. And you know how I reached my conclusion. And you say that I can still look at those stipulations of fact and, Judge, if you will just look at *Lukich*, you will realize that you were wrong. And I'm going to do that, I promise you. And if I agree with you, I'm going to change it.

Id. at p. 83, lines 1-8.

> I'm limiting this reconsideration to the arguments on *Lukich*.... [I]t's strictly on the *Lukich* issue, recognizing the facts as stipulated, narrowing it just to that. That's where I'm going with it.

Id. at p. 88, lines 1-7.

The Court allowed Petitioner to file her motion and granted a stay of discovery, but ruled if Petitioner's motion turned upon any contested facts "the summary judgment goes out the window." *Id.* at p. 60. "If it involves factual issues, obviously I would not rule on it; I will say you have to have an opportunity to complete discovery before I rule to determine whether or not there were genuine issues of material fact in dispute." *Id.* at p. 61. This Court cannot and should not affirm based on disputed, material facts submitted by Respondent in her Initial Brief.

In addition, numerous alleged "facts" are simply Respondent's counsel's interpretation of legal documents and are therefore inappropriate. For example,

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[11] *See* the lower court's statements in Hearing Transcript, June 30, 2015 at p. 61, lines 17-24 ("I was trying to get -- and I did, I thought -- a stipulation that everybody from here on out who had a dog in the fight, so to speak, would agree to the stipulations of facts so that when it got to the Supreme Court or the Court of Appeals would at least have an agreed-upon set of facts to apply it to *Lukich* or whatever else they want to apply it to."); p. 54, lines 2-5, 10-13; p. 55, lines 7-15 ("I'm going to limit it just to that little narrow issue [on the appellate courts' decisions in *Lukich*] and disregard all this other stuff. And when I say other stuff, I mean issues involved.").

Respondent improperly asserts as "facts," her own counsel's interpretation of Trust language regarding management costs to be paid to the Trust's fiduciary representatives. *See* Initial Brief of Respondent at p. 5. As pointed out in Appellant Terry Brown's Initial Reply Brief, at pp. 8-9, Respondent's interpretation of these documents is factually incorrect and arguably only injected for bias against Appellants, particularly the Estate. As a second example, Respondent improperly asserts as "facts," her own counsel's interpretation of the conclusions of law in the Ahmed Annulment Order r. Initial Brief of Respondent at p: 4 (stating the order "h[eld] [Respondent] had no impediment to her marriage to [Decedent]").

Finally, Respondent recounts as relevant "facts," certain occurrences which were not, and could not have been, presented to the lower court for its consideration on the cross motions for summary judgment involved in this appeal. Notably, Respondent references a Settlement Agreement and Release entered into by the Estate and certain heirs of Decedent on November 17, 2015. *See* Respondent's Initial Brief at p. 5, footnote 4. This settlement was executed more than ten months after the lower court issued its first order granting Respondent summary judgment. *See* Order, filed January 13, 2015. The settlement was executed almost a month after the lower court denied the LSA's motion to reconsider. *See* Order, filed October 26, 2015.

The settlement agreement and the Joint Motion to Authorize Settlement, filed December 7, 2015, are wholly irrelevant to the subject appeal and their inclusion in the Record on Appeal would prejudice the Estate. *See* Rule 208(b)(1)(D), SCACR ("A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal...."); Rule 209(b), SCACR ("A party shall not

include any matter in his Designation which is not relevant to the appeal."); Rule 210(c), SCACR ("The Record shall not ... include matter which was not presented to the lower court or tribunal.").

Respondent acknowledges there is no need for additional discovery because "all of the *material* factual issues in this action are resolved by the Joint Stipulation." Initial Brief of Respondent at p. 60. For these reasons, any other alleged "facts" cited by Respondent are irrelevant to the issues in this appeal because they were expressly not considered by the lower court in issuing its orders on appeal. Respondent respectfully requests this Court consider the issues on appeal in light of only the stipulated facts.

