THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002417

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 APPELLANT TERRY BROWN

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STATEMENT OF THE CASE

The issues before this Court are the result of the Limited Special Administrator's ("LSA") motion to modify protective orders issued by the lower court in 2008 allowing the LSA to view Tommie Rae Hynie Brown's ("Ms. Hynie") writings ("Diaries") thereby allowing the parties use of the same in litigating the underlying undue influence and trust challenges. At a hearing on the LSA's motion ("March 31, 2014 Hearing"), Ms. Hynie's attorneys argued against producing her Diaries or the need for further discovery and, as an alternative, stated they would file a motion for partial summary judgment proving as a matter of law she was Mr. Brown's "surviving spouse", without reference to any disputed fact, including whatever evidence might be contained in her

Diaries.[1]

As opposed to arguing that Ms. Hynie's marriage to Javed Ahmed ("Ahmed") was factually bigamous, Ms. Hynie's attorneys contended she was entitled to a ruling that she is Mr. Brown's surviving spouse based solely upon the Charleston Family Court's April 15, 2004 annulment of Petitioner's February 1997 marriage to Javed Ahmed ("Ahmed Annulment Action").[2] Ms. Hynie argued the April 15, 2004 Order ("Ahmed Annulment Order")[3] is "binding on the world" and she is, accordingly, entitled to summary judgment based entirely "on the law and not the facts."[4] Ms. Hynie sought stay of discovery in these cases pending a summary judgment motion limited to the "surviving spouse" issue. The Court allowed Ms. Hynie to file such motion and granted stay of discovery, but ruled if her motion turned upon any contested facts or involved factual issues "the summary judgment goes out the window."[5] Around April 24, 2014, she filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for partial summary judgment. The parties entered into a joint stipulation of facts with exhibits on September 5, 2014. On September 12, 2014, Ms. Hynie filed a brief supporting her motion for partial summary judgment. On October 3, 2014, Appellants filed briefs in opposition. On October 17, 2014, Ms. Hynie filed a reply. On October 31, 2014, the LSA, Terry Brown and Jeannette Mitchell each filed a reply. On November 24, 2014, the lower court held a hearing on the respective

[1] March 31, 2014 Hearing Transcript, pp. 54-61. (R., Vol. VII, pp. 2454-2462)
[2] Joint Stipulation of Facts, ¶ 7, Exhibits 5 through 12. (R., Vol. I, pp. 254-296)
[3] Id. at Exhibit 12. (R., Vol., I, p. 293-296)
[4] March 31, 2014 Hearing Transcript, p. 54. (R., Vol. VII, pp. 2454-2455)
[5] Id. at p. 60. (R., Vol. VII, p. 2461)

motions. All parties were present and represented by counsel. The Court entered its Order granting Ms. Hynie summary judgment on January 23, 2015 ("Final Order"). Appellant filed a timely Motion to Alter, Amend and Reconsider the Final Order on February 2, 2015. On February 19, 2015, the South Carolina Supreme Court stayed all proceedings in this matter. On June 10, 2015, the stay was lifted. On June 18, 2015, the lower court held a status conference and set a July 1, 2015 hearing. At the July 1, 2015 hearing on the Appellants' Motions to Alter, Amend or Reconsider, the lower court directed the parties to brief and argue Lukich.[6] The parties filed briefs on July 30, 2015. The lower court issued an Order denying the Motions to Alter, Amend or Reconsider, which was entered on October 26, 2015. Appellant timely filed a Notice of Appeal on November 24, 2015.

STATEMENT OF FACTS

Ms. Hynie is a bigamist. When she married James Brown, she was legally married to Ahmed. It is undisputed that Ms. Hynie married Ahmed on February 17, 1997 ("Hynie-Ahmed Marriage").[7] Ms. Hynie married James Brown on December 14, 2001.[8] From the 1997 marriage to Ahmed and the 2001 marriage to James Brown, she stipulated that "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 her and Ahmed."[9] She further stipulated that she "cannot identify a single person who can testify that Ahmed was married or not to another person when Tommie Rae and Ahmed

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[6] Lukich v. Lukich, 379 S.C. 589 (2008)
[7] Joint Stipulation of Facts, ¶¶ 1 and 2, Exhibit 1. (R., Vol. I, pp. 254-256; 265-266; R. Vol. II, pp. 515-526)
[8] Id., at ¶¶ 4 and 5. (R., Vol. I, p. 256)
[9] Id. at ¶ 6. (R., Vol. I, p. 256)

participated in the 1997 marriage ceremony."[10] In fact, the only admissible evidence provided regarding whether Ahmed was married when he married her, is in the form of sworn statement by Ahmed that he was not married prior to marrying Ms. Hynie.[11] Additionally and subsequent to the Ahmed Annulment Order, Ms. Hynie and James Brown entered into a Consent Order wherein she agreed she was not James Brown's wife.[12]

Ms. Hynie's entire argument in support of her motion for partial summary judgment, therefore, may be summed up in one simple phrase which is "because I said so." Better explained, Ms. Hynie's entire argument in support of her motion for partial summary judgment does not dispute she was a bigamist, but instead that because the Charleston County Family Court ("CCFC") ordered her marriage to Ahmed annulled that she was suddenly married to James Brown. Further, without any proof other than Ms. Hynie's own unsupported, uncorroborated, inadmissible, hearsay statements, the lower court proclaims that she is Mr. Brown's wife. The lower court retroactively applied an annulment action determining that because Ms. Hynie told the CCFC, in a matter that Mr. Brown was not a party, that Ahmed had other wives, she was married to Mr. Brown. The lower court erred.

Ms. Hynie hid the facts and truth under a shroud of irrelevant technical arguments. When viewed in their simplest terms, this Court must look beyond this shroud and reach but one conclusion on the evidence as applied to the law at hand. Ms. Hynie is a bigamist. She was never married to Mr. Brown. At a minimum, she has

[10] Id. at ¶¶ 9-10. (R., Vol. I, p. 257)
[11] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, Line 8 and 18 of the application)
[12] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

known this to be true since the conclusion of Mr. Brown's annulment action ("Brown-Hynie Annulment") by entering into a consent order ("Brown-Hynie Consent Order") wherein she agreed she was not Mr. Brown's spouse.[13] In reality, she knew the moment she married Mr. Brown because, as she stipulated, she knows of "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 Tommie Rae and Ahmed."[14] These statements are incontestable facts.

