THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown,

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.

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Respondent has muddied the waters on what is a relatively simple issue: Should Respondent be able to retroactively claim the status of "spouse" under South Carolina law, and obtain spousal benefits, when her marriage to James Brown was bigamous and contrary to the law of this State? The answer to that question is no.

Appellants will briefly respond to Respondent's unavailing arguments to clarify the issues before this Court.

I. RESPONDENT ERRONEOUSLY CLAIMS THAT THE CIRCUIT COURT LACKS SUBJECT MATTER JURISDICTION AND THAT APPELLANTS LACK STANDING TO PARTICIPATE IN THE DETERMINATION OF RESPONDENT'S SPOUSAL RIGHTS UNDER THE PROBATE CODE.

The circuit court properly has subject matter jurisdiction over this matter and Appellants have standing because this matter arises under the South Carolina Probate Code, not in family court. The Probate Court has exclusive jurisdiction to determine the heirs of an estate, including purported spouses. See S.C. Code Ann. § 62-1-302 (a)(1); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014); *see also* S.C. Code Ann. § 62-3-105. Respondent's arguments regarding subject matter jurisdiction and standing are based upon a mischaracterization of Appellants' arguments – namely, that Appellants are somehow seeking to re-litigate the annulment of the Hynie/Ahmed Marriage.

As Appellants have clearly stated, they neither seek nor have any interest in undoing this annulment. It is well established, however, that Appellants are not bound by the *factual findings* in that *in rem* proceeding to which they were never joined as parties, and in which they could not have intervened. Throughout her opposition Respondent repeatedly mischaracterizes Appellants' arguments and asserts straw man arguments like

this to distract this Court from the real issue in this appeal: whether the belated Annulment Order can turn back the hands of time so as to retroactively "cure" Respondent's bigamous marriage to Brown. Pursuant to S.C. Code Ann. § 20-1-80 and the plain language of the South Carolina Supreme Court's decision in *Lukich v. Lukich*, 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008) ("*Lukich*"), which control, the subsequent Annulment Order, cannot, as a matter of law, be applied retroactively to resuscitate Respondent's knowingly illegal marriage to Brown. No amount of judicial contortionism advocated by Respondents can or should change this result.

II. RESPONDENT PROPOSES A TWISTED READING OF *LUKICH* THAT WOULD LEAD TO UNNECESSARY CHAOS AND INSTABILITY IN FAMILY AND PROBATE LAW DETERMINATIONS.

Under *Lukich's* common-sense, bright-line rule Respondent is not James Brown's surviving spouse. The rule in South Carolina, as set forth in S.C. Code Ann. § 20-1-80, and as pragmatically interpreted by our Supreme Court is that a spouse's annulment of her first marriage *after* her attempted second marriage *does not relate back* so as to validate her bigamous second marriage. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 ("The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective.") The Supreme Court rightly concluded that "[a]ny other construction of S.C. Code Ann. § 20-1-80 would lead to uncertainty and chaos", exemplified here by Respondent's tortured arguments to arrive at a polar-opposite result.

Lukich is not notable for the principle, touted by Respondent, that a bigamous marriage is void *ab initio*, as that was black-letter law long before *Lukich*. *See, e.g.* *Splawn v. Splawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993)(There is no legal distinction between a marriage which is annulled and one terminated by reason of

bigamy. Legally, they are both void *ab initio*, "from the inception."). *Lukich* is noteworthy for its unequivocal holding that a spouse's belated annulment of her first marriage *after* her second marriage does not operate so as to revive her second marriage because any other application of S.C. Code Ann. § 20-1-80 would cause too much uncertainty in an area of the law that requires certainty. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907. *Lukich's* holding is clear, unequivocal and emphatic. It contains no carve-outs or exceptions based on the different ground for belated annulment of a first marriage, because *Lukich*'s core rationale – to prevent "uncertainty and chaos" in this fundamental area of the law – does not, by its very nature, allow for case-by-case exceptions.