II. RESPONDENT CANNOT ESTABLISH HER SECOND MARRIAGE IS VALID THROUGH THE AHMED ANNULMENT ORDER.

Respondent contends Appellants, including the LSA, are attempting to obtain a "posthumous annulment" of Decedent's marriage to Respondent. Initial Brief of Respondent at p. 4, 16. The LSA is attempting to do no such thing. Rather, the Estate is seeking to have the lower court rule upon the status of Respondent's purported marriage to Decedent. *See* LSA's Initial Brief at pp. 7-13. This action determines whether Respondent is an heir of the Estate of James Brown as the decedent's "surviving spouse." *Id.* at p. 7.

As stated in the LSA's Initial Brief, pp. 14-26, the findings of fact and conclusions of law in the Ahmed Annulment Order are not binding on Decedent, the Estate, and are entitled to no weight in this case. The LSA is not "attacking" the order. *See* Initial Brief of Respondent at p. 4, 10; *see also* pp. 10-12, 46-47. The LSA is merely challenging the effect of the order based on its timing and collateral effect on Decedent

and the Estate, an issue injected into this case by Respondent herself, who seeks to use the order to prove she is Decedent's surviving spouse.

Respondent argues the probate court has no jurisdiction over annulments. As stated by Appellant Terry Brown in his Initial Reply Brief, the lower court, exercising jurisdiction of the Probate Court, has jurisdiction to determine the heirs of an estate. S.C. Code Ann. § 62-1-302(a)(1). Appellant Brown's arguments on this point, Initial Reply Brief of Appellant Terry Brown, pp. 2-3, are hereby expressly incorporated by reference.

It is clear that when faced with a claim by a purported spouse, whether for an elective share under Section 62-2-201, or an omitted spouse share, under section 62-2-301, as here, the probate court has the jurisdiction and obligation to assess and rule upon the validity of the claim at issue. Part and parcel of that ruling is a judicial determination whether the clamant was validly married to the decedent on the date of death. In *Lovett v. Lovett*, 329 S.C. 426, 494 S.E.2d 823 (Ct. App. 1997), this Court recognized the lower court's jurisdiction to make a surviving spouse determination.

In that case, Ms. Lovett, the decedent's alleged surviving spouse, appealed a probate court order invalidating a life estate left to her under Mr. Lovett's will, and denying Ms. Lovett an elective share of the estate. *Id.* at p. 429, 494 S.E.2d at 825. Ms. Lovett "had been married eight times prior to her marriage to Lovett. Although her second through fourth marriages ended in either divorce or annulment, there is no record of a divorce or annulment for her first, fifth, sixth, seventh, or eighth marriage." *Id.* On appeal, this Court affirmed the probate court's denial of Ms. Lovett's statutory elective share, upholding the "probate judge's ruling [Ms. Lovett's] marriage to [Mr.] Lovett was invalid." *Id.* at 429-43, 494 S.E.2d at 825. The Court held Ms. Lovett "was not [Mr.]

Lovett's surviving spouse." *Id.*

This Court's ruling in *Lovett* confirms the probate court has jurisdiction to determine marital status in the context of probating an estate and that power does not usurp the family court's jurisdiction to grant divorces and annulments. *Contra* Initial Brief of Respondent at p.4. In *Lovett*, the court declared Ms. Lovett's purported marriage to Mr. Lovett was not valid because she remained married to another person on the date of their marriage ceremony. *Id.* at p. 432, 494 S.E.2d at 826. Thus, the probate court is permitted to review evidence submitted by the parties and determine a party's alleged status as the decedent's surviving spouse. The notion our probate courts do not possess jurisdiction to "decide the validity of the marriage" in determining claims for elective share or omitted spouse claims is erroenous. *See* Initial Brief of Respondent at pp. 4, 10 at footnote 10.

The LSA has already addressed Respondent's argument that the Estate is estopped by the Ahmed Annulment Order. *See* LSA's Initial Brief at pp. 14-26. Decedent was not a party or in privity with Respondent in her annulment action and thusly Respondent's argument fails. However, Respondent's Initial Brief reflects a fundamental misunderstanding of the mechanics of offensive non-mutual collateral estoppel,[12] and the LSA believes it is important to clarify.

