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.

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN IT IS UNDISPUTED THAT RESPONDENT FAILED TO TERMINATE HER FIRST MARRIAGE BEFORE ATTEMPTING HER SECOND MARRIAGE TO JAMES BROWN, RENDERING THE SECOND MARRIAGE BIGAMOUS AS A MATTER OF LAW UNDER SECTION 20-1-80 OF THE SOUTH CAROLINA CODE AND *LUKICH V. LUKICH*, 379 S.C. 589, 666 S.E.2D 906 (2008)?

II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN RESPONDENT'S ANNULMENT OF HER FIRST MARRIAGE DOES NOT RELATE BACK TO VALIDATE HER BIGAMOUS SECOND MARRIAGE UNDER SECTION 20-1-80 OF THE SOUTH CAROLINA CODE AND *LUKICH V. LUKICH*, 379 S.C. 589, 666 S.E.2D 906 (2008)?

III. DID THE TRIAL COURT FURTHER ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN THE RECORD CONTAINED ADMISSIBLE EVIDENCE THAT RESPONDENT'S FIRST MARRIAGE WAS NOT INVALID, AND RESPONDENT, WHO HAS THE BURDEN OF PROOF AS TO THE ALLEGED INVALIDITY OF HER FIRST MARRIAGE, PRESENTED NO ADMISSIBLE EVIDENCE TO SUPPORT HER ASSERTIONS?

IV. DID THE TRIAL COURT FURTHER ERR IN BASING ITS RULING ON THE FINDINGS OF FACT IN A FAMILY COURT ORDER ANNULLING RESPONDENT'S FIRST MARRIAGE BY DEFAULT, WHICH FINDINGS WERE INADMISSIBLE HEARSAY, AND IN HOLDING THAT MR. BROWN AND APPELLANTS WERE COLLATERALLY ESTOPPED FROM CHALLENGING SUCH FINDINGS, WHEN THEY WERE NOT PARTIES TO RESPONDENT'S ANNULMENT ACTION NOR ALLOWED TO INTERVENE?

V. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT PRIOR TO ALLOWING THE PARTIES TO PARTICIPATE IN DISCOVERY, WHEN HER MOTION IMPLICATED TRIABLE ISSUES OF DISPUTED FACT AND THE COURT HAD IMPROPERLY PROHIBITED APPELLANTS FROM TAKING DISCOVERY OF RESPONDENT OR USING HER DIARIES?

STATEMENT OF THE CASE

The legendary music artist James Brown ("Decedent" or "Brown") died on Christmas Day, December 25, 2006, in Atlanta, Georgia. His will devised his personal effects to six named children, including the Appellants, and the remainder of his considerable estate was left to an irrevocable trust ("Trust"), from which the bulk of his fortune was devised to The James Brown "I Feel Good" Trust to provide financial assistance for the education of disadvantaged youth.[1]

Following Brown's death, the respondent Tommie Rae Brown, a.k.a. Tommie Rae Hynie ("Respondent" or "Hynie"), brought an action in probate court to set aside Decedent's entire will, which named neither her nor her son as beneficiaries. Her action to set aside the will was based upon alleged undue influence and fraud. She separately claimed an elective share or an omitted spouse's share of the Brown Estate. The probate court transferred Hynie's claims to the circuit court.

Seven years of cluttered litigation ensued. The trial court thereafter approved a Compromise Settlement Agreement that provided Hynie 23.75% of Brown's entire estate, notwithstanding his testamentary wishes, but the settlement was sharply rejected by the South Carolina Supreme Court in *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013), and the case was remanded to the trial court.

On October 1, 2013, the trial court appointed David C. Sojourner, Jr. to serve as Limited Special Trustee of the Trust specifically to defend the Estate and Trust against the will and trust challenges, and on October 10, 2013, the Probate Court

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[1] *See Wilson v. Dallas*, 403 S.C. 411, 449, 743 S.E.2d 746, 767 (2013) (containing a detailed description of the factual and procedural history).

appointed Mr. Sojourner as the Limited Special Administrator (hereinafter Mr. Sojourner is referred to in both capacities as the "LSA").[2]

The present motions for summary judgment and orders on appeal arose as a result of the LSA's motion to modify protective orders the trial court had issued in 2008 sealing Hynie's handwritten diaries ("Diaries"). During a hearing on the LSA's motion ("March 31, 2014 Hearing"), Hynie's attorneys argued against producing the Diaries and sought a stay of all discovery pending a summary judgment motion they intended to file on the issue of whether Hynie is Brown's "surviving spouse."[3] The trial court stayed *all* discovery and allowed Hynie to file her motion, but ruled if her motion turned upon any contested facts "the summary judgment goes out the window."[4]

On April 28, 2014, Hynie filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for summary judgment, which was joined in by the Appellants, and limited to the question of whether Hynie is Decedent's surviving spouse ("Appellants' motion").

On September 5, 2014, the parties filed a Joint Stipulation of Facts (with Exhibits) ("Joint Stipulation") that sets forth all of the undisputed material facts applicable to the parties' cross-motions for summary judgment.

The trial court held a hearing on the motions on November 24, 2014, and on January 13, 2015, entered an order granting Hynie's motion for summary judgment

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[2] *See* R. p. 56, January 13, 2015 Order, at p. 4.

[3] R. pp. 631-640, March 31, 2014 Hearing Transcript, 54:3-63:25, attached as Exhibit 1 to Memorandum of Law Supporting LSA's Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse, filed October 6, 2014 (the "LSA's Memo in Support").

[4] R. p. 637, *Id.* at 60:19-21.

("MSJ Order"). The trial court ruled that Hynie's 2001 marriage to husband #2 (Brown) was not bigamous because, in its view, Hynie's 1997 marriage to husband #1 (Ahmed) was bigamous, based solely on the unsupported findings in a 2004 order annulling Hynie's first marriage, obtained against Ahmed by default.[5] The LSA and Appellants filed motions to reconsider on January 26, 2015.[6] At the June 30, 2015 hearing on these motions, the trial court requested supplemental briefing on the application of *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), which the parties thereafter filed.[7] On October 20, 2015, the court denied the motions to reconsider ("Order Denying Reconsideration").[8]

Appellants duly filed their Notice of Appeal of the above orders (collectively, the "Orders") on November 20, 2015.[9]

STATEMENT OF THE FACTS

Tommie Rae Hynie and Javed Ahmed ("Ahmed"), after applying for and securing a Texas marriage license, were legally married in Harris County, Texas on February 17, 1997 (the "Hynie/Ahmed Marriage").[10]

Thereafter, on November 27, 2001, James Brown and Hynie executed a Prenuptial Agreement wherein Hynie acknowledged she was entering the agreement knowingly and voluntarily on the advice of counsel of her own choosing. *See Wilson v.*

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[5] R. pp. 69, 71 and 97, MSJ Order, at 17, 19, and 45.

[6] R. pp. 825-883, LSA Motion to Reconsider; R. pp. 884-887, Brown Appellants' Motion to Reconsider.

[7] R. pp. 1049-1063, Memorandum of Limited Special Administrator on Issue of Application of *Lukich v. Lukich*.

[8] R. pp. 103-121, Order Denying Reconsideration.

[9] Brown Appellants' Notice of Appeal.

[10] R. pp. 265-266, Hynie/Ahmed Marriage License, Exhibit 1 to Joint Stipulation.