Contrary to Ms. Hynie's assertion that Mr. Brown supported her annulment to Ahmed so that she and Mr. Brown could continue as husband and wife, Mr. Brown clearly indicated his desire to void the marriage to Ms. Hynie by filing for his own annulment against Ms. Hynie, ("Brown-Hynie Annulment") on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed ("Hynie-Ahmed Annulment").[15] Mr. Brown continued his efforts to terminate the marriage to Ms. Hynie when on May 4, 2004, a mere 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating:

> 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 . . .[16]

Even as late as July 6, 2004, Mr. Brown continued to take the position that Ms. Hynie was a bigamist in his Reply to Counterclaim responding to Ms. Hynie's counterclaim for

[13] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[14] Id. at ¶6. (R., Vol. I, p. 256)
[15] Id. at Exhibits 5 and 15. (R., Vol. I, pp. 271-273; 329-331)

divorce to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[17]

Throughout the two annulment actions (Ms. Hynie's and his own), Mr. Brown consistently claimed Ms. Hynie a bigamist. The Brown-Hynie Annulment was concluded by negotiated settlement and memorialized in the Brown-Hynie Consent Order.[18] In the settlement and Brown-Hynie Consent Order, Ms. Hynie agreed she was not Mr. Brown's spouse.[19] Specifically, the Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future."[20] The Brown-Hynie Consent Order was the last judicial declaration regarding the parties' status.[21] The Brown-Hynie Consent Order unequivocally reflects Mr. Brown's state of mind and that the parties reached a contractually valid meeting of the minds that Ms. Hynie was not married to Mr. Brown and that he did not want her to try to sidestep their agreement by later claiming a common law marriage.[22] The parties did not want a very public and ugly litigation over Ms. Hynie's bigamy as the Brown-Hynie Consent Order also provided for the sealing of the Court's entire file.[23]

The only admissible facts this Court has before it are: 1) Ms. Hynie married Ahmed;[24] 2) Within five years of marrying Ahmed, Ms. Hynie married Mr. Brown;[25] 3) Ms. Hynie's marriage to Ahmed had not terminated before Ms. Hynie and Mr. Brown

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[16] Id. at Exhibit 16. (R., Vol. I, pp. 332-335)
[17] Id. at Exhibit 18. (R., Vol. I, pp. 347-348)
[18] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[19] Id. (R., Vol. I, pp. 349-350)
[20] Id. at ¶ 3 of Exhibit 19. (R., Vol. I, p. 349)
[21] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[22] Id. (R., Vol. I, pp. 349-350)
[23] Id. (R., Vol. I, pp. 349-350)
[24] Id. at Exhibit 1. (R., Vol. I, pp. 255; 265-266)

were allegedly married;[26] 4) Mr. Brown filed the Brown-Hynie Annulment;[27] 5) Ms. Hynie agreed in the Brown-Hynie Consent Order, which indicated she was not Mr. Brown's spouse;[28] 6) Ms. Hynie further stipulated that she "cannot identify a single person who can testify that Ahmed was married to another person when Tommie Rae and Ahmed participated in the 1997 marriage ceremony";[29] and 7) Ahmed swore under oath in the Ahmed-Hynie Marriage License Application that he was not married at the time he married Ms. Hynie.[30]

ARGUMENT

On an appeal from the Court of Common Pleas, this Court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to SCRCP 56. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361(2002). "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 (S.C. Ct. App. 2003). "Summary judgment is appropriate when there is no remaining genuine issue of material fact such that the moving party must prevail as a matter of law." SCRCP 56(c), Fleming v. Rose, 350 S.C. 488, 493 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490,

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[25] Id. at Exhibits 4 and 7. (R., Vol. I, pp. 269-270; 280)

[26] Ms. Hynie attempted to argue that Appellants failed to prove that Mr. Ahmed was still alive or had not divorced Ms. Hynie. Appellants refer to the simple fact that Ms. Hynie filed an annulment as proof that he was alive, as such action would be unnecessary if Mr. Ahmed was deceased or they were divorced. Further, the Affidavit of David Bell 9/30/14 conclusively proves this fact. (R., Vol. II, pp. 515-521)

[27] Joint Stipulation of Facts, Exhibits 15 and 16. (R., Vol. I, pp. 329-335)

[28] Id. at Exhibit 19. (R., Vol. I., 349-350)

[29] Id. at ¶10. (R., Vol. I, p. 257)

493 (1994). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 378 (2000). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330 (2009). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976). Further, in accordance with SCACR 208(6), Appellant adopts the briefs of all other Appellants in this matter as if set forth and incorporated herein.

I. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE WHEN THE LUKICH DECISION OF THE SOUTH CAROLINA SUPREME COURT IS APPLIED TO THE JOINT STIPULATION OF FACTS IN THIS CASE IT PROVES MS. HYNIE A BIGAMIST.

A. Lukich v. Lukich declares Ms. Hynie a bigamist.

Ms. Hynie took great strides to tender to the lower court that a bigamous marriage is void and not voidable and that Lukich only addresses voidable annulments. Appellant agrees and does not dispute that bigamous marriages are void, but disagrees as to the lower court's interpretation of Lukich as it applies to annulments for bigamy. In analyzing Lukich, the following facts are all that is needed for the Lukich analysis:

[30] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, Line 8 and 18 of the application)

1. Ms. Hynie married Ahmed on February 17, 1997 ("Hynie-Ahmed Marriage").[31]
2. Ms. Hynie married Mr. Brown on December 14, 2001.[32]
3. Ms. Hynie obtained the Ahmed Annulment Order from the Charleston County Family Court (CCFC) on April 15, 2004 a/k/a Tommie Rae Brown v. Ahmed, 2003-DR-1 0-4609 (the "Ahmed Annulment Action") on April 15, 2004.[33]
4. From the February 17, 1997 marriage between Ms. Hynie and Ahmed through the December 14, 2001 marriage ceremony between Ms. Hynie and Mr. Brown, no order of any court or other occurrence of which Ms. Hynie is aware at this time ended or caused to end any marriage that certain parties assert existed between Ms. Hynie and Ahmed.[34]

The lower court's analysis and application of Lukich is simply wrong.[35] The South Carolina Supreme Court affirmed this Court's ruling in Lukich, but wrote its own opinion to clarify the analysis used in its decision. The analysis supports granting Appellants' motion for partial summary judgment, not Appellee's. The South Carolina Supreme Court in Wilson v. Dallas[36] suggested a road map to the lower court in footnote 16 as follows:

> The circuit court noted the decision of the Court of Appeals in Lukich v. Lukich, 368 S.C. 47, 627 S.E. 2d 754 (Ct. App. 2006), in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage. The circuit court distinguished Brown's situation, opining that the rule in Lukich did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed Lukich, in Lukich, 379 S.C. 589, 666 S.E. 2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

Although the South Carolina Supreme Court expressed no opinion on the lower court's void marriage analysis and its attempt to distinguish Mr. Brown's situation, it noted that

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[31] Joint Stipulation of Facts, ¶¶1-2, Exhibit 1; Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. I, pp. 255; 265-266; R., Vol. II, pp. 522-526)
[32] Joint Stipulation of Facts, at ¶ 5. (R., Vol. I, p. 256)
[33] Id. at Exhibit 12. (R., Vol. I, pp. 293-296)
[34] Id., at ¶ 6. (R., Vol. I, p. 256)
[35] Final Order denying Motions to Alter, Amend, Reconsider dated October 27, 2015. (R., Vol. I, pp. 101-119)

subsequent to such lower court's ruling it issued its Lukich opinion affirming the Lukich decision of this Court. The South Carolina Supreme Court felt this footnote would aid the lower court in making its decision on remand. Lukich makes it clear that Ms. Hynie's alleged marriage to Mr. Brown was bigamy *ab initio*. Any other facts discovered in this matter do not change this result. The South Carolina Supreme Court makes analysis for bigamous relationships clear when it states:

> 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. ... **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.** (Emphasis added)

Placing the Lukich opinion language with the facts in this matter results in the following:

> Under the statute's terms, Wife's **(Hynie's)** marriage to Husband #2 **(Mr. Brown)** was void from inception since at the time of the marriage she had a living spouse **(Ahmed)** and that marriage had not been "declared void" **(§20-1-80)**[37] . . . The statute speaks to the status quo at the time the marriage **(Brown-Hynie)** was contracted and does not contemplate a prospective or retroactive perspective **(a Hynie-Ahmed Annulment)**. Any other construction of §20-1-80 would lead to uncertainty **(Mr. Brown not knowing of a future annulment)** and chaos **(this case)**. . . It would be inconsistent at best to hold that a marriage declared void ab initio **(Hynie-Ahmed Marriage)** never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support.