Notably, Respondent not once addresses in her 75-page Opposition *Lukich's* unequivocal language, highlighted by Appellants. Instead, Respondent repeats her mantra that bigamous marriages are void *ab initio*. First, this does nothing to alter or alleviate *Lukich*'s concern over the chaotic inability to ascertain a marriage's validity *at the time of marriage* if that were subject to the parties' choices and conduct at an indeterminate time, years after marriage. Nor is there anything remarkable about the void *ab initio* status argued by Respondent as it is common place for annulments declare to declare a marriage "void *ab initio*" for any number of reasons. *See* 52 Am. Jur. 2d Marriage § 57 ("Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid . . . there must be a new ceremony following the termination of the earlier marriage."); *see also Splawn v. Splawn*, 311 S.C. at 425, 429 S.E.2d at 806 (1993)

(there is "no legal distinction between a marriage which is annulled and one terminated by reason of bigamy. Legally, they are both void *ab initio*.").

Furthermore, the Supreme Court firmly closed the door on Respondent's circular argument by stating in *Lukich*: "It would be inconsistent at best to hold that a marriage declared void ab initio never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support." 379 S.C. at 593, 666 S.E.2d at 907 (citing *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004)). A bigamous marriage may be void *ab initio*. However, *the legal capacity to contract a new marriage* is not cleared until *after* an annulment order is issued by a competent court because "[t]he statute [S.C. Code Ann. § 20-1-80] speaks to the status quo at the time the marriage was contracted, and does not contemplate ... a retroactive perspective." *Id.*

This is the law which controls; *irrespective* of the fact that Respondent's entire opposition relies on her unproven assumption that her marriage to Ahmed was bigamous – a self-serving fiction for which she and her attorneys have failed in all this time to present any admissible evidence.

Ultimately, this Court is presented with a simple question of timing as to when a party's legal capacity to marry must be defined. In determining whether a second marriage is void due to one spouse's bigamy, does the law look to the status quo when the second marriage was attempted or does the question remain speculative and open for some other indefinite period of time? The latter suggestion and the total lack of certainty it entails is unworkable and untenable as the Supreme Court *expressly* recognized. *Id.* The correct result mandated by *Lukich* and S.C. Code Ann. § 20-1-80, and the only result

that makes any sense from a legal, equitable and pragmatic perspective, is that a court must look to a spouse's *legal capacity* to marry at the time her second marriage was attempted, notwithstanding a later annulment of her first marriage.

Here, Respondent actively obtained a marriage license and engaged in a marriage ceremony with Ahmed in 1997, and was well aware that she was married at the time she purported to marry James Brown in 2001.[1] In the intervening five years Respondent could well have obtained an annulment of her marriage to Ahmed, prior to "marrying" Brown; instead she hid this from Brown and the State of South Carolina.[2] South Carolina law does not condone or reward such conduct. A person desiring legal marriage has both a legal and moral obligation to ensure that he or she is legally eligible to marry *before* actually marrying. This includes, of course, the resolution of any prior marriage *before* undertaking to marry once again. *See Johns v. Johns*, 309 S.C. 199, 202-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992) (noting that even "good faith" will not change this bright-line rule). In the eyes of the law what matters is that Respondent's "first marriage shall have been declared void by the sentence of a competent court" *before* she attempted to remarry in 2001. S.C. Code Ann. § 20-1-80.

Any other application of the law would be inequitable and dysfunctional. Marital status under the law, and all of the financial, familial, and legal consequences of that status, cannot seesaw between absolute invalidity and retroactive validity based on the subsequent discretionary actions of the participants, including Respondent's belated 2004 annulment. Marriages that are void at the time cannot be "un-voided" due to an annulment years later for whatever purported reason. *Lukich* specifically acknowledged

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[1] Joint Stipulation, ¶ 6.

[2] Joint Stipulation, Exhibits 15-16.

the "chaos" that would result from this type of discretionary retroactive application and *explicitly* rejected it. 379 S.C. at 592, 666 S.E.2d at 907.

As it is undisputed that Respondent did not divorce Ahmed nor annul their marriage until 2004, she lacked the legal capacity in 2001 to contract marriage to Brown, as a matter of law. *Id.* It is also undisputed that after Respondent obtained an annulment of her marriage to Ahmed in 2004 ("Annulment Order") that she and Brown did not marry prior to his death on December 25, 2006. As a result, Respondent is not the decedent's surviving spouse as a matter of law.