Dallas, 403 S.C. 411, 418, 743 S.E.2d 750, 762 (2013). Therein, Hynie "agreed to waive any claim for an interest in his estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse." *Id.*

On December 10, 2001 Brown and Hynie obtained a marriage license in Aiken County, South Carolina.[11] To obtain the license Hynie falsely swore under oath to the Aiken County Probate Court that this was her first marriage, concealing the Hynie/Ahmed Marriage from both Brown and the Probate Court.[12]

On December 14, 2001, Brown and Hynie participated in a marriage ceremony in Aiken County, South Carolina (the "Hynie/Brown Marriage").[13] Hynie now admits that her 1997 marriage to Ahmed was never dissolved prior to her attempted marriage to Brown in 2001.[14]

Two years later, on December 15, 2003, Hynie filed an action in the Charleston County Family Court (the "Family Court") against Ahmed, alleging their marriage should be annulled (the "Hynie/Ahmed Annulment Action").[15] Ahmed was never personally served, but instead was purportedly served by publication.[16] Because he never made an appearance in the Annulment Action, the only testimony presented to the Family Court was Respondent's own self-serving testimony that Ahmed allegedly told her that he had three or more wives in Pakistan when they married.[17] On April 15, 2004, the Family

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[11] R. pp. 269-270, Joint Stipulation, Exhibit 4.

[12] *Id.*; *see also* S.C. Code Ann. § 20-1-230 (A)(4).

[13] R. p. 256, Joint Stipulation, ¶ 5.

[14] . p. 256, *Id.*, ¶ 6.

[15] R. pp. 271-273, Joint Stipulation, Exhibit 5.

[16] R. pp. 274-291, Joint Stipulation, Exhibits 6–10.

[17] R. pp. 297-313, Joint Stipulation, Exhibit 13.

Court entered an order annulling the Hynie/Ahmed Marriage based solely on Hynie's testimony (the "Annulment Order").[18]

After discovering the 1997 Hynie/Ahmed Marriage, but prior to the Annulment Order, Brown brought his own annulment proceedings on January 29, 2004, in Aiken County, South Carolina, against Hynie for bigamy (the "Brown/Hynie Annulment Action").[19] Hynie counterclaimed for a divorce from Brown. The parties settled and dismissed their respective suits in a consent order filed August 16, 2004 (the "Hynie/Brown Consent Order"), wherein Hynie expressly agreed even to "forever waive any claim of a common law marriage to [Brown], both now and in the future.[20]

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). Thus, if a genuine issue of material fact exists, summary judgment is inappropriate and will be reversed on appeal. *Lanham v. Blue Cross & Blue Shield of SC., Inc.*, 349 S.C. 356, 366, 563 S.E.2d 331, 335–36 (2002). The appellate courts review a grant of summary judgment *de novo*. *Stoneledge at Lake Keowee Owner's Ass'n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 634–45, 776 S.E.2d 434, 437 (Ct. App. 2015).

On summary judgment, the evidence must be viewed, and all reasonable inferences must be drawn, in the light most favorable to the non-moving party. *Fleming*

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[18] R. pp. 293-296, *Id.*, Exhibit 12.

[19] R. p. 258, *Id.*, ¶ 19.

[20] R. pp. 349-350, *Id.*, Exhibit 19.

v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). However, where a party "makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the [moving party], he was entitled to judgment as a matter of law." *Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991).

Although a denial of a motion for summary judgment ordinarily is not appealable, an appellate court "may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation." *Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002).

SUMMARY OF ARGUMENT

The trial court's Orders erroneously and inequitably permit Tommie Rae Hynie to loot the Estate of James Brown and to defy his charitable testamentary intent based upon an attempted marriage that was bigamous as a matter of law.

Hynie's counsel conceded at the November 2014 summary judgment hearing that the parties' cross-motions for summary judgment can be decided based entirely upon the undisputed facts in the parties' Joint Stipulation of Facts.[21] Relevant to the questions before this Court, the parties stipulated to the following:

- On February 12, 1997, Hynie and Ahmed obtained a marriage license in Texas;
- On February 17, 1997, Hynie and Ahmed participated in a marriage ceremony in Texas;
- On December 14, 2001, Hynie and Decedent participated in a marriage ceremony in South Carolina;

[21] R. pp. 2467-2469, Nov. 24, 2014 hearing transcript, 4:13–6:5.

- From February 17, 1997, to December 14, 2001, no court order was entered that ended the Hynie/Ahmed Marriage;

- On April 15, 2004, the Charleston County Family Court entered an order declaring the Hynie/Ahmed Marriage void based solely on Hynie's testimony, as Ahmed did not appear in the action;

- Hynie can identify no evidence (other than her own assertions) that Ahmed allegedly had other wives on February 17, 1997; and

- Decedent was not a named party in the Annulment Action nor was he able to intervene therein.[22]

Family matters are often messy and rarely easy, but, thankfully, the South Carolina Supreme Court clarified in *Lukich v. Lukich* that under the bigamy statute, section 20-1-80 of the South Carolina Code, a spouse's annulment of her first marriage *after* her attempted second marriage does *not* relate back to validate retroactively the bigamous second marriage. 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008). Simply stated, because Hynie's 1997 marriage to Ahmed had not been dissolved, she lacked the legal capacity to marry Brown in 2001. South Carolina law is clear that Hynie had a legal obligation, as well as a moral one, to resolve her prior marriage *before* she married again, and her annulment of this marriage years later cannot serve as a time machine to go back and resuscitate her illegal second marriage.

Even if the purported reason for Hynie's untimely annulment was somehow relevant (it is not), Hynie has consistently failed to present any admissible evidence whatsoever that her first marriage was bigamous (like her second marriage)—a burden of proof she alone must carry. Indeed, the only admissible evidence before the trial court was Ahmed's own sworn statement that he was <u>not</u> married to another. The trial court nonetheless held, contrary to well-settled law, that Appellants are precluded by the

[22] R. pp. 255-258, Joint Stipulation, ¶¶ 2, 5, 6, 9 10, 12, and 18.

findings of fact in the hasty Annulment Order, even though neither Decedent nor Appellants were parties to that action, nor could they have intervened.

Finally, the trial court erred in granting Hynie summary judgment while barring Appellants from using her Diaries, holding depositions, or taking written discovery of Hynie. Whereas, the court could and should have ruled as a matter of law that the Hynie/Brown Marriage was bigamous, the converse is not true. There were obvious triable issues of fact precluding summary judgment in Hynie's favor.

ARGUMENT

I. HYNIES'S ATTEMPTED MARRIAGE TO BROWN WAS BIGAMOUS AS A MATTER OF LAW DUE TO HER FAILURE TO TERMINATE HER FIRST MARRIAGE PRIOR TO HER SECOND MARRIAGE.

A. The 2004 Annulment Order Did Not Retroactively Validate Hynie's Bigamous 2001 Marriage to Brown.

The trial court erred in failing to abide by the unambiguous holding of the South Carolina Supreme Court in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) ("*Lukich*"), which strictly construed the bigamy statute, S.C. Code Ann. § 20-1-80. *Lukich* and Section 20-1-80 are dispositive of this appeal as a matter of law, in light of the parties' Joint Stipulation,[23] such that the trial court's grant of summary judgment to Hynie must be reversed and summary judgment entered in favor of the Appellants.