South Carolina Code §20-1-80 provides:

> 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

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[36] Wilson v. Dallas, 403 S.C. 411(2013).

[37] **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.**

> 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.

The terms "contracted while" indicates the status at the time Ms. Hynie contracted to marry Mr. Brown. The term "while" cannot mean "subject to future determinations by competent courts." The South Carolina Supreme Court in its Lukich opinion, in interpreting such unambiguous language clearly supports this Court's opinion in Lukich. This Court emphasized its position in its Lukich opinion when it specifically referenced the general rule applicable in 52 Am. Jur. 2d Marriage §57:

> [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 v. Lukich, 368 S.C. 47, 55 (S.C. Ct. App. 2006).

The South Carolina Supreme Court has determined that the public policy of attempting to prevent bigamy has overridden all other considerations. The Lukich language when broken down into an analytical framework works for every situation on the continuum of multiple marriages if analyzed from each individual's perspective in the relationship at the point in time at which the parties attempt to get married. The South Carolina Supreme Court determined that a person's capacity to marry a subsequent spouse will be determined by that individual's capacity and status **at that time and does not contemplate either a prospective or a retroactive perspective.** In other words, the power to free one's own capacity to marry another individual rests solely in the hands of the person seeking to marry another individual. Simply put, the first spouse in time to enter into a bigamous relationship is the gatekeeper who has the ability to clear his or her own capacity to marry another individual and declare to the world that the first marriage does not exist. As between Mr. Brown and Ms. Hynie, she was the only party with knowledge of her prior marriage. She could have and should have legally recorded the prior marriage's conclusion to let the rest of the world know that she was free to marry. By not doing so, chaos, such as we have in the matter sub judice is the result. The South Carolina Supreme Court suggested this would occur without the Lukich rule.

In this matter, Ms. Hynie does not know of any facts proving Ahmed was married. Even if the alleged Ahmed statements regarding his other wives actually happened, that certainly does not make the alleged statements a fact. Further, such statements alone, for obvious reasons, do not actually annul Ms. Hynie's marriage without the entry of an annulment order. As a result, an individual seeking a subsequent marriage faces the harshest penalty (i.e. being declared a bigamist) under the South Carolina Supreme Court analysis without clearing the capacity to marry. The sanctity of marriage must be protected at all costs. This analysis works in both relationships in the matter at hand (i.e. the Hynie-Ahmed and Brown-Hynie) applying a consistent protection to the sanctity of marriage and prevention of bigamy. As such, the analysis must be correct because the result is the same for both Ms. Hynie in her relationship with Ahmed and Mr. Brown in his relationship with her. It does not matter whether Ahmed was married prior to entering into his relationship with Ms. Hynie. What matters is whether either she or Ahmed rectified the restrictions on her capacity to marry when she attempted to marry a subsequent individual. Upon the grant of an annulment order by a competent court, she removes the impediments on her capacity to marry. Ms. Hynie did exactly this on April 15, 2004.[38]

Ms. Hynie became a bigamist when she attempted to marry Mr. Brown. At the time of her attempted marriage to Mr. Brown in 2001,[39] she was married to Ahmed. From the February 17, 1997 marriage between her and Ahmed through the December 14, 2001 marriage ceremony between her and Mr. Brown, no order of any court or other occurrence ended or caused to end any marriage that existed between Ms. Hynie and Ahmed.[40] An annulment order was not obtained until April 15, 2004. As such, she had no capacity to marry Mr. Brown. Ms. Hynie is a bigamist and neither party may enforce the relationship as it relates to rights and obligations among one another *ab initio*. Mr. Brown regained his capacity to marry another party when he and Ms. Hynie sought an annulment (which he did) and obtained an Order, which he did.[41] Even if Ms. Hynie's argument is correct that that the Brown-Hynie Consent Order was not an annulment, it would not matter. Ms. Hynie could not enforce any rights of the marriage to Mr. Brown *ab initio* due to her incapacity to marry at the time of the ceremony with Mr. Brown. The only person who would have an issue with the fact that an annulment may or may not have occurred would be a subsequent spouse that Mr. Brown attempted to marry, which he did not do. As can be seen from this analysis, the continuum is intact and the analysis produces the same result in every situation, which is to protect the sanctity of marriage and avoid bigamy.

The South Carolina Supreme Court makes it clear that the statute does not

[38] Joint Stipulation of Facts, Exhibits 5 through 12. (R., Vol. I, pp. 271-296)
[39] Id. at Exhibit 4. (R., Vol I, pp. 269-270)
[40] Id. at ¶ 6. (R., Vol I, p. 256)
[41] Id. at Exhibits 15, 16 and 18. (R., Vol. I, pp. 329-335; 347-348)

contemplate a retroactive or prospective analysis in the determination of bigamy. The lower court applied the Lukich analysis in a retroactive fashion which is the fatal flaw in its analysis.[42] The lower court claimed that the April 15, 2004 annulment order proved that the Hynie-Ahmed Marriage was void from the beginning. This is a retroactive application of the annulment action because such fact had not been declared by a competent court at the time James Brown allegedly married her on December 14, 2001.

As the lower court's analysis fails to do, bigamy under the Lukich analysis may only be viewed on an individual basis from a particular point in time. For purposes of example, what if Ahmed actually had other wives when he married Ms. Hynie and then he had all those marriages annulled *ab initio* for reason of bigamy in 2016? Do those annulments *ab initio* for bigamy make Ahmed's marriage to Ms. Hynie valid because the other marriages were void *ab initio* for bigamy? That is Appellee's argument that the lower court has incredulously agreed with and adopted, which fails for the reasons noted. A bigamous relationship is void *ab initio* and neither party may enforce the rights and obligations of a marriage. However, capacity is not cleared until the annulment order is issued by a competent court. Once cleared, a party could enter into a subsequent marriage to a third party. The equity that is provided to all parties, including third parties to the bigamous relationship, involved with the application of this analysis is sublime.

B. Under the Lukich analysis, it does not matter if the underlying marriage that allowed for the Annulment Order was Void or Voidable.

Lukich applies regardless of Appellee's attempt to obfuscate and confuse the discussion with the terms of void versus voidable. The South Carolina Supreme Court

[42] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, pp. 12-15. (R., Vol. I, pp. 114-117)

did not make this distinction. However, for purposes of argument, Appellant provides the following analysis. The Appellee and now the lower court attempts to distinguish Lukich from the case sub judice by denoting Lukich's first marriage was voidable and in this case, Hynie's first marriage was void for bigamy rather than voidable and as a result bigamous marriages are void from inception not voidable.[43]

Void versus voidable was not addressed in Lukich, however, this Court in its Lukich opinion referenced 52 Am.Jur. 2d Marriage §57.[44] In fact, 52 Am.Jur. 2d Marriage §57 clearly addresses bigamy in its analysis in such clear concise language that inserting the names of the parties in the matter sub judice is exactly the answer that this Court must reach:

> [A]part from statute, **bigamous (Hynie-Brown)** marriage does not acquire validity when the prior subsisting **(Hynie-Ahmed)** marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting **(Hynie-Ahmed)** marriage is annulled **after** the second **(Hynie-Brown)** marriage is contracted, even though the purpose of an **(Hynie-Ahmed)** annulment proceeding is to declare that no valid marriage ever took place between the parties **(Hynie-Ahmed)** or that no valid marriage relation ever existed between the parties **(Hynie-Ahmed)**. Even where the **(Hynie-Ahmed)** annulment decree expressly declares the first **(Hynie-Ahmed)** marriage null and void ab initio, it does not relate back so as to validate the second **(Hynie-Brown)** marriage. In order for the subsequent **(Hynie-Brown)** marriage to be valid, it has been held that there must be a new ceremony **following** the termination of the earlier **(Hyine-Ahmed)** marriage.