The doctrine of non-mutual offensive collateral estoppel was adopted in this State by this court in *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984), and was confirmed as the law of this State by our Supreme Court in *South Carolina Prop. and Cas. Ins. Guar. Ass'n v. Wal–Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). Under the doctrine of offensive non-mutual collateral estoppel, a party may be prevented

[12] *See* Initial Brief of Respondent at pp. 46-55.

from relitigating issues actually determined in a prior action so long as the party estopped had a full and fair opportunity to litigate the issue in the first action and there are no circumstances which justify affording him an opportunity to retry the issue. *Beall*, 281 S.C. 363, 315 S.E.2d 186; *Roberts v. Recovery Bur., Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994) (citing *McPherson v. South Carolina Dept. of Highways and Pub. Transp.*, 297 S.C. 303, 376 S.E.2d 780 (Ct.App.1989)).

Respondent contends Decedent is bound by the Ahmed Annulment Order through collateral estoppel because he "provide[d] essential support for the litigation." Initial Brief of Respondent at p. 49. Respondent cites to *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912), for the proposition that "[b]y supporting his parents in [a] custody case, . . . the father became bound by the result." Initial Brief of Respondent at p. 49. In *Tillman*, the claims at issue, involving custody, originally belonged to the father. The parties to the action were the father's parents, to whom the father assigned his custodial rights, and mother. *Id.* at 93 S.C. 281, 76 S.E. at 559. In addition to the claims at issue belonging originally to the father, he "submitted an affidavit . . . insisting on the claim of [his parents], to whom he had solemnly conveyed all of his rights . . . ." *Id.* The Supreme Court held: "It is clear that by this action he became bound by the decree rendered in the formal proceeding."

Other than making a payment to Respondent's counsel for her legal fees and receiving filed copies of the initial pleadings and final order, *see* Joint Stipulation at ¶¶ 13, 14. There is no evidence in the record to imply or establish that Decedent did anything to otherwise inject himself in, control, or participate in the annulment action. More importantly, unlike the father in *Tillman*, Decedent had no "rights" in Respondent's

annulment action. Unlike Decedent, who had no standing to be a party in the Ahmed Annulment Action, the father in *Tillman* had standing to be a party in the proceeding involving his son's parentage *because he was the father of the child involved.* In sum, Respondent's attempt to analogize this case to the facts in *Tillman* fails. *See* Initial Brief of Respondent at p. 50.

Respondent also cites *Piney Oil & Gas Co. v. Scott*, 79 S.W.3d 394 (Ky. 1934), which, according to Respondent "held that paying part of another party's attorney's fees is sufficient to establish privity." Initial Brief of Respondent at p. 51. A significant difference between the Kentucky Court of Appeals' decision in *Piney Oil* and South Carolina law is the definition of "privy." Notably, Kentucky law, at least in 1934 at the time of the *Piney Oil* case, defined "privity" narrowly, as an "acquirer[] of interest" from a party. 79 S.W.2d at 396. South Carolina law applies "privity" more broadly, including within its scope "one so identified in interest with another that he represents the same legal right." *H.G. Hall Const. Co., Inc.*, 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984).

It is without dispute that had the *Piney Oil* case arisen in South Carolina, the non-party in the case would be considered in "privity" with the party to the original action as they both had the same interest: quieting title to the mineral rights conveyed by a common grantorIn addition to this clear ground for privity, the Kentucky court held, in its equitable discretion, that the non-party was further bound because he "paid for Scott's legal fees" and "participated in that action." The court expressly recognized the first action was a "test suit." *Piney Oil* at 396.

There is little South Carolina case law on the issue of collateral estoppel of a non-

party on the ground the non-party paid the prior party's legal fees. However, neither *Tillman*, a South Carolina case, nor *Piney Oil*, from Kentucky, support Respondent's extreme proposition that Decedent's one-time payment of Respondent's legal fees collaterally estopped him, and now estops his Estate, to the findings of fact and conclusions of law in the Ahmed Annulment Order. There is no evidence to support Respondent's implication that Decedent had a "full and fair opportunity to previously litigate the issue," by his mere payment of legal fees as is required for application of collateral estoppel against a non-party.