In *Lukich*, the Supreme Court was faced with a wife's first marriage that was annulled subsequent to her second marriage. The Court found that while the family court's annulment order rendered the first marriage void *ab initio*, this did not resurrect the bigamous second marriage. *Id.* at 592, 666 S.E.2d at 907. In a nutshell, *Lukich* bars the lower court's application of the 2004 Annulment Order to validate retroactively

[23] R. pp. 254-258, Joint Stipulation, at pp. 1–5.

Hynie's 2001 marriage to Brown, which was bigamous under Section 20-1-80. *Lukich* unequivocally holds that a subsequent order declaring a first marriage void *ab initio* does *not* relate back so as to validate a second bigamous marriage. *Id.* at 592–93, 666 S.E.2d at 907.

It is thus crystal-clear that Hynie's marriage to Brown was bigamous under the Supreme Court's analysis of Section 20-1-80:

> Under the statute's terms, Wife's "marriage" to Husband #2 was "void" from the inception since *at* the time of that marriage she had a living spouse and that marriage had not been "declared void." . . . 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***. Any other construction of §20-1-80 would lead to uncertainty and chaos.

Id. (emphasis added). *Lukich* did not equivocate or limit its holding to the reasons for an annulment order, and instead focused on that point in time when the wife attempted to contract her second marriage. *Id.* Because the wife, as here, failed to annul her first marriage prior to her second marriage, the Supreme Court found it to be bigamous under the statute *as a matter of law*. *Id.* The same is true in the instant case.

The Supreme Court's analysis comports with the general rule set forth in 52 Am. Jur. 2d *Marriage* §57, which is quoted by this Court in *Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006):

> [A]part from statute, bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is contracted, ***even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. 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, it has been

> held that there must be a new ceremony following the termination of the earlier marriage.

(Emphasis added.)

Lukich's insistence that one's first marriage be annulled by a competent court *before* attempting a second marriage is supported by the plain language of the bigamy statute:

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. § 20-1-80. The exceptions listed in the statute would be nonsensical if they applied to an indeterminate point in time *after* the second marriage. The first sentence unequivocally states the general rule that "[a]ll marriages" contracted while one has a living spouse are void. *Id.* The second sentence provides just three exceptions to the general rule. If a person has a spouse living when he contracts marriage to another, the second marriage is only valid if by that time: (1) the first spouse has been absent for five years and it is unknown if he/she is alive; (2) the first marriage was dissolved by divorce; or (3) the first marriage has been declared void by a court order. *Id.*

In the instant case, none of the exceptions in Section 20-1-80 are met. It was undisputed that Hynie and Ahmed obtained a marriage license and were thereafter married on February 17, 1997, and that at the time of her second, attempted marriage to Brown on December 14, 2001, in South Carolina, five years had not elapsed, Hynie had not obtained a divorce, and her first marriage had not been declared void by a court.[24] In

[24] R. p. 256, Joint Stipulation, ¶ 6.

short, Hynie lacked the legal capacity to contract marriage to Brown as a matter of South Carolina law.

Yet, contrary to the plain wording of the bigamy statute, the Supreme Court's mandate in *Lukich*, and the general rule in this country, the lower court adopted Hynie's circular argument that her subsisting 1997 marriage was no impediment to her contracting marriage in 2001 because her first marriage was supposedly bigamous as well.[25] This conclusion was erroneous as a matter of law.

B. Under the *Lukich* Analysis, It Does Not Matter Whether the Subsequently Annulled Marriage Was "Void" or "Voidable."

The trial court's ruling is based on a parsing distinction between later-annulled marriages that were "void" and those that were "voidable"[26]—a distinction found nowhere in the Supreme Court's controlling decision or in Section 20-1-80. In place of the Supreme Court's express holding, the trial court relied on a passing footnote in *Lukich v. Lukich,* 368 S.C. 47, 55 n.2, 627 S.E.2d 754, 758 n.2 (Ct. App. 2006) ("Footnote 2"). Footnote 2 stated this Court's decision did not address those situations in which the annulled first marriage never had legal validity in South Carolina, including "(1) bigamous marriages ...; (2) same sex marriages ...; and (3) marriages of minors under the age of 16...."

The Supreme Court, however, wrote its own opinion in *Lukich* to clarify the analysis, and refrained from making any distinction between annulments of "void" and "voidable" marriages, *because the statute contains no such distinction in determining whether a second marriage is bigamous. Lukich*, 379 S.C. at 592–93, 666

[25] R. pp. 72 and 97, MSJ Order, at pp. 20 and 45; R. p. 115, Order Denying Reconsideration at p. 13.

[26] R. p. 110, Order Denying Reconsideration, at p. 8.

S.E.2d at 907. It is persuasive that the Supreme Court knew of the reservation in Footnote 2 but chose not to adopt it.

Lest there be any remaining doubt, the following passage in *Lukich* demonstrates that its holding applies equally to the case at hand—a first marriage, later annulled for bigamy:

> Moreover, under South Carolina's current view of ***bigamy***, the family court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio*. *Rodman v. Rodman,* 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). ***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 (emphasis added). *Rodman*, cited in *Lukich*, expressly followed *White v. White,* 283 S.C. 348, 323 S.E.2d 521 (1984), and *Splawn v. Splawn,* 311 S.C. 423, 429 S.E.2d 805 (1993), both of which hold that the family court has subject matter jurisdiction to distribute the marital property of a couple whose marriage it has declared void *ab initio* as bigamous. If, as held by the lower court, an annulment for bigamy "related back" such that the marriage was non-existent, the family court would lack such jurisdiction. *Lukich, Rodman, White,* and *Splawn*, however, all reject this circular notion.

Nor is this a new interpretation of the bigamy statute. The Supreme Court in 1993 expressly stated 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*." *Splawn v. Splawn*, 311 S.C. at 425, 429 S.E.2d at 806 (1993). *See also Rodman v. Rodman*, 361 S.C. 291, 296, 604 S.E.2d 399, 401 (Ct. App. 2004) ("There is no legal distinction

between a marriage which is annulled and one terminated by reason of bigamy, as they are both void *ab initio*, or 'from the inception.'").

A bigamous relationship 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. S.C. Code Ann. § 20-1-80. As emphasized by the Supreme Court, "[t]he statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of Section 20-1-80 would lead to uncertainty and chaos." *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

C. Vital Public Policy Concerns Underlie *Lukich* and Section 20-1-80.

The institution of marriage holds a critical place in our society with wide-ranging legal and financial implications throughout our family, trust and estate, and tax laws. The question of whether someone may legally contract a second marriage, when she/he previously contracted marriage to another, is too critical a legal question to be left to subsequent whims and circumstances, uncertain and unknown at the time of the second marriage.

Any other application of the law would be dysfunctional, and permit a person's marital status to see-saw back and forth with the retroactive application of a later annulment order. At one moment in time, a particular marriage is void *ab initio* due to bigamy, but, years later, a void marriage suddenly becomes valid all along due to a subsequent annulment of a prior marriage? It cannot be. The variations are unlimited, and exemplify the uncertainty and "chaos" the Supreme Court sought to preempt in *Lukich*.