Instead of the above, the lower court ruled that the Hynie-Ahmed marriage was void from the beginning which validated the Brown-Hynie marriage (the above language makes it

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[43] Id., pp. 4-16. (R., Vol. I, pp. 106-118)

[44] [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

clear this is not the correct result).[45] Query what happens if Ahmed had filed a Rule 60 Motion on the fraudulently obtained CCFC annulment order within a year of its issuance and proven it to be just that. What if Ahmed in 2016, seeks an annulment of all of the alleged marriages and is successful in being granted the same? Under Ms. Hynie's theory of how the Lukich analysis works and the lower Court's ruling, this would mean that the Hynie-Ahmed Marriage was no longer void. Suddenly, Ms. Hynie's bigamy would be resurrected because now Ahmed was not married when Ms. Hynie married him in 1997 and everything is void ab initio. If the analysis works for Ms. Hynie, it would work for Ahmed. As such, under the lower court's ruling, Mr. Brown would yoyo from being not married, to married when the CCFC Order was issued, and then not married again when the CCFC annulment order was overturned. This is absolute lunacy and the chaos that the South Carolina Supreme Court references. The continuum could never end. That is why the analysis requires a specific point in time. That is why Appellants' analysis and the South Carolina Supreme Court's analysis are absolutely correct and the lower court's current ruling is wrong. Regardless of the actions of third parties, Appellants' and the South Carolina Supreme Court's analysis has the same result each time. Mr. Brown was never married to Ms. Hynie because she was a bigamist when they attempted to marry.

Under Appellants' and the South Carolina Supreme Court's analysis of Lukich, Mr. Brown's marriage is void from the beginning and unaffected by any of the above changes in circumstances related to the Hynie-Ahmed marriage because it is analyzed at

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ceremony following the termination of the earlier marriage. (Emphasis added). Lukich v. Lukich, 368 S.C. 47, 55 (S.C. Ct. App. 2006).

[45] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, p. 16. (R., Vol. I, p. 118)

one point in time, which is December 14, 2001. All that matters is what each party's marital status is at the time of an attempted marriage. The lower court enforced Lukich in a manner that creates retrospective and prospective application of its rules. The South Carolina Supreme Court very clearly said this is not how the analysis works. The relation back in time effect the lower court applies is the exact chaos Lukich describes if everything after the bigamist marriage is washed away as if it never occurred. Affirming the lower court's ruling will open flood gates and create chaos.

An additional issue with the void versus voidable argument arises when, interestingly, Ms. Hynie argues that a drunkenness annulment was voidable and bigamy is void.[46] She used this as her main point, in an attempt to distinguish Lukich, and the lower court agreed.[47] However, there is no evidence that Ms. Hynie's marriage to Ahmed was actually bigamous. In fact, it is incontrovertible and stipulated that Ms. Hynie has no factual knowledge of Ahmed's alleged prior marriages. Therefore, Ms. Hynie did not and does not know whether Ahmed had a wife or wives at the time he married her. As a result, it is not a fact that Ahmed was a bigamist and that her marriage was void as a result of being bigamous. It was not until April 15, 2004 that the CCFC granted an annulment for bigamy among other issues. Ms. Hynie, if she had chosen to do so, could have continued life married to Ahmed, because she really did not or does not know whether he had other wives or not. By way of example, had Ahmed won the lottery after his marriage to Ms. Hynie and before the annulment, Ms. Hynie would have a spousal claim for the lottery winnings. There is no fact of Ahmed's actual bigamy so Ms. Hynie only has manufactured bigamy by order of a court. Based on Hynie's

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[46] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, pp. 6-16. (R., Vol. I, pp. 108-118)

argument, her marriage to Ahmed was therefore voidable, not void until the ruling of April 15, 2004. However, with all of this said, it does not matter. Lukich does not distinguish between void versus voidable and neither does 52 Am. Jur. 2d Marriage §57.

As a final problem with the lower court's adoption of Appellee's argument that injects the concepts of void versus voidable, in an attempt to distinguish Lukich, it ignores some very important facts. The South Carolina Supreme Court simply stated that a bigamous marriage is void. The term voidable appears nowhere in the actual construct of the opinion (as noted below it appears in a 1947 case cite, but only as a reference that such relationship is absolutely void and not merely voidable). Any attempt to distinguish between these terms reads language into the Lukich case that does not exist. The South Carolina Supreme Court made it very clear that the way to review South Carolina Code Section 20-1-80 was through the plain language of the statute. They did not say that you look through to the type of marriage (i.e. void or voidable) that may or may not exist. All bigamous relationships fall into one category regardless of how they came to be, which is that they are void *ab initio* after being declared such by a competent court. Specifically, they noted:

> 'A mere marriage ceremony between a man and a women, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable'

Lukich v. Lukich, 379 S.C. 589, 592 (2008)(citing Howell v. Littlefield, 211 S.C. 462 (1947)).

At the time that Ms. Hynie attempted to marry Mr. Brown, she was still legally married to Ahmed because an annulment was not declared until April 15, 2004. As such, the language cited above applies and Ms. Hynie's attempt to marry Mr. Brown was

[47] Id. (R., Vol. I, pp. 108-118)

"absolutely void." Appellee argued and the lower court adopted that it is this same language that made Ms. Hynie's marriage to Ahmed void thereby freeing her capacity to marry Mr. Brown. However, there is a major fallacy in this argument under South Carolina law. South Carolina Code Section 20-1-80 requires that the "first marriage (Hynie-Ahmed Marriage) shall be declared void **by the sentence of a competent court**. This did not occur until April 15, 2004. As such, the Hynie-Ahmed marriage was not void for purposes of her capacity to remarry until the ruling of a competent court declared it so.

This Honorable Court has the ability to dispose of this entire action, as it relates to Ms. Hynie, in one swift ruling and close a longstanding chapter and saga in this legal matter. All of the arguments made by the parties regarding evidence, annulment, service, extrinsic and intrinsic evidence, collateral estoppel, res judicata and every other argument made by any party in this matter need not be addressed because the entire matter may be disposed of as a matter of law. The South Carolina Supreme Court in Lukich provides the vessel for such result when it states:

> 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. ... 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.

The parties jointly stipulated that Ms. Hynie was married to Ahmed at the time she allegedly married Mr. Brown on December 14, 2001. She did not annul her relationship with Ahmed until April 15, 2004. Ms. Hynie never had another marriage ceremony of any type with Mr. Brown after the first one of December 14, 2001. There are no other facts obtainable through discovery that will alter these facts. The parties have stipulated to them. Applying the Lukich analysis to these facts, this Honorable Court can reach but one conclusion, Ms. Hynie is a bigamist. Based on such determination, Appellants' motion for partial summary judgment must be granted as matter of law and the lower court's grant of Appellee's motion for partial summary judgment reversed.

II. THE LOWER COURT ERRED IN APPLYING COLLATERAL ESTOPPEL TO JAMES BROWN'S ESTATE AND HIS HEIRS WHEN IT DETERMINED THAT THE FACTS CONTAINED IN THE APRIL 14, 2004 CHARLESTON COUNTY FAMILY COURT ORDER WERE BINDING AND DISPOSITIVE AS TO JAMES BROWN'S MARITAL STATUS EVEN THOUGH THAT ISSUE WAS NEVER LITIGATED AND JAMES BROWN WAS NEVER A PARTY TO THE PROCEEDING.