In addition, "[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied." *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009). "Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Id.* Unfairness would result from Respondent's collateral use of the Ahmed Annulment Order against Decedent, a party who was legally barred from "litigating" the issue in the Ahmed Annulment Action directly. *See Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006) (recognizing a non-party to the marriage does not have standing to intervene in an annulment action); *Joye v. Yon*, 345 S.C. 264, 276, 547 S.E.2d 888, 894 (Ct. App. 2001) ("Since Yon had no standing to challenging the granting of the annulment, it was not necessary for Joye to include him as a party to the action."). For these reasons, Respondent cannot collaterally bind Decedent or the LSA to the Ahmed Annulment Order granting Respondent an annulment from her first husband, Javed Ahmed.

III. RESPONDENT CANNOT ESTABLISH HER SECOND MARRIAGE IS VALID THROUGH JUDICIAL ESTOPPEL.

For the reasons set forth in the LSA's Initial Brief, pp. 7-13, Respondent has the burden of proving she is decedent's surviving spouse. Respondent must come forward with "specific facts showing there is a genuine issue for trial" proving her first marriage to Mr. Ahmed was invalid in order to overcome the legal presumption that her first marriage is valid and renders her second attempted marriage to Decedent bigamous and invalid. *See* Initial Brief of LSA at p. 14. The LSA relies, in part, upon *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), a case Respondent fails to address as to Respondent's burden of proof in this case. Respondent cannot and should not be permitted to establish her 1997 marriage to Mr. Ahmed was invalid (and, thus, her 2001 marriage to Decedent was valid) through the Ahmed Annulment Order, issued in 2004. *See* LSA's Initial Brief at pp. 14-26.

In her Initial Brief, Respondent attempts to establish her marriage to Decedent was valid through use of the 2008 Compromise Agreement. As this Court is well aware, the 2008 Compromise Agreement was overturned in full by the South Carolina Supreme Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). Nevertheless, Respondent attempts to use both language in the Compromise Agreement as well as legal arguments made in support of the Compromise Agreement to judicially estop the Estate from opposing Respondent's position in this appeal. For the following reasons, Respondent's arguments on this issue should be flatly rejected.

A. Respondent cannot establish her second marriage is valid through the 2008 Compromise Agreement.

Respondent asserts the Court and parties to this appeal are bound by a "binding

private . . . agreement," a 2008 Compromise Agreement, which conceded for purposes of settlement Respondent was Decedent's surviving spouse. Initial Brief of Respondent at p. 6. The 2008 Compromise Agreement states, *inter alia*:

> 6. This agreement is a private and binding settlement agreement among the parties hereto. Although the parties may ask the Court to approve this agreement, this agreement remains binding among the parties and applies to personal representatives and trustees even if not approved by the Court.

2008 Compromise Agreement at ¶ 6.[13] Respondent claims this agreement is enforceable "despite the lack of any court approval," based on its own terms. Initial Brief of Respondent at p. 6.

The *Wilson v. Dallas* decision, issued by the South Carolina Supreme Court on May 8, 2013, does far more than fail to approve the 2008 Compromise Agreement, as Respondent asserts. Rather, the Supreme Court itself characterized the effect of its decision as "invalidating the compromise agreement" as well as "invalidating the circuit court's approval of the compromise agreement." 403 S.C. at 449, 450, 743 S.E.2d at 767, 768. Accordingly, the entire agreement, including the provision regarding Respondent's marital status, is invalidated by the Supreme Court's decision and is therefore unenforceable.

Even if this provision were enforceable following a Supreme Court decision "invalidating" it, the provision could only mean the *entire* agreement is binding, not just one morsel of the entire agreement. No party has sought to enforce the entire agreement, or even a part of the agreement, through a separate breach of contract action, following

[13] The LSA's incorporation of the 2008 Compromise Agreement is included in this Brief and designated for inclusion in the Record on Appeal for the sole purpose of rebutting Respondent's claims that the Estate is bound by language of the Compromise Agreement in this matter. The LSA in no way contends that this documents, or any alleged facts contained therein, were considered by the lower court in addressing the cross motions for summary judgment now at issue in this appeal

issuance of the *Wilson v. Dallas* decision rendered by the Court more than three years ago. The obvious reason no one has done so is that by seeking to enforce the purported "private binding agreement," the parties would have to completely dismantle Decedent's estate plan. Doing so would clearly violate the purpose and effect of the Supreme Court's ruling in *Wilson v. Dallas.*