Lukich's analysis is both a practical necessity and assures an equitable result. Hynie, at the time she purported to marry Brown, was the only one of the two who knew of her marriage to Ahmed. Before entering into a bigamous marriage with Brown, Hynie had both the moral and legal responsibility to disclose and seek an annulment of her first marriage. It does not matter in the eyes of the law whether her 1997 marriage to Ahmed was "void" or "voidable." What matters is that Hynie's "first marriage shall be declared void by the sentence of a competent court" *before* she attempts to remarry. S.C. Code Ann. § 20-1-80. As Hynie did not divorce Ahmed nor annul their marriage until 2004, she lacked the legal capacity to contract marriage to Brown in 2001. *Id.*

Appellants are entitled to summary judgment that: (1) Hynie lacked the legal capacity to marry Brown on December 14, 2001; (2) their purported marriage was void as bigamous under Section 20-1-80; (3) the April 15, 2004 Annulment Order did not retroactively validate her bigamous 2001 marriage; (4) Brown and Hynie did not marry after the 2004 Annulment Order; and accordingly, (5) Hynie is not Brown's surviving spouse as a matter of law.[27]

II. SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO APPELLANTS BECAUSE HYNIE FAILED TO PRESENT ANY ADMISSIBLE EVIDENCE THAT HER MARRIAGE TO AHMED WAS INVALID.

Whereas the reason for an annulment of a first marriage is legally irrelevant under Section 20-1-80 and *Lukich*, under which this Court can readily dispose of Hynie's spousal claim, it bears mention that the lower court granted Hynie summary judgment on the purported ground that the Hynie/Ahmed Marriage was bigamous without any

[27] R. pp. 255-258, Joint Stipulation, ¶¶ 1, 2, 5, 6, 9, 10, 18.

evidentiary support for its finding. In fact, the only evidence before the court compelled a finding that the Hynie/Ahmed Marriage was *not* bigamous.

A. Hynie Bears the Burden of Proving She is Decedent's "Surviving Spouse."

Hynie has the burden of proving she is 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). Hynie's production of a marriage certificate, showing that she and Brown engaged in a marriage ceremony on December 14, 2001, does not relieve her ultimate burden of proof.

The party challenging the validity of a marriage bears the burden of proof. *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992) *citing Yarbrough v. Yarbrough*, 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984). Thus, Appellants bear the burden of establishing the Hynie/Brown Marriage is invalid. This burden is discharged by the Joint Stipulation, which shows Hynie entered into a marriage with Ahmed on February 17, 1997.[28] While it is true that when evidence of conflicting marriages are presented "a presumption arises that the former marriage was dissolved by death or divorce prior to the second marriage,"[29] that presumption was easily rebutted in this case.

First, Hynie stipulated that no other occurrence ended the marriage between her and Ahmed,[30] and in December 2003 she therefore filed her Annulment Action. The parties' Joint Stipulation further rebuts that Hynie's marriage was dissolved by divorce.[31]

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[28] R. pp. 269-270, Joint Stipulation, Exhibit 4.

[29] *Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18.

[30] R. p. 256, Joint Stipulation, ¶ 6.

[31] R. p. 256, *Id.*, ¶ 6 states: "From the February 17, 1997 marriage ceremony between Petitioner and Javed Ahmed through the December 14, 2001 marriage ceremony between

Second, any notion that Ahmed died prior to December 14, 2001, was also readily overcome. The September 30, 2014 affidavit of attorney David Bell provided detailed testimony that he spoke to Ahmed in February 2008 and engaged an attorney in Pakistan who interviewed Ahmed later that same month.[32]

Having overcome the presumption that the Hynie/Ahmed Marriage was dissolved by death or divorce, a 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*, 280 S.C. 546, 550, 314 S.E.2d 16, 18. As Hynie challenges the validity of the Hynie/Ahmed Marriage on grounds of alleged bigamy, she bears the burden of presenting *admissible* evidence that Ahmed already was married on February 17, 1997—a burden she entirely failed to meet. *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 lower court made a fundamental error of law in misapplying the burdens of proof.[33]

B. The Findings of Fact in the Annulment Order Are Inadmissible Hearsay.

The trial court also committed error in relying upon the Annulment Order for the truth of the matters asserted in its findings of fact because in South Carolina such findings are inadmissible hearsay not subject to an exception. The definition of "hearsay" under the South Carolina Rules of Evidence is the same as in the Federal Rules of Evidence: an out-of-court statement by the declarant that is offered to prove the truth of

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Petitioner and Decedent, no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between Petitioner and Javed Ahmed."

[32] R. pp. 645-647, LSA's Memo in Support, Exhibit 2.

[33] R. p. 96, MSJ Order, at p. 44.

the matter asserted. *Compare* Rule 801(c), SCRE, *with* Rule 801(c), FRE. South Carolina courts thus often look to and adopt the federal courts' interpretation of the Rules of Evidence. *See State v. Broadnax*, 414 S.C. 468, 477, 779 S.E.2d 789, 793 (2015), *reh'g granted* (Sept. 8, 2015) ("[W]e note that we routinely look to the federal interpretation of the Rules of Evidence to guide us in our interpretation of our own Rules of Evidence.").

In *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993), the Fourth Circuit considered whether the South Carolina district court erred in allowing into evidence a state court order, *involving the same parties*, to prove the facts therein. The Fourth Circuit found that the order was inadmissible hearsay that did not fall within any FRE exception. *Id.* at 417. Although the plaintiffs argued the order was properly admitted under the public record exception of Rule 803(8)(C), FRE, the Fourth Circuit disagreed, stating, "Rule 803(8)(C), on its face, does not apply to judicial findings of fact." *Id.* It further found that at common law, a judgment from another case could not be admitted as evidence of the facts set forth therein. *Id.* The Fourth Circuit vacated the judgment of the South Carolina district court, holding that it abused its discretion in allowing the state court order's findings of fact to be admitted at trial. *Id.* at 418.

The South Carolina Supreme Court has adopted the holding of *Nipper* 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). In *Mizell*, the Supreme Court considered whether the introduction into evidence of a jury interrogatory from another case to impeach an expert witness in the current case was reversible error. *Id.* at 398, 570 S.E.2d at 179. Relying on

Nipper, the Supreme Court found the interrogatory to be inadmissible hearsay, reversed the Court of Appeals and remanded the case for a new trial. *Id.* at 402, 570 S.E.2d at 182.

In *Hill v. USA Truck, Inc.*, C.A. No. 8:06-CV-1010-GRA, 2007 WL 1574545, *4 (D.S.C. May 30, 2007), the South Carolina district court considered whether a new trial should be granted because the trial court admitted a probate court order from a different case to prove the truth of its findings of fact. The district court, citing *Nipper*, found that the probate court order was hearsay that did not fall under the public records exception, but that ultimately the error was harmless as other admissible evidence proved the same facts. *Id.* at *6.

In the instant case, however, the trial court based its finding that the Hynie/Ahmed Marriage was bigamous *solely* on the findings of fact in the Annulment Order—no other evidence was presented to support Hynie's contention that Ahmed was already married. Under the above line of cases beginning with *Nipper*, the findings of fact in the Family Court proceeding were inadmissible hearsay; thus, it was plainly erroneous for the trial court to admit and rely upon the Annulment Order for this purpose. Without any evidence whatsoever to support an independent finding of fact, the trial court had no basis to conclude that Hynie's first marriage was bigamous.

C. The Admissible Evidence Before the Trial Court Established that Ahmed Was Not Married When He Married Hynie in 1997.

The record before the trial court contains the sworn testimony of Javed Ahmed that he was *not* married when he married Hynie: Ahmed's own sworn, notarized statement that "I am not presently married" on the couple's Texas Marriage License

Application.[34] To obtain a marriage license in Texas both parties to a marriage must swear before the County Clerk of Harris County, Texas that they were not already married. Their marriage license application is then reported to the Bureau of Vital Statistics of the State Department of Health.[35] As the Hynie/Ahmed Marriage License Application is a sworn statement and a certified public record, it is admissible in this proceeding. S.C. Code Ann. § 19-5-10; Rules 803(8), 902(4) and 1005, SCRE.