III. RESPONDENT ERRONEOUSLY CLAIMS APPELLANTS ARE BOUND BY ALL FINDINGS CONTAINED IN A DEFAULT JUDGMENT ENTERED IN A CASE TO WHICH THEY WERE NOT PARTIES.

As a threshold matter, no discussion of Respondent's Annulment Order is even necessary under *Lukich* because the annulment does not relate back so as to retroactively "un-void" Respondent's marriage to Brown, which the law does not recognize. Notwithstanding this, Respondent, again, mischaracterizes Appellants' arguments regarding the Annulment Order.

Appellants acknowledge that the Annulment Order terminated the Hynie/Ahmed marriage on April 15, 2004. The Annulment Order, as a judgment *in rem*, binds the entire world as to its dissolution of the Hynie/Ahmed marriage on that date. *See Carnie v. Carnie,* 262 S.C. 471, 167 S.E.2d 297 (1969).

Appellants challenge, however, Respondent's erroneous assertion that the factual findings in the *in rem* Annulment Order, are somehow binding on Appellants and conclusive as to their rights in this probate proceeding and beyond. Respondent's arguments are contrary to well-established law. The United States Supreme Court has

held that "[e]stablishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S. Ct. 356, 357, 73 L. Ed. 752 (1929) (citation omitted); *see also Gratiot County State Bank v. Johnson,* 249 U.S. 246, 39 S. Ct. 263, 63 L. Ed. 587 (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted).

To steer the Court in her direction Respondent equivocates, arguing that a judgment "is not functionally binding unless both its factual findings and its conclusions of law are binding". This is nonsensical and, again, directly contrary to well-settled law. Id.; *see also* Restatement (First) of Judgments § 73 (1942), cmt. c.

Similarly, Respondent attempts to evade the clear effect of binding precedent by distinguishing between factual findings essential to a judgment and nonessential factual findings. But, of course, *Becher* makes no such distinction. Under *Becher*, neither category of facts is binding upon a third party. Importantly, such a distinction has been explicitly rejected by this Court in *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013). In *Kunst*, the lower court ruled that the preclusion doctrine of collateral estoppel could be applied "as to matters essential to the judgment." *Id.* This Court reversed the lower court, holding that South Carolina stood with the majority of states in refusing to divide factual findings into categories or treat them differently based upon their classification as "essential" or "non-essential." *Id.*

Applying *Becher* and its progeny here, Respondent's marriage to Ahmed is annulled, and the *in rem* judgment is binding upon third parties as to its termination on April 15, 2004 of the Hynie/Ahmed Marriage. But to the extent, if any, that the truth or falsity of the Annulment Order's factual findings affect or are relevant to Appellants' legal rights, Appellants are not bound by such factual findings, under *Becher*, because Appellants were not parties to the annulment action. To the extent that the factual issue of whether Ahmed was married to an unidentified other person when Respondent chose to marry him is even relevant under the *Lukich* analysis (it is not) Appellants are guaranteed constitutional due process to litigate these factual questions – not to "undo" the annulment – but to determine *Appellants*' legal rights.

There is likewise no merit to Respondent's argument that the doctrine of collateral estoppel binds Appellants to the factual findings of the Hynie/Ahmed Annulment proceedings. Appellants' opening brief cites numerous cases in support of two fundamental barriers to Respondent's attempts to have its overcooked doctrinal spaghetti stick to the wall.

First, the issue of whether Ahmed was actually married to another was *never* "actually litigated" in the Charleston County family court annulment, which the Supreme Court described *sua sponte* as "hastily granted." *Wilson v. Dallas*, 403 S.C. 411, 434; 2013 S.C. LEXIS 240, *35 (S.C. 2013), n. 16 ("Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her."). It is undisputed that Respondent and her counsel ran to the Charleston County family court on December 15,

2003 to obtain a quickie annulment of the Hynie/Ahmed Marriage[3] upon news that Brown would shortly file the annulment/divorce action, filed by Brown on January 29, 2004.[4] Respondent's uncontested and one-sided hearing was held on April 15, 2004, and the order she submitted annulling her marriage was signed the same day.[5] Ironically, the putative wife in *Lukich*, sneaked off to the *same* court and received a speedy annulment from the *same* family court judge in an unsuccessful attempt to stave off her second husband's action to void their marriage based upon her bigamy. *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C.Ct. App. 2006).