Furthermore, despite Respondent's contention to the contrary, the Estate is not bound by the Compromise Agreement because the Estate was not a party to the agreement. By indicating generically that "*Appellants* entered into a binding private settlement agreement," Respondent's Initial Brief at p. 6, 63 (emphasis added), Respondent misrepresents the "Estate" was a party. Russell L. Bauknight, former Limited Special Administrator and Limited Special Trustee, who, as of October 1, 2013, serves as Personal Representative of the Estate and Trustee of the Trust, supported the 2008 Compromise Agreement.

At the time of the settlement, Bauknight was serving "for the limited purpose of providing input and recommendations to the court regarding the compromise agreement." *Wilson v. Dallas*, 403 S.C. at 420, 743 S.E.2d at 751. *See also* Hearing Transcript, January 30, 2009,[14] p. 40, lines 6-25; p. 59, lines 7-18 (Court: "I appointed him to report to this Court his opinion as to the fairness of the agreement").[15] In contrast, "[t]he circuit court ordered [Adele Pope and Robert Buchanan] to continue [during the settlement

[14] The LSA's incorporation of the January 30, 2009 hearing transcript is included in this Brief and designated for inclusion in the Record on Appeal for the sole purpose of rebutting Respondent's claims that the Estate is judicially estopped in this matter by prior arguments allegedly made "by the Estate." The LSA in no way contends that these documents, or any alleged facts contained therein, were considered by the lower court in addressing the cross motions for summary judgment now at issue in this appeal.

[15] Bauknight himself testified that "I certainly found that the [order of appointment] was very, very narrow in scope [and therefore] [I] tried to limit my work to exactly what the order told me to do." Hearing Transcript (January 30, 2009) at p. 100, lines 8-14.

approval proceedings] serving in their fiduciary capacities [as the Estate's Personal Representatives and Trustees] . . . ." *Id.* Neither Mr. Buchanan nor Ms. Pope executed the 2008 Compromise Agreement. In fact, Buchanan and Pope, as "Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust" *appealed* the trial court's decision approving the 2008 Compromise Agreement, resulting in the *Wilson v. Dallas* decision.

Respondent contends the LSA should be estopped from taking a contrary position to Mr. Bauknight's during the settlement negotiations and approval process because the LSA is purportedly "acting for Mr. Bauknight in these litigated matters." Initial Brief of Respondent at p. 64. Respondent's assertion could not be further from the truth.

On October 1 and 10, 2014, following removal of Buchanan, Pope, and Bauknight by the Supreme Court's decision in *Wilson v. Dallas*, the Circuit Court and Probate Court appointed the LSA to serve solely, specifically, and exclusively to defend the Trust and the Estate against the Will and Trust Challenges. The appointment orders make clear the LSA is to act separate and independent of Mr. Bauknight:

> This interim appointment is made with the requirement that Mr. Sojourner, in his limited capacity, shall remain independent from Mr. Bauknight, [and] shall act with sole and absolute authority in his limited capacity....

See Order of Appointment (October 1, 2013) at page 20.

B. The Estate is not "judicially estopped" by arguments made by Russell L. Bauknight in support of the 2008 Compromise Agreement.

Respondent asserts the Estate is judicially estopped by "position[s] they asserted before the South Carolina Supreme Court" in the *Wilson v. Dallas* appeal. Initial Brief of Respondent at pp. 6, 64-65. To say the Estate is bound only by Russell Bauknight's actions in support of the 2008 Compromise Agreement is disingenuous and misleading

for the reasons stated above. *Supra* at § III(A). Respondent completely fails to reference Buchanan and Pope's role in the settlement negotiation and approval process.