In contrast, the sole "evidence" before the trial court that Ahmed was already married on February 17, 1997, is the "finding" in the Annulment Order, which was based solely on Hynie's uncorroborated self-serving assertion. In fact, in the 19 years since the Hynie/Ahmed Marriage, in the 14 years since the Hynie/Brown Marriage, in the 12 years since Hynie filed her Annulment Action, and in the 9 years since she filed this case, Hynie has not provided any *admissible evidence* to support her convenient, *post-hoc* assertion that her marriage to Ahmed was bigamous.

The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). As to an issue on which the non-moving party bears the burden, the moving party need only point to the lack of evidence supporting the non-movant's position. *Id.* Then, the non-movant must come forward with specific facts and evidence that indicates there is a genuine issue of material fact. *Id. See also Fairfield County Sch. Dist. Bd. of Trs. v. State,* 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014)

[34] R. p. 648, Application for Marriage License attached as Exhibit 3 to LSA Memorandum in Support.

[35] *See* http://www.dshs.state.tx.us/vs/default.shtm (last visited May 10, 2016).

("[T]he non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence . . . in support of its proposition.")

Thus, even if the purported basis for Hynie's belated annulment of the Hynie/Ahmed marriage were relevant under *Lukich* (it is not), Hynie would have had to present some admissible evidence to support her bald assertion that her marriage to Ahmed was bigamous. *See Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Because Hynie utterly failed to provide any admissible evidence to support her motion and to overcome Appellants' motion for summary judgment, the trial court should have granted summary judgment to Appellants.

III. THE TRIAL COURT COMMITTED ERROR IN HOLDING THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ANNULMENT ORDER WERE PRECLUSIVE AS TO APPELLANTS.

A. Because the Annulment Order is a Judgment *In Rem*, its Findings Are Not Binding on Non-Parties.

As the circuit court rightly acknowledged, "[t]here is no question that a judgment annulling a marriage is a judgment in rem."[36] *See Carnie v. Carnie,* 262 S.C. 471, 167 S.E.2d 297 (1969); 4 S.C. Jur. *Action* § 5. The terms "in personam" and "in rem" distinguish between actions that seek a personal judgment against the defendant ("in personam") and judgments which operates only upon a specific property *or status* ("in rem"). *See* 4 S.C. Jur. *Action* § 5; C.J.S., *Actions* § 69; 1 Am. Jur. 2d, *Actions* §§ 39, 40. "Although a valid judgment in rem is binding on all the world as to the existence of *a status* which is the subject of the action, *it is not conclusive as to a fact upon which the judgment is based in any subsequent action* . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." Restatement (First) of

[36] R. p. 87, MSJ Order, at 35.

Judgments § 73 (1942), cmt. c (emphasis added); *see also id.*, at § 74(2) ("A judgment in such [in rem] proceeding ... is not conclusive as to the fact upon which the judgment is based except as to persons who have actually litigated the question of the existence of the fact.")

The trial court, in declaring that that the Annulment Order is "binding on all the world," misconstrued this essential distinction.[37] The U.S. Supreme Court expressed the distinction as follows: "Establishing 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 recognize that the Annulment Order's findings of fact are not binding in this case does not mean, as the lower court misunderstood, that the Annulment Order must be re-opened, undone, or disregarded.[38] The *in rem* Annulment Order binds "all the world" as to the marital status of Hynie and Ahmed *as of April 15, 2004*, the date the order was filed. However, the Annulment Order's *findings of fact and conclusions of law* are not binding on those who were not parties to that proceeding, such as the Decedent and the Appellants.

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[37] R. P. 97, MSJ Order, at 45.

[38] R. pp. 72-80, MSJ Order, at 20–28.

The trial court committed reversible error in concluding that the findings and conclusions in the Annulment Order bound Brown and Appellants.[39]

B. Appellants Are Not Collaterally Estopped From Contesting the Findings of Fact and Conclusions of Law in the Annulment Order.

The trial court erroneously held that the Decedent, and by extension Appellants, were collaterally estopped from challenging the findings of fact and conclusions of law in the Annulment Order.[40]

The doctrine of collateral estoppel or issue preclusion prevents *a party* to a prior action from re-litigating an issue that was decided in that action. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). For collateral estoppel to apply, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Id.* Thus only a party to an action who had a "full and fair opportunity to previously litigate the issue" therein may be collaterally estopped by such action. *Id.* Finally, collateral estoppel should not be rigidly or mechanically applied, and where it would result in unfairness, the court may decline to apply it. *Id.*

1. The Issue of Ahmed's Alleged Bigamy Was Not "Actually Litigated."

The Annulment Order was essentially granted by default, and the issue of Ahmed's alleged bigamy was never actually litigated. Thus, the first element of collateral estoppel was never met.

The Fourth Circuit has cautioned, regarding collateral estoppel, that courts should determine "with particular care" whether a matter has been "actually litigated" in the

[39] R. pp. 80-86, MSJ Order, at 28–34.

[40] R. pp. 86-97, MSJ Order, at 34–45.

prior action. *In re Raynor,* 922 F.2d 1146, 1148 (4th Cir. 1991) *(quoting Combs v. Richardson,* 838 F.2d 112, 113 (4th Cir. 1988)). In South Carolina, a *default* judgment cannot support collateral estoppel—not even as to a party to the case—because the issues were not actually litigated. *See State v. Bacote*, 331 S.C. 328, 330–31, 503 S.E.2d 161, 162–63 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation."); *Kunst v. Loree*, 404 S.C. 649, 658, 746 S.E.2d 360, 364 (Ct. App. 2013) ("Accordingly, we hold the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met.").[41]

Ahmed was served by publication locally.[42] "Javed Ahmed failed to appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action."[43] As a result, the only testimony at the perfunctory Family Court hearing was Hynie's self-serving testimony. Because Ahmed was not present to oppose her assertions, the Family Court accepted them, granting the annulment by default.[44]

This is more than sufficient to constitute a judgment by default under Rule 55, SCRCP, which states that a default occurs "[w]hen a party against whom a judgment for

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[41] Courts in other jurisdictions are in accord. *See e.g. In re Kalita,* 202 B.R. 889, 914 (Bankr. W.D. Mich. 1996) (holding that because a party did not file an answer, the facts were never actually litigated, thus, the ensuing default judgment is not entitled to collateral estoppel effect).

[42] R. pp. 256-257, Joint Stipulation, ¶7, ¶ 17.

[43] R. p. 257, Joint Stipulation, ¶ 17.

[44] Even Hynie's counsel noted this at the annulment hearing (R. p 256, *Id.*, ¶ 8; R. p. 300, Exhibit 13 to Joint Stipulation, 4:6–8).

affirmative relief is sought has failed to plead or otherwise defend." *See also Black's Law Dictionary* 480 (9th ed. 2009) (defining "default judgment" as "entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim."). That Hynie did not formally move to place Ahmed in default is of little consequence as the entry of default is simply "official recognition" of a defendant's "failure to appear or otherwise defend." *Beckham v. Durant,* 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989). For purposes of estoppel, the defendant is still "in default." *See RRR, Inc. v. Toggas,* 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).