The lower court determined that James Brown's estate and heirs were collaterally estopped from challenging the facts set forth in the Charleston County Family Court ("CFCC") Order dated April 14, 2004 ("CCFC Order") and that such facts effectively proved that James Brown was married to Ms. Hynie. The lower court failed in its forty-six (46) page Final Order to set forth the law of collateral estoppel and then subsequently apply such law to the facts. Instead, the lower court focused on inapposite cases that stand for the proposition that a party who accepts the benefits of an order precludes a party from latter challenging such order.[48] These cases cited do not relate to the matter at hand, as James Brown was never a party to the action and never accepted any of the benefits of the CCFC Order. To the contrary, Ms. Hynie is collaterally estopped from arguing that she was not married to Ahmed at the time she allegedly married James Brown. Furthermore, James Brown's Estate and heirs are not estopped from arguing he

[48] Final Order, p. 45. (R., Vol. I, p. 97)

was never married to Ms. Hynie. The South Carolina Supreme Court's ruling in Lukich v. Lukich is controlling.

A. Res judicata and Collateral Estoppel.

1. Res Judicata does not preclude Mr. Brown from proving that he was not married due to bigamy.

"The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188 (1992); Treadaway v. Smith, 325 S.C. 367(S.C. Ct. App. 1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189 (S.C. Ct. App. 1993). Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533 (S.C. Ct. App. 1999). In the matter sub judice, clearly and indisputably, neither Mr. Brown, nor his privies (heirs) were parties to the CCFC proceeding. Res judicata prevents a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11(1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30 (1999). The Hynie Annulment Action was not litigated and was by all essence a default judgment. (see discussion supra).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543 (1986); Rogers, 336 S.C. at 537; Owenby v. Owens Corning Fiberglas, 313 S.C. 181 (S.C. Ct. App. 1993). Clearly, all three prongs fail as it relates to Mr. Brown. Mr. Brown was not a party. The subject matter of the Hynie Annulment Action was the annulment of a marriage that was not Mr. Brown's. Mr. Brown's estate and his heirs currently seek to have his alleged marriage to Ms. Hynie declared void due to bigamy which was not litigated by the CFCC.

2. Collateral Estoppel does not preclude Mr. Brown from proving that he was not married due to bigamy.

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363 (S.C. Ct. App. 1984):

> The doctrines of res judicata and collateral estoppel are . . . two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes re-litigation of only those issues 'actually and necessarily litigated and determined in the first suit.' Id. at 369 n.1, 315 S.E.2d at 190 n.1.

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434 (1986); see also State v. Bacote, 331 S.C. 328, 330 (1998) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275 (S.C. Ct. App. 1996) (noting that collateral estoppel will bar re-litigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit).

A party may assert non-mutual collateral estoppel to thwart re-litigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to re-litigate the issue. Wade v. Berkeley County, 330 S.C. 311 (S.C. Ct. App. 1998). The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: (1) whether privity exists, (2) whether the doctrine is used offensively or defensively, and (3) whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426 (S.C. Ct. App. 1997). In this action, Ms. Hynie used the vacuous CCFC Order as a weapon and indisputably, Mr. Brown was not a party and never had any opportunity, much less a full and fair opportunity to litigate the issue determining his own marital status. The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001); Beall v. Doe, 281 S.C. 363 (S.C. Ct. App. 1984). Ms. Hynie has provided no proof the matter was actually litigated. In fact, all evidence to the contrary, she has merely provided an ex parte, default judgment that ultimately casts Mr.

Ahmed as a criminal bigamist as her only evidence.[49] Only a party to a prior action or one in privity with the party can be precluded from re-litigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770. Again, how can it be argued that Mr. Brown was a party when Ms. Hynie argued at length he had no right to intervene. Mr. Brown was not in privity with Ms. Hynie and as such the doctrine of collateral estoppel cannot apply.

3. Exceptions to res judicata and collateral estoppel allowing Mr. Brown to prove he was not married due to bigamy would apply in this matter.

There are numerous exceptions to the application of res judicata and collateral estoppel. In Pye, the court adopted the Restatement (Second) of Judgments section 28, which states:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

[49] Joint Stipulation of Facts, ¶ 7, Exhibit 12. (R., Vol. I, pp. 256; 293-296)

> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38.

In Beall v. Doe, the court adopted section 29 of the Restatement (Second) of Judgments:

> A party precluded from re-litigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:
>
> (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; (Procedural opportunities?)
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

> (8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue.

Beall, 281 S.C. at 371.

The elements outlined in Beall v. Doe, adopting section 29 of the Restatement (Second) of Judgments express exactly the issues in this case. Mr. Brown and his heirs were not party and had no right to intervene in the Hynie Annulment Action and as such it was not fully litigated as to them. As a result, they now have the right to challenge any of the facts and issues that may have been presented in that matter that are now a part of this action.

4. Mr. Brown was not in privity with the Hynie and Ahmed marriage and as such has the right to prove he was not married due to bigamy.

In regard to res judicata or collateral estoppel, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." Wyndam v. Lewis, 292 S.C. 6, 8 (S.C. Ct. App. 1987). "Privity" means one so identified in interest with another that he represents the same legal right. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001). In Wade v. Berkeley County, 330 S.C. 311 (S.C. Ct. App. 1998), this court discussed privity by stating:

> 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. Id. at 317, 498 S.E.2d at 687 (citations omitted).

Mr. Brown's legal interests were not even addressed. Ms. Hynie argues that Mr. Brown had an interest in whether Ahmed was married at the time he married Ms. Hynie. Legally and according to Wade, it does not matter whether he did or did not have an interest in Ahmed's marital status. The fact of the matter is there is no privity, therefore neither do his heirs subject to privity. As a result, all avenues of challenge as to the claims Ms. Hynie is making are available to the heirs and the estate, including the right to argue she was legally married to Ahmed (which the evidence clearly indicates) at the time of her marriage to Mr. Brown. Ms. Hynie stipulated "she cannot identify a single person who can testify that Ahmed was married to another person when Ms. Hynie and Ahmed participated in the 1997 marriage ceremony." She is a bigamist.

5. Public policy dictates that Mr. Brown was not married due to bigamy.

Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001). "Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203 (S.C. Ct. App. 1992).

In Johns, a husband and wife signed a consent order where the family court found they were married at common law and ordered their legal separation. At the time the parties entered into the consent order, the husband was married to another person. The wife brought suit against the husband seeking a divorce, custody of the couple's child, an increase in alimony and child support, and attorney's fees. The husband contested the divorce, arguing the parties were not married. The wife sought to use the consent order declaring they were married at common law to bar the husband's defense under res judicata and collateral estoppel grounds. This court did not allow the wife to assert res judicata or collateral estoppel to bar the husband's defense because public policy declaring bigamous marriages void overrode the policy concerns for res judicata.

This matter is the same as Johns. A bigamous marriage existed. Public policy concerns allowing Mr. Brown to challenge the validity of his own marriage as a result of the bigamous relationship of Ms. Hynie outweigh and override any policy concerns for collateral estoppel or res judicata, and most importantly in this matter, a hasty CCFC Order based on solely self-serving, hearsay testimony.

6. The CCFC order was a default judgment. Mr. Brown is not precluded by res judicata or collateral estoppel to prove that he was not married due to bigamy.