No matter the label that Respondent now seeks to give the resulting one-sided Annulment Order, the facts remain that Ahmed never appeared, never answered the complaint or otherwise pled, and never participated in any hearing or otherwise defend himself against Respondent's sudden and convenient accusations.[6] In addition, there was zero evidence presented at the perfunctory annulment hearing other than Respondent's own self-serving and completely uncorroborated testimony, replete with inadmissible hearsay and double hearsay. These circumstances constitute the very essence of a *default judgment* (*see RRR, Inc. v. Toggas,* 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008)) to which the doctrine of collateral estoppel simply does not apply. *State v. Bacote*, 331 S.C. 328, 330 S.E.2d 161 (1998); *Kunst*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).[7]

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[3] Joint Stipulation, Exhibit 5.

[4] *Id.*, Exhibit 19.

[5] *Id.*, Exhibits 12, 13.

[6] *Id.*, ¶ 17.

[7] Respondent's loophole logic that because the annulment of a marriage is important, or Respondent's counsel did not move for a default judgment (while stating "[t]he Defendant, I guess, arguably is in default"), the uncontested annulment proceedings wherein Ahmed never appeared did not effectively result in a default judgment is, again, nonsensical. Resp. Br. p. 48.

Even today, Respondent still has presented no admissible evidence whatsoever that Ahmed was married to other women when she married him, "cannot identify a single person who can testify that Ahmed was married to another person when [she] and Ahmed participated in the 1997 marriage ceremony"[8] and is aware of "no order or other occurrence of which . . . ended or caused to end any marriage . . . between her and Ahmed."[9]

Second, neither Appellants nor Brown were in privity with Respondent, and neither Appellants nor Brown could have intervened in the family court action. *See Ex parte GEICO*, 373 S.C. 132, 644 S.E.2d 699 (2007) (holding that a third party does not have standing to intervene in a family court action despite an interest in the validity of the marriage in question). It is also undisputed that neither Appellants' nor Brown's legal interests were determined in the Hynie/Ahmed Annulment proceedings. *See Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) (holding that "[t]o be in privity a party's legal interests must have been litigated in the prior proceeding.") Nor was any finding regarding Brown's marriage to Respondent included in the Annulment Order. Brown did not attend any hearings, nor is there any assertion that he exerted any control over the legal strategies or theories advanced in the case. Brown and Respondent's interests were not even aligned.

In fact, *after* Respondent filed her annulment action on December 15, 2003, Brown filed *his* divorce/annulment action against her on January 29, 2004.[10] Moreover, Brown maintained his divorce/annulment action *even after* the Ahmed Annulment Order

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[8] *Id.*, ¶ 6.

[9] *Id.*, ¶¶ 9-10.

[10] *Id.*, Exhibits 5, 19.

was entered in April 2004, consistently taking the position that his marriage to Respondent was a nullity.[11] Respondent tries to argue this reality away by claiming that Brown's reference to the Ahmed Annulment Order in his own divorce/annulment action should bind him and Appellants to the findings of the Ahmed Annulment Order because he has "accepted the benefits" of the Order, but this argument both mischaracterizes Brown's reference to the Ahmed Annulment Order and minimizes the result of Brown's own divorce/annulment action. First, Brown referenced the Ahmed Annulment Order to show that *Respondent* was bound by it.[12] Of course, this makes sense because Respondent was *a party* to the proceedings. Brown never claimed that the findings of the Ahmed Annulment Order were true or that he was bound by them. Second, Brown did not "accept" any "benefits" from the Ahmed Annulment Order because there was no ruling in his favor based upon his arguments. Brown and Respondent reached an out-of-court agreement.

Due to the severe legal consequences that flow from privity and collateral estoppel, privity is strictly construed. *Wade v. Berkeley County*, 330 S.C. at 317, 498 S.E.2d at 687. The only support cited by Respondent for her unpersuasive "privity" theory is that Brown ended up paying her legal fees. The law is clear, however, that the payment of another party's legal fees does <u>not</u> render one in privity with that party. *See* Restatement (Second) of Judgments § 39, cmt. c, at 384 (1982). Respondent cites one 1934 Kentucky case in support of her argument that payment of legal fees may result in privity, but this case will not overcome our strongly worded Fourth Circuit precedent, which, in turn, cites the Restatement of Judgments on this point: "It is not sufficient [for

[11] Joint Stipulation, Exhibits 15-16.