Throughout the settlement hearings, the Estate, through Buchanan and Pope, its appointed Personal Representatives and Trustees, actively fought the settlement in general and the 2008 Compromise Agreement in particular. *See* Hearing Transcript, January 30, 2009, at p 21, lines 13-17; p. 155, line 24 – p. 156, line 6; p. 159, line 18 – p. 160, line 6; Hearing Transcript, March 4, 2009, p. 65, line 22 – p. 66, line 9. During the settlement negotiations, hearings before the lower court, and through appeal to the Supreme Court, Buchanan and Pope, on behalf of the Estate, filed motions, made arguments, and presented testimony opposing the 2008 Compromise Agreement, asserting there was not enough evidence to determine Respondent was Decedent's surviving spouse. *See id.*

In particular, Buchanan and Pope asserted *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), barred use of the Ahmed Annulment Order to retroactively validate Petitioner's bigamous marriage to Decedent. *See* Hearing Transcript (March 4, 2009) at page 69, lines 8-23; Hearing Transcript (March 5, 2009) at page 260, lines 4-23, page 263, lines 7-13, page 305, line 25 – page 306, line 4. The LSA asserts the exact same arguments in the subject appeal. The lower court heard and considered Pope and Buchanan's positions in opposition to approval of the settlement agreement, clearly believing they held fiduciary positions with relation to the Estate and Trust. Hearing Transcripts (January 30, March 4-6, 25-26, April 6, 2009).

On May 8, 2013, the South Carolina Supreme Court issued its final ruling in the *Wilson v. Dallas* decision. The Court accepted Buchanan and Pope's position in the

appeal and invalidated the lower court's approval of the 2008 Compromise Agreement. *Id.* at 450, 743 S.E.2d at 768. The Court also "void[ed] the lower court's appointment of Bauknight as Limited Special Administrator and Limited Special Trustee, indicating his support of the 2008 Compromise Agreement was not in the best interests of the Estate or Trust. *Id.* at 449, 743 S.E.2d at 766. The Supreme Court characterized the effect of its decision as "invalidating the compromise agreement" *and* "invalidating the circuit court's approval of the compromise agreement." *Id.* at 449, 450, 743 S.E.2d at 767, 768. The Court remanded the case with instructions to appoint new fiduciaries to oversee the probate cases in accordance with the provisions of Decedent's estate plan.

It was following the Supreme Court's remand that the LSA was appointed. *See* Appointment Orders. The Appointment Orders require the LSA to defend the Estate and Trust against all Will and Trust challenges. *See id.* Any ruling by this Court finding the LSA to be bound by previous arguments or positions in *Wilson v. Dallas* would contradict both the lower court's Appointment Orders and the Supreme Court's *Wilson v. Dallas* final decision.

IV. *WILSON V. DALLAS* DOES NOT AFFIRM RESPONDENT'S INTERPRETATION OF *LUKICH.*

Respondent incorrectly implies the South Carolina Supreme Court agrees with her interpretation of the *Lukich*[16] decisions. In her Initial Brief, Respondent claims:

> As to Mrs. Brown's status as surviving spouse, *Wilson v. Dallas* noted the language in the trial court's order that the *Lukich* case supported the validity of Mrs. Brown's marriage to Mr. Brown. *Wilson v. Dallas* did not reverse that conclusion although the Supreme Court had the opportunity to do so. Had the Supreme Court believed Mrs. Brown was not Mr. Brown's wife under *Lukich*, it could have easily have said so. If the effect of

[16] *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); *aff'd* 379 S.C. 589, 666 S.E.2d 906 (2008).

> *Lukich* was that Mrs. Brown was not Mr. Brown's wife, this would have been the most compelling point that the Supreme Court could have made to invalidate the settlement agreement. Apparently, the Supreme Court understood that, not only does *Lukich* not invalidate the marriage of Mrs. Brown and Mr. Brown, it confirms the validity of that marriage.

Initial Brief of Respondent at p. 9 (footnote omitted). In a footnote, Respondent admits the Supreme Court "expressly declined to comment on the *Lukich* issue." *Id.* (citing *Wilson v. Dallas*, 403 S.C. 411, 434 n. 16, 743 S.E.2d 746, 759 n. 16).