In essence and procedurally, Ahmed's failure to respond to the Hynie Annulment Action and failure to appear for the hearing would be treated as a default. Ms. Hynie's counsel at her annulment hearing went so far as to note this in the transcript of the hearing.[50] 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.[51] South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated.[52] South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel.[53] The Restatement takes the position that default judgments have not

[50] Joint Stipulation of Facts, ¶ 8, Exhibit 13, Page 4, lines 6-8. (R., Vol. I, pp. 256; 300, l. 6-8)
[51] 50 C.J.S. Judgments § 797 (1997); State v. Bacote, 331 S.C. 328, 330-31 (1998).
[52] Powell v. Lane, 289 S.W.3d 440, 451 (Ark. 2008) (Wills, J., dissenting)
[53] See, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213 (1991) (adopting the general rule set forth in the Restatement for offensive use of collateral estoppel); Beall v. Doe, 281 S.C. 363, 370 (S.C. Ct. App. 1984) ("[A] fair rule regarding the application of issue preclusion in

been "actually litigated," and therefore cannot be used as the basis for collateral estoppel in subsequent actions.[54] The Restatement's position is the view taken by the majority of the courts throughout our nation.[55] "Although a party against whom a default judgment is entered certainly had an opportunity to litigate, most courts have concluded that an opportunity to litigate should not be given the same effect as actual litigation . . . .".[56]

As the Hynie Annulment Action was an ex parte, default judgment because Mr. Ahmed failed to appear due to insufficient service among other items, none of the issues were actually litigated. Based on the foregoing, Mr. Brown and/or his heirs have every right to challenge the facts and issues whether Ms. Hynie was married at the time she married Mr. Brown. As a result, Ms. Hynie was a bigamist.

B. Mr. Brown was not a party to the Hynie Annulment Action.

It is indisputable that Mr. Brown did not participate in the Hynie Annulment Action, however, the lower court attempts to draw a conclusion that Mr. Brown supported and acquiesced to the Hynie Annulment Action and Hynie Annulment Order by referencing payments to Ms. Hynie's attorney and referencing the Hynie Annulment Action facts.[57] The lower court's suggestion that because Mr. Brown paid Ms. Hynie's attorney meant that he acquiesced to the outcome and desired a void ab initio result is neither factually nor chronologically sound. Mr. Brown filed his own annulment proceeding against Ms. Hynie merely 46 days later evidently wanting his marriage to Ms.

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subsequent litigation with different parties is the rule recently formulated by the American Law Institute [in the Restatement (Second) of Judgments].").

[54] See Restatement (Second) of Judgments § 27 cmt. e (1982) ("In the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.").

[55] See Powell, 289 S.W.3d at 450 (Wills, J., dissenting) (stating that the "majority view" is that default judgments cannot serve as the basis for collateral estoppel);

[56] 50 C.J.S. Judgments § 1049 (2013)

Hynie terminated.[58] Additionally, Rule 1.8(f) of the South Carolina Rules of Professional Conduct ("SCRPC") requires that a lawyer obtain consent of the client before accepting compensation from someone other than the client. The lawyer also must not allow the person paying the fees to interfere with the exercise of judgment, SCRPC 1.8(f)(2) and 5.4(c), and must not disclose protected information to that person unless permitted under SCRPC 1.6. Ms. Hynie's attorney could not accept any direction from Mr. Brown or share confidential factual information received or discovered. He could only accept his money. Mr. Brown was not his client and not a party to the action. As the SCRPC clearly indicate, payment of money does not make one a party to an action or even a client for an attorney. As such, Mr. Brown's payment of money is irrelevant to the issue of whether or not he was a party to the Hynie Annulment Action. Mr. Brown's immediate filing of the Brown Annulment Action, certainly contradicts Ms. Hynie's allegations of Mr. Brown's involvement in Ms. Hynie's annulment action. Not to mention, the fact that immediately after the Hynie Annulment Order, Mr. Brown amended and continued his own annulment action reasserting his bigamy claims and thereafter Mr. Brown and Ms. Hynie entered into the Brown-Hynie Consent Order wherein Ms. Hynie agreed she was not his spouse and would never make a claim of common law marriage.[59]

C. The Charleston Family Court's order does not apply to the case sub judice.

Somehow, the lower court determined that in an action that Mr. Brown was not a party where Ms. Hynie presented self-serving hearsay testimony along with other suspect

[57] Final Order at p. 45-46. (R., Vol. I, pp. 97-98)
[58] Joint Stipulation of Facts, ¶ 19. (R., Vol. I, p. 258)
[59] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

facts, that such CCFC Order bound Mr. Brown and any in privy to him.[60] This falsehood creates a public policy entwined in complete chaos should South Carolina allow third parties to ultimately, and dramatically, be affected by cases to which they could not intervene to protect their interests. Mr. Brown could not and did not intervene in the CCFC action. Mr. Brown, in any effort to protect his assets from a bigamous spouse, could not intervene in the Hynie Ahmed Annulment Action. Therefore, Mr. Brown must be afforded protective measures outside the CCFC and the CCFC Order to challenge the hearsay evidence as presented by Ms. Hynie. The CCFC in the Hynie Annulment Action based its decision on self-serving, uncorroborated, hearsay evidence and conjecture.[61] No authenticated evidence or testimony other than Ms. Hynie's was provided.[62] Res judicata and collateral estoppel should not be applied to such a vacuous legal proceeding. Ms. Hynie has used such proceeding as the foundation to grab an economic interest in Mr. Brown's estate which is particularly troubling as she had already agreed she was not Mr. Brown's wife.[63] Effectively, Ms. Hynie wants this Court to affirm that non-parties and their successors are bound by court orders from actions that they had no right to challenge or be considered a party. Such a result offends even the basic sense of due process and fair dealing, and violates all of the rules of res judicata and collateral estoppel.

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[60] Final Order, p. 32-34. (R., Vol. I, pp. 84-86)
[61] Joint Stipulation of Facts, ¶¶ 9, 10 and 18. (R., Vol. I, pp. 257-258)
[62] Id. (R., Vol. I, pp. 257-258)
[63] Id. at ¶ 19, Exhibit 19. (R., Vol. I, pp. 258; 349-350)

III. THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN THE WEIGHT OF THE EVIDENCE PROVES THAT MS. HYNIE WAS NEVER THE WIFE OF JAMES BROWN.

A. The lower court erred in granting summary judgment to Ms. Hynie without allowing discovery and allowing use of the Diaries.

As James Brown and his heirs are not collaterally estopped from proving that Ms. Hynie is a bigamist, the lower Court erred when it allowed no discovery whatsoever, not even limited discovery as it relates to the validity of the Hynie-Brown Marriage and instead tried to resolve this matter on summary judgment for Appellee. Appellants presented the following evidence that proves that Ms. Hynie is a bigamist and not married to Mr. Brown:

1. Ms. Hynie agreed in the Brown-Hynie Consent Order that she was not Mr. Brown's spouse;[64]

2. Ms. Hynie has never proposed that she and Ahmed divorced, but she instead filed for an annulment, which very clearly denotes that the parties were still married;[65]

3. Ms. Hynie has not shown a death certificate of Ahmed, which would have made an annulment action moot;[66]

4. Ms. Hynie's marriage to Mr. Brown was less than 5 years after the marriage to Ahmed thereby demonstrating that Ahmed was not missing for more than 5 years;[67]

5. The fact under consideration as to whether Ahmed was married to three women in Pakistan has never been proven;[68]

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[64] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)
[65] Id. at Exhibit 5. (R., Vol. I, pp. 271-273)
[66] Id. at Exhibits 5 through 12. (R., Vol. I, pp. 271-296)
[67] Id. (R., Vol. I, pp. 271-296)
[68] R., Vol. II, pp. 515-526.