The trial court erroneously held that the *findings of fact and conclusions of law* of the Annulment Order bound the Decedent and Appellants when such would not even bind a named party to that action—the absentee Ahmed—in a subsequent proceeding, under settled principles of law.

In addition, it appears that Ahmed was not even properly served with Hynie's summons and complaint. Ahmed was purportedly served by publication when Mr. Tannell, Hynie's process server in Texas, allegedly was unable to locate Ahmed.[45] The ensuing service by publication was buried in the Houston Chronical on page 2 of the classified section. *Id.* Mr. Tannell's affidavit requesting publication does not reflect the requisite due diligence to locate Ahmed, merely that he did not find a valid address on a "national" database, and that "[t]he results were inconclusive."[46] He says nothing about searching U.S. immigration databases or trying to locate Ahmed in Pakistan. *Id.*

[45] R. p. 256, Joint Stipulation, ¶ 7; R. pp. 274-289, Exhibits 6, 7, 8 and 9.

[46] R. p. 256, *Id.*, ¶ 7; R. pp. 283-289, Exhibit 9.

Hynie knew Ahmed was from Pakistan,[47] but she made no effort to locate and serve Ahmed pursuant to Rule 4(h)(5), SCRCP, for foreign service of process.[48] Ahmed was readily located in 2008, however, by an attorney in this action.[49]

In *Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324 (1924), the South Carolina Supreme Court determined that an affidavit requesting publication was "fatally defective … on its face, in that it does not show that diligence was used to find the defendant." As courts favor decisions on the merits, strict compliance with the rules governing service by publication is required. *Id.* The Order for Publication in the hasty Hynie/Ahmed Annulment Action was secured without the requisite showing of due diligence, rendering such service defective.

2. As Neither Decedent Nor Appellants Were Parties to the Annulment Action Nor in Privity to a Party, They Lacked a Full and Fair Opportunity to Litigate Whether the Hynie/Ahmed Marriage Was Bigamous.

In South Carolina, as in virtually every jurisdiction, collateral estoppel only applies to *parties* to the prior action and their privies. *See Carman v. South Carolina Alcoholic Beverage Control Com'n,* 317 S.C. 1, 451, S.E.2d 383 (1994); *Roberts v. Recovery Bureau, Inc.,* 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (holding re-litigation of issues is "precluded as to parties and their privies in any subsequent action based upon different claim"). The only named parties in the Ahmed Annulment Action were Hynie and Ahmed.

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[47] R. p. 256, *Id.*, ¶ 8, R. p. 303, Exhibit 13, 7:7–9.

[48] Per Rule 2 of the South Carolina Family Court Rules, the SCRCP apply to Family Court actions.

[49] R. pp. 645-647, Affidavit of David Bell, Esq., 9/30/2014, attached as Exhibit 2 to LSA's Memo in Support.

Decedent and Appellants were not parties to the Family Court action[50], *nor could they have intervened* such that their interests were fairly represented. *See Ex parte GEICO,* 373 S.C. 132, 644 S.E.2d 699 (2007) (holding that a third party with an indirect interest in the validity of a marriage does not have standing to intervene in a family court action); *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (holding that only the parties to the marriage have a sufficient interest in the subject matter of the litigation to be parties to a divorce action); *Powell ex rel. Kelley v. Bank of America,* 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (holding that a third party does not have standing to intervene); *Lukich v. Lukich,* 368 S.C. at 51, 627 S.E.2d at 756 (Ct. App. 2006) (Trial court "denied [second husband's] motion to intervene [in annulment action], finding he did not have standing because he was not a party to the [first] marriage.").

As to whether Decedent was "in privity" with Hynie regarding the Annulment Action, South Carolina courts strictly construe "privity." As held by this Court:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. ***Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.***

Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) (emphasis added, citations omitted). *See also Wyndam v. Lewis*, 292 S.C. 6, 8, 354 S.E.2d 578, 579–80 (Ct. App. 1987).

Under this standard, Brown was clearly not in privity with Hynie regarding the Annulment Action due to his alleged "interest" in the outcome. *Carrigg v. Cannon*, 347

[50] R. p. 257, Joint Stipulation, ¶¶ 12, 15, and 16; R. pp. 297-313, Exhibit 13.

S.C. 75, 82, 552 S.E.2d 767, 771 (Ct. App. 2001). Decedent's legal interests (or by extension, those of the Appellants) were never litigated in the action, nor even addressed.

In *Carolina Renewal*, this Court found that a party may be estopped from litigating an issue if its interests are *identical* to those of a party to a prior action where the issue was *actually litigated.* 385 S.C. at 556, 684 S.E.2d at 782. In that case, a company filed a breach of contract action, but this Court found an earlier adjudication involving *the same company's sole officer and sole shareholder* was dispositive. *Id.* at 556, 684 S.E.2d at 782–83. This Court found there was no prejudice in holding the company to the prior determination as the company's interests were identical and in very close proximity to those of its *sole* officer and owner. *Id.* Here, by contrast, the Decedent's and Appellants' interests are neither identical to nor closely aligned with any party to the Annulment Action.

In *Palm v. General Painting Co., Inc.,* 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988), this Court affirmed the trial court's ruling that an alleged child of the decedent was not estopped from re-litigating her parentage despite *two* previous orders finding her illegitimate. *Id.* at 44, 370 S.E.2d at 465. The Court held that even though the child's paternity had already been determined *twice* before, she was <u>not</u> estopped from challenging paternity in a *third* action because she was not a party to those actions nor in privity to her parents. *Id.*

The trial court erroneously found without support that the Decedent exercised control over the Hynie/Ahmed Annulment Action, and on that basis that he was in privity with Hynie or somehow estopped from litigating any findings in the Annulment Order.[51]

[51] R. pp. 84-86, MSJ Order, at 32–34.

In keeping with the policy rationale that only persons who had *a full and fair opportunity to litigate an issue* may be barred by collateral estoppel, the Fourth Circuit has held that a non-party may be estopped from litigating an issue in a later proceeding only "if (1) the person had a direct financial or proprietary interest in the prior litigation; and (2) the person assumed control over the prior litigation." *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1312 (4th Cir. 1987). As to the second prong, the court explained:

> To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain [appellate] review. . . ***It is not sufficient, however, that the person merely contributed funds or advice in support of the party, [or] supplied counsel to the party***, or appeared as amicus curiae.

Id. at 1313 *(citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)) (emphasis added). The Court found that the appellant did not exercise control over the prior litigation because it did not have "any effective choice as to the legal theories and proofs advanced in the prior suit, and there is no suggestion that [it] had control over whether or not to appeal the judgment in that case." *Id.*

None of these factors are present here either. Brown did not participate in the Family Court hearing or in any other aspect of the Hynie/Ahmed Annulment Action, was not a client of Hynie's attorney in that action,[52] and there is no evidence in the record to show that Brown had any choice as to "the legal theories and proofs to be advanced in behalf of" Hynie.[53] *Id.* at 1312.

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[52] R. p. 257, Joint Stipulation, ¶¶ 12, 15 and 16; R. pp. 297-313, Exhibit 13.