[12] *Id.*

privity], however, that the person merely contributed funds or advice in support of the party, [or] supplied counsel to the party...". *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) *(citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)); *see also Kunst*, 404 S.C. at 656, 746 S.E.2d at 363 ("South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel."). Moreover, the idea that payment of some legal fees automatically results in the level of involvement and control required for privity directly contradicts to the admonishment in S.C. App. Ct. R. RULE 407 RPC 1.7 which expressly provides that the payment of legal fees cannot in itself confer any right of control over the legal proceedings in question.

To the unlikely extent, if any, that this Court finds Respondent's *post-hoc* bigamy allegations regarding her first marriage to be relevant under *Lukich* (they are not), Appellants have never been afforded the full and fair opportunity to litigate this unproven highly disputed issue of fact. Moreover, Respondent asserts that the ruling of this Court on the ultimate question of whether Respondent qualifies as James Brown's surviving spouse under South Carolina law will have effects as far-reaching as under federal copyright law. *See* 17 U.S.C.A. § 203(a), 304(c)(d) (West).[13] If that is true, then Respondent ultimately seeks to have Appellants bound by the Annulment Order's unsupported factual findings, which they have *never had any opportunity to litigate*, with respect to wholly separate rights under federal copyright law as to which Appellants unquestionably have independent standing that is in no way based upon or confined to the

[13] Such copyright "termination" interests were also referenced in the 2009 Settlement Agreement prior to the South Carolina Supreme Court's rejection of the overall Agreement. (Addendum to Private Agreement of August 10, 2008 to Include Settlement Agreement With Terry Brown Creating Restated and Amended Private Agreement.)

shoes of the Decedent. *See Ray Charles Found. v. Robinson*, 919 F. Supp. 2d 1054, 1066 n.9 (C.D. Cal. 2013), *rev'd on other grounds*, 795 F.3d 1109 (9th Cir. 2015) (holding that the plaintiff's "invocation of Ray Charles's testamentary intent is unpersuasive because the intent of the author is irrelevant under the termination provisions of the Copyright Act."). The stakes are far too high for the truth to be hidden behind the hasty Annulment Order based on nothing more than Respondent's self-serving hearsay. Thus, even notwithstanding the insurmountable legal barriers to holding that Appellants are precluded by collateral estoppel from contesting the so-called findings in the Annulment Order, because the doctrine of collateral estoppel is "grounded upon concepts of fairness", courts always retain discretion to decline to apply it where, as here, it would be highly inequitable and/or thwart the truth-seeking mission of every court. *Bacote*, 331 S.C. at 331; 503 S.E.2d at 163.

In a final attempt to prevent Appellants from discovering and presenting evidence regarding the truth or falsity of Ahmed's alleged bigamy, Respondents claim the Annulment Order is the "law of the case." That doctrine, however, obviously does not apply here. The "law of the case" doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision." *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999). Of course, this probate proceeding is wholly separate from the uncontested proceeding resulting in the Ahmed Annulment Order, so the law of the case doctrine does not and cannot apply.

The trial court committed reversible error in concluding that the findings and conclusions in the Annulment Order were preclusive and binding upon Appellants, and in

preventing Appellants from taking any discovery as to Respondent's uncorroborated claim, to the extent this Court holds that such claim is even material under *Lukich* .

IV. RESPONDENT ASKS THIS COURT TO ENFORCE A SETTLEMENT AGREEMENT ALREADY STRUCK DOWN BY THE SUPREME COURT AS ILLEGAL.

Respondent points to the 2009 Settlement Agreement as a purported additional ground to sustain the judgment below. Any reliance upon the 2009 Settlement Agreement, however, is wholly unavailing, as the South Carolina Supreme Court held the Agreement to be without consideration and refused to approve the Agreement. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). In doing so, the Supreme Court stated that "[a] compromise agreement is void unless executed in compliance with the governing statute" and proceeded to hold that the 2009 Settlement Agreement was not in compliance with the mandatory court approval process contained in S.C. Code Ann. § 62-3-1102, rendering it void and of no effect. *Id.* (quoting *In re Estate of Riley,* 228 Ariz. 382, 266 P.3d 1078, 1080 (Ct.App.2011)). *See also Mackey v. Kerr-McGee Chem. Co.*, 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984) (holding that a settlement agreement reached pursuant to workers' compensation statutes was not binding on the parties thereto because the Industrial Commission approval required by statute had not been obtained).