6. In the 19 years since her marriage to Ahmed, 14 years since her marriage to Mr. Brown, 12 years since filing her annulment action against Ahmed ("Hynie-Ahmed Annulment"), and 9 years since filing the matter sub judice, Ms. Hynie has never provided proof of Ahmed's prior marriage(s), or death; and [69]

7. Ms. Hynie further stipulated that she cannot identify a single person who can testify that Ahmed was married to another person when Ms. Hynie and Ahmed participated in the 1997 marriage ceremony.[70]

8. Ahmed swore under oath in the Ahmed-Hynie Marriage License Application that he was not married at the time he married Ms. Hynie.[71]

Ms. Hynie, on the other hand, has provided no admissible evidence (for example an Ahmed prior marriage license or death certificate), that she was not married to Ahmed except self-serving inadmissible hearsay in a court where Ahmed was not present that proclaims Ahmed told her that he had three wives in Pakistan and that she and Ahmed did not consummate their marriage.[72]

1. <u>The Ahmed-Hynie marriage license and marriage license application are more than a scintilla of proof and admissible.</u>

In the Hynie –Ahmed Marriage License application, Ahmed swore under oath that he was not married.[73] South Carolina Rule of Evidence 803(9) provides: "Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to the requirements of law." Section 1.03 of the Texas Family Code of 1995 (which was the statute in effect at the time Ahmed and Ms. Hynie were married) provided:

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[69] <u>Id.</u> at Exhibits 1 through 19. (R., Vol. I, pp. 254-350)
[70] R., Vol. I, p. 257
[71] <u>See</u> Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[72] <u>Joint Stipulation of Facts</u>, Exhibit 13, p. 8-10. (R., Vol. I, pp. 304-306)
[73] <u>See</u> Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

§ 1.03. Application Form

(a) The county clerk shall furnish the application form as prescribed by the Bureau of Vital Statistics of the State Department of Health.

(b) The application form shall contain:

> (1) a heading entitled "Application for Marriage License, County, Texas";(2) spaces for each applicant's full name (including the woman's maiden surname), address, social security number, if any, date of birth, and place of birth (including city, county, and state);(3) a space for indicating the document tendered by each applicant as proof of identity and age;(4) spaces for indicating whether each applicant has been divorced within the last 30 days;(5) printed boxes for the applicant to check "true" or "false" inresponse to the following statement: "I am not presently married.";(6) printed boxes for each applicant to check "true" or "false" in response to the following statement: "The other applicant is not related to me as: (A) an ancestor or descendant, by blood or adoption;(B) a brother or sister, of the whole or half blood or by adoption;(C) a parent's brother or sister of the whole or half blood; or (D) a son or daughter of a brother or sister of the whole or half blood or by adoption.";(7) a printed oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT THE INFORMATION I HAVE GIVEN IN THIS APPLICATION IS CORRECT.";(8) spaces immediately below the printed oath for the applicants' signatures;(9) a certificate of the county clerk that the applicants made the oath and the date and place that it was made (or that the applicant did not appear personally but the prerequisites for the license have been fulfilled as prescribed by Section 1.05 of this code);(10) spaces for indicating the date of the marriage and the county in which it is performed; and (11) a space for the address to which the applicants desire the executed license to be mailed.

As specifically noted under Texas law, the marriage license application form under Texas law was reported to the Bureau of Vital Statistics of the State Department of Health. The Texas form required <u>both</u> parties to swear under oath that "I am not presently married." To obtain a marriage license in Texas both parties swore before the County Clerk of Harris County, Texas that they were not married. This evidence is absolutely admissible and irrefutable. Finally, this piece of evidence by itself is enough to deny Ms. Hynie's motion for partial summary judgment when taken in light most favorable to the Appellants as it is more than a scintilla of evidence. Therefore, the only admissible evidence related to Ahmed's marital status demonstrates that Ms. Hynie was married to Ahmed in a vaild non-bigamous marriage at the time she married Mr. Brown.

2. Ms. Hynie fails to present any admissible evidence that Ahmed was married prior to their marriage.

Ms. Hynie's qualified and capable legal team must have considered seeking, Ahmed's marital records in Pakistan in order to prove their case. They failed, however, to locate and/or collect one shred of evidence linking Ahmed to any prior marriages. If such proof existed, the Court, the press, and whoever would listen would have received it. Further, Pakistan is a modern nuclear country with modern data collection capabilities. Ms. Hynie and her legal team easily could have acquired a marriage license, known as a Nikah Nama, from the Pakistani National Data and Registration Authority (NADRA) and/or the Karachi Union Councils. Under the Muslim Family Law Ordinance of 1961, it is mandatory that the Nikah Nama is registered with the local Union Council, where an original copy of Nikah Nama is kept as public record and two other copies served to the bride and groom. The Nikah Nama, is registered with a Nikah Registrar, who is appointed by the municipality, Panchayat committee, cantonment board or union council. Ms. Hynie could have, and it is expected they did, seek such documents and failed. They could have done so by going directly to the source, (i.e. NADRA) and/or the Karachi Union Councils, hiring Pakistani attorneys to search and locate such documents or utilize available web services.[74]

Based on the foregoing, only one conclusion can be reached. Ms. Hynie, and or

[74] http://inp.org.pk/nikkah-nama-registration, http://birthcertificatespakistan.com/how-to-get-pakistani-marriage-registration-certificate/, http://mamooinpakistan.com/services/marriage-certificate/

her legal team, looked and found nothing. As such Ms. Hynie is unable to provide any actual admissible evidence to any court of her self-serving claims that Ahmed was married at the time she married him. Similarly, in this case, she has failed to produce a shred of evidence supporting her contention that she was validly married to Mr. Brown. As such, she is a bigamist and summary judgment must be granted against Ms. Hynie and in favor of the Appellants.

3. The Brown-Hynie Consent Order is sufficient evidence to support the Appellants' motion for partial summary judgment and deny Ms. Hynie's motion for partial summary judgment.

In the Brown-Hynie Consent Order, Ms. Hynie agrees she will not claim to be Mr. Brown's common law spouse.[75] The only reason for inclusion of such language in the Order is because both parties did not consider themselves married at that time. Mr. Brown's actions in his own annulment action, which include amendments that denote Ms. Hynie was previously married and continuing such action to a final Consent Order resolution, indicate the parties understood that they were not married.[76] Finally, the Brown-Hynie Consent Order was the most recent Order entered in any court that actually involved both Mr. Brown and Ms. Hynie where the parties denote their understanding of their marital relationship, which was that they were not married.[77]

4. The lower court indicated on March 31, 2014 that should factual issues arise in the presentation of Appellee's motion for partial summary judgment that such motion would be denied.

As noted in the transcript of the March 31, 2014 hearing: [78]

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https://www.facebook.com/jalwastyle/posts/394566 l 577099, http://birthcertificatekarachi.com/nadra-marriage-registration-certificate/

[75] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

[76] Id. at Exhibits 15, 16 and 18. (R., Vol. I, pp. 329-335; 347-348)

[77] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

[78] See March 31, 2014 transcript of hearing Page 60, Line 12-21. (R., Vol. VII, p. 2461, l. 12-21)

Mr. Beach: Now, Judge, there are –that simple questions could be legal questions. On the other hand, if Mr. Rosen asserts that the - - if Mr. Rosen asserts that James Brown is estopped by that order, then Mr. Rosen is probably going to have to assert some facts to support that estoppel argument…
The Court: Well, if he does that – if he does that, then I think the summary judgment goes out the window.