[53] In fact, the evidence in the record shows that Hynie's counsel in the Annulment Action did not provide a filed copy of the complaint to Decedent's counsel until nearly two months after it had been filed (R. p. 257, Joint Stipulation, at ¶14; R. pp. 314-328, Exhibit 14). The record also indicates that Decedent's attorney was not informed of the final hearing until *after* the Annulment Order had been filed. *Id.*

The lower court's holding that Brown would be estopped from contesting the findings and conclusions of the Annulment Order mischaracterizes the facts and misapplies the law. The court pointed to the fact that Brown paid Hynie's legal fees.[54] The mere payment of legal fees, however, does not place one in privity with a party to a litigation, nor demonstrate control over the litigation. *See Virginia Hosp. Ass'n*, 830 F.2d at 1313; *Martin v. American Bancorp. Retirement Plan,* 407 F.3d 643, 652–53 (4th Cir. 2005) (stating the mere fact that parties to a second action helped finance a party in a prior action "is not sufficient... to warrant the application of res judicata") *citing General Foods Corp. v. Mass. Dept. of Public Health,* 648 F.2d 784, 788 (1st Cir. 1981) (noting the general rule that "a non-party is not bound by a judgment *merely* because he paid the expenses of a litigation"); *See also McKeown v. Wheat,* 231 F.2d 540, 543 (5th Cir. 1956); Restatement (Second) of Judgments § 39, cmt. c (1982) ("It is not sufficient that the [non-party] merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae.").

Under Rule 1.7 of the South Carolina Rules of Professional Conduct the payment of a party's legal fees by a non-party cannot give the non-party control over the party's litigation. Rule 1.7 warns lawyers about the conflicts of interest that arise when a non-party pays the legal fees of the represented party. Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.7, comment 11 ("If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee . . . ."). Here, the conflicts were even more apparent because Brown was adverse to

[54] R. p. 86, MSJ Order, at 34.

Hynie in his own annulment action filed on January 29, 2004 in Aiken County, South Carolina, shortly after Hynie filed her annulment action.[55]

It is well established that the doctrine of collateral estoppel only bars a party from litigating an issue when that party had a full and fair opportunity to litigate the issue in a prior action. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. In the unlikely event this Court finds Hynie's *post-hoc* bigamy allegations to be relevant under *Lukich*, it would be manifestly unjust to preclude Appellants from litigating this disputed issue of fact when they have never been afforded the full and fair opportunity to do so.

3. Even if the Elements of Collateral Estoppel Were Present, Application of the Doctrine is Discretionary and Should Not be Applied Where Inequitable.

"Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg v. Cannon,* 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) (*citing State v. Bacote,* 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)), *see also Carolina Renewal, Inc.*, 385 S.C. at 554, 684 S.E.2d at 782. Collateral estoppel should be applied "sparingly, with clear regard for the facts of the particular case." *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004) (emphasis added). "[E]stoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." *Id.*

"[R]es judicata will [also] not be applied where it will contravene other important public policies; the court must weigh the competing public policies." *Johns v. Johns*, 309 S.C. 199, 203 (Ct. App. 1992) (holding that *the public policy against*

[55] R. pp. 256-258, Joint Stipulation, ¶¶ 7 and 19.

bigamous marriages overrides the policy concerns of preclusion doctrines). As in *Johns*, public policy favors allowing Brown's heirs to challenge Hynie's bigamous marriage to him. This case is a clear example where non-parties have not been given a fair opportunity to litigate their own interests. It would be inequitable to bar Appellants from challenging the hasty findings of a prior action in which the Decedent was not a named party, had no right to intervene, did not control the proceedings, and his interests were not heard or adjudicated.

For all of the foregoing reasons, the Decedent, and by extension, Appellants were not bound by the findings of fact or conclusions of law in the Annulment Order.

IV. THE TRIAL COURT ERRED IN STAYING DISCOVERY AND GRANTING HYNIE SUMMARY JUDGMENT DESPITE GENUINE ISSUES OF MATERIAL FACT

A. The Trial Court Committed Error in Barring Appellants From Taking Discovery of Hynie.

On March 31, 2014, Hynie asked the trial court to stay discovery and protect her from being deposed, answering written discovery, or producing her Diaries. Her counsel argued: "[She] is either married to James Brown or she isn't...Whether she's married or not really depends on the law and not the facts."[56] In response, the Court ruled that if Hynie asserted disputed facts, "summary judgment goes out the window."[57] "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."[58]

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[56] R. pp. 631-633, March 31, 2014 Hearing Transcript, pp. 54-56, attached as Exhibit 1 to LSA's Memo in Support.

[57] *Id.*

[58] R. p. 638, *Id.*, at p. 61.

Based upon Hynie's representations, the trial court barred the parties from conducting *any* discovery pending its ruling on her motion for summary judgment.[59] Six months later, Hynie filed two self-serving affidavits in support of her summary judgment motion, alleging a host of disputed facts[60] that the trial court appeared to rely upon in ruling in her favor.[61]

The circuit court also sealed Hynie's handwritten Diaries[62] and did not make them available until *after* granting Hynie summary judgment. The trial court erred in granting Hynie's motion for summary judgment without allowing Appellants to depose and take written discovery of Hynie and to use her Diaries.

If a trial court considers a motion for summary judgment before discovery has taken place, it is axiomatic that the court should not grant such motion where the non-moving party could adduce contrary evidence through discovery. "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" *Schmidt v. Courtney,* 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (internal citation omitted). *See also Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). This is even more so where, as here, the trial court affirmatively *stayed all discovery* prior to entertaining Hynie's summary judgment and prevented the use of potentially relevant evidence that may be adverse to the moving party.

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[59] R. p. 56, MSJ Order, at p. 4.

[60] R. pp. 351-497, *See generally,* Hynie's Initial Memorandum

[61] R. pp. 62-69, MSJ Order, at 10–17.

[62] R. pp. 638-639, *See* March 31, 2014 hearing transcript, pp. 61–62, attached as Exhibit 1 to LSA's Memo in Support.

The Appellants had an absolute right to depose and cross-examine Hynie with her Diaries in hand, and to take written discovery of Hynie, prior to the Court hearing her motion for summary judgment, but were improperly denied the opportunity for discovery.

B. At a Minimum, Disputed Issues of Material Fact Prevented Summary Judgment in Hynie's Favor.

The lower court and Hynie agreed that unless her motion for summary judgment could be determined solely upon the parties' Joint Stipulation, the motion must be denied.[63] The court relied, however, upon facts outside of the Joint Stipulation, and that were contested by Appellants.

The undisputed facts in the Joint Stipulation pertaining to the question of whether Hynie had the legal capacity to marry Brown on December 14, 2001, are limited to:

- On February 17, 1997, Hynie participated in a marriage ceremony with Javed Ahmed;
- On December 14, 2001, Hynie participated in a marriage ceremony with Brown;
- From February 17, 1997, to December 14, 2001, no court order had been entered to end Hynie's marriage to Ahmed;
- On April 15, 2004, Hynie obtained the Annulment Order from the Charleston County Family Court; and
- Hynie has no purported evidence that Ahmed had other wives when he married her on February 17, 1997 other than her own assertions that Ahmed told her this.[64]

As discussed in Section I above, these undisputed facts squarely demonstrate that Hynie's purported second marriage was bigamous under Section 20-1-80 and the South

[63] R. pp. 2467-2469, Nov. 24, 2014 hearing transcript, 4:13–6:5.

[64] R. pp. 255-258, Joint Stipulation, at pp. 2–5.

Carolina Supreme Court's mandate in *Lukich* because Hynie's first marriage was not dissolved prior to her attempted second marriage. Accordingly, this Court can and should grant Appellants summary judgment on this issue as matter of law.