Respondent vaguely claims that "estoppel" bars Appellants from claiming that she does not qualify as Brown's spouse under South Carolina law, but she does not specify what theory of estoppel would support her argument. South Carolina generally recognizes two forms of estoppel, judicial estoppel and equitable estoppel, but neither are applicable here.

First, judicial estoppel requires a showing that, among other things, the "party taking the [allegedly inconsistent] position must have been successful in maintaining that

position and have received some benefit". *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013). Here, the Settlement Agreement contained a bargained-for exchange only a portion of which was that Respondent could be treated as Brown's spouse. The 2009 Settlement Agreement was determined to be contrary to South Carolina law, however, and Appellants received no benefit from it. Parenthetically, the notion that Respondent obtained the benefits of this disapproved settlement compromise, while Appellants have none makes no sense. *Second*, judicial estoppel requires that "the inconsistency must be part of an intentional effort to mislead the court", but a term in a Settlement Agreement bargained for by Respondent does not qualify. Moreover, there is not, nor can there be, any claim that Appellants have tried to mislead the court as to the facts or their positions regarding what is essentially a question of law. *Id.* Appellants have consistently maintained that Respondent does not qualify as Brown's surviving spouse because her marriage to Brown was contrary to South Carolina law. Respondent simply cannot satisfy the elements of judicial estoppel.

Likewise, equitable estoppel requires proof of the following elements: (1) conduct which amounts to a false representation; (2) intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). As above, Respondent cannot meet her burden as to any of these elements. The contents of the 2009 Settlement Agreement were arrived upon in good faith, but the South Carolina Supreme Court's ruling that the Agreement was void and wholly unenforceable as contrary to South Carolina law gutted the Agreement's consideration and purpose.

Importantly, equitable estoppel also requires Respondent to demonstrate that she has relied upon Appellants' representation to her detriment, but she cannot. *Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 23, 138 S.E.2d 410, 414 (1964) (holding that essential elements of equitable estoppel are "reliance upon [the party's] conduct, representations or silence; and [] resulting action, to his detriment, by the party claiming the estoppel"). Respondent points to no action taken or omission made in reliance upon the 2009 Settlement Agreement, nor would that be credible as the Agreement was struck down. Because Respondent cannot satisfy the elements of either judicial estoppel or equitable estoppel, her vague estoppel references regarding the 2009 Settlement Agreement are unavailing.

V. RESPONDENT BEARS THE ULTIMATE BURDEN OF PROOF AS THE INDIVIDUAL CLAIMING SPOUSAL PRIVILEGES.

Once again, Respondent attempts to blind this Court to the forest by propping up cardboard trees. It is clear that Respondent has the burden of proving she is the decedent's "surviving spouse" in each of her will and trust challenges. *See Byrd v. Byrd,* 279 S.C. 425, 308 S.E.2d. 788 (1983); *Calhoun v. Calhoun,* 277 S.C. 527, 290 S.E.2d 41 5 (1982). Respondent's production of a marriage certificate, showing that she and Brown engaged in a marriage ceremony on December 14, 2001, is insufficient to carry her ultimate burden of proof because she stipulated that her marriage to Ahmed had not been annulled at the time she improperly obtained the Hynie/Brown marriage certificate.