Respondent's logic is flawed in that it fails to consider Rule 220 of the *South Carolina Rules of Appellate Procedure.* That Rule proclaims an appellate court "need not address a point which is manifestly without merit." Rule 220(b), SCACR. This provision has been cited for the ground that an appellate court need not address points unnecessary to the decision of the appeal. *Shah v. Palmetto Health Alliance*, 2012-UP-475, 2012 WL 10862486 (Ct. App. Aug. 1, 2012). "[T]he appellate court will find it unnecessary to address all the grounds appealed where one requires affirmance." *Anderson v. S.C. Dept. of Highways and Public Transp.*, 322 S.C. 417, 472 S.E.2d 253 (1996) (citing *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984)). It is a uniformly recognized principle of judicial procedure "that a court should usually refrain from deciding unnecessary questions." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000); *see also Bagwell v. State*, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014). It is recognized as a "firm" judicial "policy" to decline to reach issues when it is not necessary to resolve a case. *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002). Because *Wilson v. Dallas* completely invalidated the 2008 Compromise Agreement as being unsupported by sufficient evidence, it would have been surplusage for the Court to address the *Lukich* question.

To adopt or even consider Respondent's argument that the Supreme Court implicitly supports Respondent's interpretation on *Lukich* because it "expressly declined to comment," Respondent's Initial Brief at p. 9 n. 9, would contradict this Court's own Rules and overturn clear judicial policy and practice.

V. THE SUPREME COURT'S DECISION IN *JOYE V. YON* GOVERNS THE COURT'S RULING.

Respondent tries to support her position on appeal by citing language from this Court's decision in *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001). *See* Respondent's Initial Brief at pp. 35-38. While the language Respondent quotes does not support her position, it is unnecessary to explain why, because this Court's decision was reversed by the Supreme Court after appeal. *See Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003). More significantly, the Supreme Court's decision in *Joye* holds a family court order annulling a wife's marriage as bigamous only applies prospectively, and *does not relate back to the date of the bigamous marriage. Id.* at 457, 586 S.E.2d at 134. The Supreme Court's holding therefore directly directly supports the LSA's position here.

In *Joye*, Husband and Wife were married in 1970. *Id.* at 454, 586 S.E.2d at 132. After being married for 26 years, the couple divorced in 1996 and Husband was ordered to pay Wife monthly alimony. *Id.* In March 1999 Wife remarried to Vance, but soon discovered Vance had never divorced his former spouse and filed for an annulment. *Id.* In September 1999, the family court granted Wife an annulment on the grounds of bigamy, ruling her March 1999 marriage to Vance was void *ab initio*. *Id.*

Following Wife's remarriage to Vance, her first husband had ceased paying alimony because in South Carolina a payor spouse's alimony obligation terminates upon

the payee spouse's remarriage. 355 S.C. at 454, 586 S.E.2d at 133 (citing S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2002)). Following her annulment, Wife filed a contempt action against Husband for his failure to pay alimony, arguing because her marriage to Vance was void *ab initio* her former Husband's alimony obligation never terminated. *Id.* The family court agreed and ordered Husband to make the alimony payments "both retroactively and prospectively." *Id.*

This Court affirmed the family court's order, ruling Husband's obligation to pay alimony never terminated on the grounds that a second bigamous marriage is void from its inception and is perceived as never having existed. *Id.* at 274, 547 S.E.2d at 893. This Court ruled the annulment order applied retroactively against Husband, even though he was not a party to the annulment action. *Id.* Both Court holdings, which were overturned on appeal, reflect Petitioner's position in this appeal, which should likewise be rejected.

The following portion of the Supreme Court's holding directly rejects Respondent's position and governs this Court's ruling:

> We also hold that regardless of whether the family court determines to reinstate periodic alimony payments or not, Husband has *no obligation to pay retroactive alimony to Wife for the time period that Wife was married to her bigamous husband.*

355 S.C. at 457, 586 S.E.2d at 134 (emphasis added). In other words, Husband would owe no alimony for the 6 months between the time Wife and Vance married and the time their marriage was annulled, even though the order of annulment contained a ruling the marriage was bigamous and, therefore, void *ab initio.* The Supreme Court's ruling in *Joye* establishes a family court decree voiding *ab initio* a bigamous marriage *does not apply retroactively to a non-party to that family court action.* That holding directly contradicts and therefore forecloses Respondent's position in this appeal. It establishes

the Ahmed Annulment Order does not apply retroactively to completely invalidate Respondent's marriage to Javed Ahmed and cannot retroactively validate Respondent's marriage to Decedent.