The converse, however, is not true—summary judgment *could not be granted in Hynie's favor* based on the parties' Joint Stipulation. In order for the trial court to have decided as a matter of law that Hynie is Brown's surviving spouse, it would have had to conclude that there is no triable issue of fact bearing on whether Hynie was married to Ahmed when she tried to marry Brown on December 14, 2001. Without limitation, the following evidence before the trial court raised genuine issues of material fact precluding summary judgment for Hynie:

- Javed Ahmed swore under oath in the 1997 Hynie/Ahmed Marriage License Application, signed by Hynie, that he was not married.[65]
- Hynie stipulated that she cannot identify a single person who can testify that Ahmed was married to another when she and Ahmed participated in the 1997 marriage ceremony.[66]
- In the 19 years since her marriage to Ahmed, Hynie has not provided any admissible evidence whatsoever that Ahmed was already married.
- Hynie agreed she was not Brown's spouse in the Brown/Hynie Consent Order which settled the Brown/Hynie Annulment Action.[67]

In the event summary judgment is not granted to Appellants as a matter of law pursuant to Sections I and II above, the above evidence[68], especially when viewed in the light most

[65] R. p. 648, *See* Application for Marriage License, attached as Exhibit 3 to LSA's Memo in Support.

[65] R. p. 257, Joint Stipulation, ¶ 10.

[67] R. pp. 349-350, Joint Stipulation, Exhibit 19.

favorable to Appellants—the non-movants—was more than sufficient to raise a triable issue of fact as to whether the Hynie/Ahmed Marriage was bigamous, as shown below.

1. Negative Inferences Are Drawn From Hynie's Consistent Failure to Present Any Evidence That Ahmed Was Already Married.

If, as Hynie asserted, Ahmed had *three* or more wives in Pakistan when he married Hynie, records of such marriages surely would exist. Pakistan is a modern country with a well-developed regulatory infrastructure and data collection systems. In Pakistan, as here, to be legally married one must obtain a marriage license, which is called a "Nikah Nama."[69] Pursuant to the Muslim Family Law Ordinance of 1961, the Nikah Nama must be registered with the Nikah Registrar at the local Union Council. *Id.* Such records can be obtained from NADRA and/or the Karachi Union Councils via multiple internet services[70] or attorneys in Pakistan. If they existed, Hynie's qualified legal team would certainly have searched for, obtained, and presented such records: (1) in support of the 2004 Hynie/Ahmed Annulment Action; (2) in opposition to the 2004 Brown/Hynie Annulment Action, and (3) in support of Hynie's current summary judgment motion under review. Instead, at each juncture Hynie failed to present any evidence supporting her self-serving assertion.

2. The 1997 Hynie/Ahmed Marriage License Application Evidences That Ahmed Was Not Already Married.

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[68] Appellants, in fairness, should not even be confined to this evidence in assessing whether triable issues of fact precluded Hynie's motion because the trial court barred them from taking discovery on the issues surrounding the Hynie/Ahmed Marriage.

[69] *Pakistan: Information on Marriage Registrations, Including Mixed Marriages*, Immigration and Refugee Board of Canada—Responses to Information Requests, PAK104253E, 2, §3 (Jan. 14, 2013), available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/03/04/PAK104253.E.pdf (last visited May 7, 2016).

[70] *See* http://inp.org.pk/nikkah-nama-registration; http://mamooinpakistan.com/services/marriage-certificate/.

As discussed in Section II above, Ahmed's own sworn, notarized statement that "I am not presently married" on the Texas Marriage License Application underlying his 1997 marriage to Hynie is admissible evidence that Hynie's 1997 marriage to him was valid and that her 2001 marriage to Brown was bigamous. S.C. Code Ann. § 19-5-10; Rules 803(8), 902(4) and 1005, SCRE.

3. The Brown/Hynie Consent Order Further Evidences She Was Not Legally Married to Brown.

The Brown/Hynie Consent Order resulted from and effectively settled the Brown/Hynie Annulment Action and Hynie's counterclaim therein for divorce. The Consent Order expressly provides: "Defendant [Hynie] agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff [Brown], both now and in the future."[71] There would logically and legally be no reason to include such language in the Consent Order if Brown and Hynie were married.

Brown filed the Brown/Hynie Annulment Action on January 29, 2004, on the grounds that their marriage was bigamous shortly after Hynie filed for annulment of her marriage to Ahmed.[72] On May 4, 2004, soon after Hynie obtained her annulment of the Hynie/Ahmend Marriage by default, Brown amended his complaint re-asserting Hynie's bigamy.[73] On July 6, 2004, Brown similarly replied to Hynie's counterclaim

[71] R. pp. 349-350, Joint Stipulation, Exhibit 19.

[72] R. p. 330, *Id.*, Exhibit 15, ¶3 ("Defendant was never legally divorced from her previous husband prior to entering into a marital contract with the Plaintiff. As such, this marriage is void *ab initio*.").

[73] R. p. 333, *Id.*, Exhibit 16, ¶5 ("At the time of the marriage ceremony on December 14, 2001 in Aiken County, South Carolina, Defendant was still legally married to Javed Ahmed and by way of such legal impediment was legally barred from entering into a marriage to Plaintiff . . .").

for divorce.[74] None of these documented actions by Brown comport with Hynie's unsupported assertions, accepted by the trial court that Brown controlled and supported the Hynie/Ahmed Annulment Action. Instead, Brown continued to litigate with Hynie until resolving their relationship in the Hynie/Brown Consent Order. In that Order, Hynie expressly waived any claim to even a common law marriage with Brown.

CONCLUSION

The trial court erred in granting Hynie and denying Appellants summary judgment. Based on the Joint Stipulation of Facts, Hynie is not James Brown's "surviving spouse" because the Hynie/Brown Marriage was bigamous as a matter of law under Section 20-1-80 and *Lukich*, *supra*. The trial court misconstrued both the statute and controlling precedent. Notwithstanding that the purported reason for Hynie's belated annulment is irrelevant under *Lukich*, the trial court erroneously relied on and gave preclusive effect to the findings of fact in the Hynie/Ahmed Annulment Order, contrary to well-established South Carolina law. Thus Hynie completely failed to carry her burden on summary judgment, as there was no admissible evidence in the record to support her self-serving allegation that her marriage to Ahmed was bigamous. Finally, and again, to the extent Hynie's bigamy assertion is even relevant, obvious triable issues of fact precluded the trial court from granting summary judgment to Hynie on this basis; an error compounded by the court improperly preventing Appellants from deposing and taking written discovery of Hynie.

Appellants therefore respectfully request that this Court (i) find that summary judgment was entered erroneously in favor of Hynie, and (ii) grant summary judgment to

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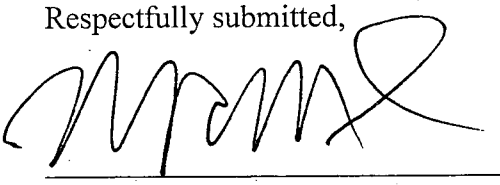
[74] R. p. 347, *Id.*, Exhibit 18, ¶4 ("Defendant remained married to this man at the time she entered into the marriage to Plaintiff.").

Appellants because, as a matter of law, Hynie lacked the legal capacity to contract marriage with the Decedent on December 14, 2001.

[SIGNATURE PAGE FOLLOWS]

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.

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