As demonstrated in their opening brief,[14] Appellants have met the burdens of proof applicable to them. Here, of course, the parties have stipulated to the key fact: At

[14] App. Br., pp. 16-17.

the time Respondent attempted to marry Brown, she knew and believed she was already married to Ahmed.[15]

Respondent essentially argues that she somehow unwittingly participated in not one, but *two* bigamous marriages, but that Appellants are estopped from challenging her self-serving uncorroborated assertions about Ahmed, or have the burden of proof, after convincing the trial court to erroneously prevent Appellants from taking discovery, a decision which Appellants have strenuously argued should be reversed.[16]

Even more ironically, Respondent ignores the Supreme Court's pointed admonition in *Lukich* regarding the "chaos" that would result if subsequent annulment orders were retroactively applied to revivify bigamous marriages, but tries to sway this Court with vague policy arguments about "chaos in the law of marriage". She erroneously charges Appellants with shifting the burden of proving a marriage's validity onto those who are married to distract the Court from the simple fact that Respondent was secretly already married at the time she tried to marry Brown anyway. Appellants do not suggest that every married person "be prepared to prove, at a moment's notice, to every third party who seeks to contest the issue, the validity of the second marriage."[17] But surely it is not too much to ask that a party seeking spousal benefits in a probate proceeding, involving significant assets, be prepared to prove that her admitted first marriage was legally terminated prior to her a second marriage with the decedent.

Because the factual stipulations, exhibits and affidavits of record overcome the presumption that the Hynie/Ahmed Marriage was dissolved by death or divorce, a

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[15] Joint Stipulation, ¶ 6.

[16] App. Br., pp. 32-37.

[17] Resp. Br. p. 71.

presumption arose in favor of the validity of that marriage. *See Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906), relied upon in *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). As Respondent challenges her marriage to Ahmed on grounds of his alleged bigamy, and has wholly failed to meet her burden of presenting *admissible* evidence that Ahmed was married to another at the time Respondent married him, her marriage to Brown was void as bigamous. S.C. Code Ann. § 20-1-80; *E.D.M.*, 307 S.C. at 475, 415 S.E.2d at 815; *Yarbrough*, 280 S.C. at 550, 314 S.E.2d 16, 18 (citing 52 Am. Jur. 2d *Marriages*, § 130 (1970)).

The Annulment Order itself cannot serve as evidence of Ahmed's bigamy because the South Carolina Supreme Court has adopted the holding of *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993), and other federal courts, that "judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial." *Mizell v. Glover*, 351 S.C. 392, 402, 570 S.E.2d 176, 181 (2002).[18] Respondent asserts that this argument has not been preserved for this Court's review, but that is incorrect. The transcript from the November 24, 2014 hearing before Judge Early clearly includes arguments from counsel that the Ahmed Annulment Order has been "only offered to prove facts".[19] Counsel then unequivocally states to the lower court, "That's hearsay."[20] The argument was presented with specificity to the lower court and is now properly before this Court on appeal.

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[18] Respondent's disingenuous argument (Resp. Br. pp. 43-44) that Appellants refute the collateral estoppel effect of the Annulment Order based on *Nipper* is yet another straw man mischaracterization with no basis in Appellants' opening brief (*see* App. Br. pp.17-18).

[19] Nov. 24, 2014 Hr'g Tr. pp. 66:12-25; 67:1-5.

[20] *Id.*

The lower court therefore made a fundamental error of law in mis-assigning the burdens of proof.[21] Notwithstanding that *Lukich* is already dispositive of this issue, because Respondent had the burden of proof, and the Annulment Order is incompetent as evidence of Ahmed's bigamy, but was the *only* evidence presented by Respondent to support her bigamy allegations, the trial court should have granted summary judgment to Appellants. *See Fairfield County Sch. Dist. Bd. of Trs. v. State,* 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014); *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

CONCLUSION

Ultimately, this Court is asked to determine how best to resolve this mess of Respondent's own making. It is undisputed that in 1997 Respondent obtained a marriage license, engaged in a marriage ceremony and secured a marriage certificate with another man in Texas before she attempted in 2001 to marry James Brown in South Carolina, without bothering to annul her first marriage.

Respondent suggests that her legally bigamous marriage to Brown can be retroactively "un-voided" by a hasty family court order annulling her first marriage years after her purported second marriage. *First*, this contravenes the statute (S.C. Code Ann. § 20-1-80) and *Lukich* – controlling Supreme Court authority which holds, without exception or equivocation, that "the statute speaks to the status quo at the time the marriage was contracted, and does not contemplate . . . a retroactive perspective." 379 S.C. at 593, 666 S.E.2d at 907. *Second*, and as emphasized in *Lukich*, Respondent's

[21] MSJ Order, at 44.

path leads to uncertainty in areas needing it the most – family, parentage, and the panoply of legal rights and obligations flowing from marriage. *Id.* ("Any other construction of §20-1-80 would lead to uncertainty and chaos.")