CONCLUSION

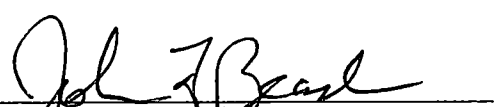
The Estate's position in this appeal is clear: Respondent bears the burden of proving she is Decedent's surviving spouse in order to succeed on all three of her will and trust challenges, including elective share, pursuant to S.C. Code Ann. § 62-2-201, omitted spouse, pursuant to S.C. Code Ann. § 62-2-301, and that Decedent's Will and Trust should be set aside on the basis of fraud and undue influence. The burden of proof is particularly relevant in this case because existing case law mandates the burden shift between the parties. The applicable burden of proof, established by *Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613 (1906), governs the outcome in this case and requires Respondent to come forward with evidence to rebut the existing presumption in the Estate's favor that her first marriage was valid.

Respondent has produced no evidence to establish her first marriage's invalidity. While Respondent frequently references language from her own self-serving affidavit, filed in 2007, as well as various other court documents, including the Ahmed Annulment Order, the 2008 Compromise Agreement which was invalidated, and legal arguments made in the *Wilson v. Dallas* appeal of the 2008 Compromise Agreement, the only uncontested facts, and indeed the only facts considered by the lower court, are set forth in the Joint Stipulation. In the complete absence of evidence showing her first marriage was invalid, Respondent is left to hide behind legal technicalities which are inapplicable in this case. To the extent Respondent attempts to create a reasonable inference to support

her position in this appeal, it should be disregarded. *See Companion Prop. And Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) ("Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom.") (citation omitted)..

Respondent's legal position is hyper technical and convoluted. It has been recognized that appellate courts should not be called upon to "'grope in the dark' to ascertain the precise point at issue," *Brady v. Brady*, 222 S.C. 242, 245, 72 S.E.2d 193 194 (1952). For the reasons set forth above as well as in the LSA's Initial Brief, this Court should determine Respondent is not Decedent's surviving spouse as a matter of law, and reverse the rulings in the lower court's January 13, 2015 and October 26, 2015 orders which granted summary judgment in favor of Respondent.

Respectfully submitted,



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November 9, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2015-002417

Tommie Rae Brown, ...Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that she has served the foregoing Initial Reply Brief of Appellant David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000 and Appellant David C. Sojourner, Jr.'s, in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000 Supplemental Designation of

on Appeal, by depositing a copy of same in the United States Mail, postage prepaid on November 9, 2016 and addressed as follows:

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November 9, 2016

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Clerk of Court
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In Re: The Estate of James Brown a/k/a James Joseph Brown
Tommie Rae Brown v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417
A&R File No. 022853-000001

Dear Ms. Kitchings:

Pursuant to Order extending the LSA's deadline to November 9, 2016, enclosed for filing are an original and one copy of the Initial Reply Brief and Supplemental Designation of Matter to be Included in the Record on Appeal of Appellant David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000 in the above-referenced matter together with a Proof of Service. Please file the original and return the clocked-in copy with our courier.

Also enclosed for filing are an original and seven copies of the Appellant David C. Sojourner, Jr.'s Motion to Exclude Irrelevant Documents from Record on Appeal and Appellant David C. Sojourner, Jr.'s Motion to Strike Irrelevant and Prejudicial Statements from Initial Brief of Respondent Tommie Rae Brown together with Proofs of Service. Please file the originals and return a clocked-in copy of each Motion with our courier. Our checks in the amount of $25.00 each are enclosed to cover the motion fee.

By copy of this letter, I am serving a copy of these documents on all attorneys of record.

Thank you for your assistance in this matter. Please contact me with any questions or concerns.

Sincerely,

John F. Beach

JFB/lbb
Enclosures
cc: David C. Sojourner
All parties of Record