Appellants submit, and *Lukich* mandates, that a person who participated in a marriage lacks the legal capacity to consummate a second marriage unless and until she annuls her first marriage. A person's marital status and legal capacity to remarry must be determined at the time he/she attempts to remarry, a fixed point in time, fair and predictable to all, and conducive to consistent judicial application. Applying this rule to our case results in a clear and well-supported holding that Respondent's purported marriage to Brown was void and of no legal force. The Ahmed Annulment Order did not serve to reinstate or revive it. Once the Annulment Order was entered terminating Respondent's first marriage, she could have, but failed to marry Brown. Indeed, they entered into a Consent Order that she would not assert even a common-law marriage to Brown.[22] Accordingly, when Brown's died, he and Respondent were not legally married, and Respondent is not the Decedent's surviving spouse.

The law does not permit speculative, uncertain and retroactive loopholes of the kind advanced by Respondent when it comes to the institution of marriage. The law dictates a simple solution. People, like Respondent, who know they are married, need to do something about it *before* they attempt to marry again.

To the unlikely extent that this Court determines that Ahmed's alleged bigamy could serve as a time machine to resuscitate Respondent's void marriage to Brown, Respondent bears the burden of proof as to Ahmed's supposed bigamy – a burden she has

[22] Joint Stipulation, Exhibit 19.

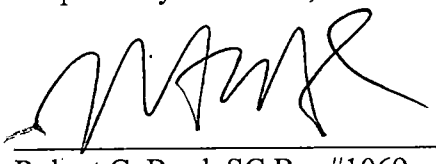
wholly and consistently failed to meet. As far as Appellants' legal interests are concerned, the perfunctory uncontested Hynie/Ahmed annulment proceeding in which Ahmed never appeared and the *in rem* Annulment Order that resulted by default provides no legal basis to bind Appellants to its purported factual findings because Appellants were neither parties to nor in privity with a party to that family court action.

Appellants therefore respectfully request that this Court (i) find that summary judgment was entered erroneously in favor of Respondent, and (ii) grant summary judgment to Appellants because Respondent lacked the legal capacity to contract marriage with Brown in 2001, she did not obtain her Annulment Order until 2004, and Respondent and Brown never married prior to his death on December 25, 2006.

[SIGNATURE PAGE FOLLOWS]

November 9, 2016

Respectfully submitted,



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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

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown,

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 on November 9, 2016, he has caused a copy of the Appellants' Initial Reply Brief to be served upon all parties of record by mailing a copy of the same addressed as follows:

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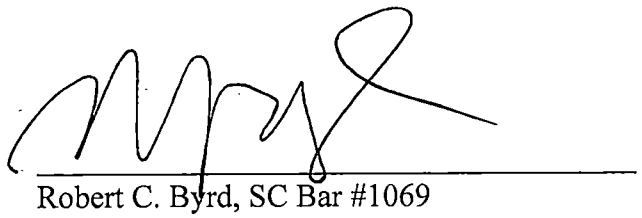

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November 9, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: 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

Dear Ms. Kitchings:

Enclosed for filing please find an original and one copy of an *Initial Reply Brief of Appellants* along with a *Proof of Service* in the above-referenced appeal. Please return a filed-stamped copy of the documents in the enclosed postage-prepaid envelope.

By copy of this letter, we are serving all parties of record with a copy of the same.

Should you have any questions regarding this matter, please do not hesitate to contact me. With kindest regards, I am

Sincerely,

Robert C. Byrd

RCB:kxl
Enclosures

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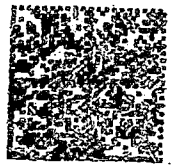

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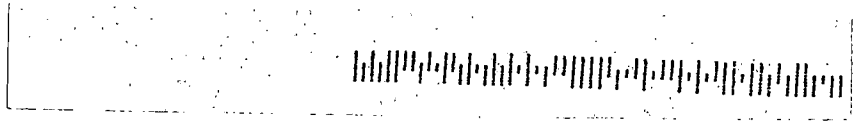

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