Consistent with the discussion with the lower court, several facts have been raised which would preclude summary judgment for Ms. Hynie such as:

1) the supportive effects of Brown-Hynie Consent Order and annulment dismissal which is challenged by Ms. Hynie and used by Appellants supporting their respective positions;

2) the communications between Ms. Hynie's attorney and Mr. Brown's attorney during the Brown Hynie Annulment action;

3) the estoppel arguments raised suggesting that because Mr. Brown financed the Hynie-Ahmed Annulment that Mr. Brown desired the annulment of the Ahmed-Hynie relationship which calls into question the correspondence between Mr. Brown's attorney (Jim Huff) and Ms. Hynie's attorney (Robert Rosen);

4) the Hynie-Ahmed Marriage license where Mr. Ahmed swore under oath he was not married that has not been refuted by any other evidence other than Ms. Hynie's inadmissible hearsay testimony; [79]

5) Ms. Hynie's actual versus purported knowledge of Ahmed's whereabouts as it pertains to service of process and due diligence;

6) private investigator Pannell's full report and search efforts to locate Ahmed;

7) Ahmed's immigration status and related paperwork; and

8) evidence from Mr. Brown's attorney regarding the Brown-Hynie Consent Order and the understanding of the status of the parties relationship.

None of these items would preclude summary judgment being granted to Appellants. As has been noted, Appellee has no admissible evidence that she and Ahmed did not enter into a legal marriage and that she is not a bigamist. As such, Appellants should be granted summary judgment based on the joint stipulation of facts in accordance with

Lukich.

5. The Brown-Hynie Consent Order is incontestable.

The Brown-Hynie Consent Order in essence outlined to the court the settlement of the Brown-Hynie Annulment. The Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future."[80] The question begs, why would an actual and legal current spouse agree to never make a claim for common law marriage? The only reasonable answer is that the parties were not married. This Court should consider, and it is important to note, that the Brown-Hynie Consent Order was negotiated and entered into as a result of, and to bring to a conclusion, Mr. Brown's complaint for annulment and Ms. Hynie's complaint for divorce. Both parties were seeking to conclude and finally define the relationship. Both parties had ugly and embarrassing allegations against the other. It was in everyone's best interest that their actions were concluded as privately and expeditiously as possible. All available evidence indicates Mr. Brown wanted an annulment and Ms. Hynie wanted a divorce.

Mr. Brown filed the Brown-Hynie Annulment on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed.[81] As stated in Mr. Brown's complaint for annulment: "Defendant was never legally divorced from her previous husband prior to entering into marital contract with the Plaintiff. As such, this marriage is void *ab*

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[79] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[80] Joint Stipulaton of Facts, Exhibit 19, ¶ 3 (R., Vol. I, p. 349)
[81] Joint Stipulation of Facts, Exhibit 15. (R., Vol. I, pp. 329-331)

initio."[82] On May 4, 2004, 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating: "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 . . ." [83] On July 6, 2004, Mr. Brown's reply to counterclaim responding to Hynie's counterclaim for divorce ("Hynie Divorce Counterclaim") to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[84] Further, at the conclusion of the Hynie-Ahmed Annulment, there would be no need for Mr. Brown to actually continue his annulment action if he was in favor of being married (as Ms. Hynie's contention would be that the parties were in fact married) and that Mr. Brown allegedly supported the Hynie-Ahmed action as alleged. Based on such flawed logic, Mr. Brown should have simply dismissed his annulment action with no stipulations or conditions, but that is not what happened.[85] Instead, the parties continued to litigate and negotiate a final resolution to the matter with the Brown-Hynie Consent Order.[86] When it comes to the validity of all the marriages in question, i.e. Brown-Hynie, Hynie-Ahmed, Ahmed and three other wives, the one absolute and indisputable fact is that Mr. Brown and Ms. Hynie were not legally married at any time as a result of Ms. Hynie's bigamy.

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[82] Id., at ¶ 3. (R., Vol. I, p. 330)
[83] Id., Exhibit 16, ¶ 5. (R., Vol. I, p. 333)
[84] Id., Exhibit 18. (R., Vol. I, p. 347)
[85] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

B. **Ms. Hynie bears the burden of proving she was legally married to James Brown and has failed in that burden.**

Ms. Hynie bears the burden of proving that her marriage to Mr. Brown is valid. "Once a marriage is shown to exist, the person attacking its validity has the burden of proving invalidity."[87] Ms. Hynie and Ahmed's marriage has been proven to be valid.[88] That fact is undisputed and stipulated to by the parties. The onus is therefore on Ms. Hynie to prove how her marriage to Ahmed was void prior to her marriage to Mr. Brown so that her purported marriage to Mr. Brown could be valid. Ms. Hynie has failed in meeting this burden in every way. She failed to prove that she did not enter into the admitted bigamous marriage. She failed in the intervening time to produce a shred of evidence related to the purported marriages of Ahmed. Her bigamy voids any chance she entered into a marital relationship with Mr. Brown. Ms. Hynie takes a different and more concerning viewpoint, that is, it does not matter if the marriage to Mr. Brown was factually bigamous or not because she was able to secure a hasty court default order, based solely on uncorroborated hearsay, from an unrelated jurisdiction and no one can do anything about it. This position is an insult to American Jurisprudence.

1. Fraudulent Annulment.

Ms. Hynie ineffectually attempts to utilize the third prong of S.C. Code § 20-1-80 by filing the Hynie Annulment Action and securing an order of a competent court without corroborating witnesses or supporting evidence.

i. Suspect Jurisdiction.

Ms. Hynie filed for annulment from Ahmed on December 15, 2003 in the

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[86] Id. (R., Vol. I, p. 349-350)
[87] Day v. Secretary of Health and Human Services, 519 F. Supp. 872, 878 (D.S.C. 1981); 52 Am. Jur. (2d) Marriages Section 129 (1970)."; Yarbrough v. Yarbrough, 280 S.C. 546, 550 (S.C. Ct. App. 1984).

CCFC.[89] Interestingly enough, neither Ms. Hynie, nor Ahmed lived in or near Charleston.[90] She lived across the state of South Carolina in Aiken County, South Carolina.[91] She testified she married Ahmed in Texas, and that Ahmed's last known address was 14403 Ella Boulevard, Apartment Number 314, Houston, Texas 77014 and that Ahmed was a Pakistani citizen with no relation to South Carolina.[92]

ii. Ahmed was not personally served.

Ahmed, we know, was not personally served with service of process, but was arguably served by publication when, conveniently, Ms. Hynie's Texas process server allegedly was unable to locate Ahmed.[93] The alleged service by publication was in the Houston Chronical buried on page 2 of the classified section.[94] Rule 2 of the South Carolina Family Court rules indicates that the South Carolina Rules of Civil Procedure ("SCRCP") shall apply to Family Court actions.[95] Ms. Hynie, knowing Ahmed was from Pakistan, made no effort to perform due diligence to locate and serve Ahmed in Pakistan pursuant to Rule 4 (h)(5) of the SCRCP for foreign service of process and utilizing the service of process rules prescribed by the Hague Service Convention. Specifically, Ms. Hynie's service by certified mail was not valid in accordance with Rule 4(d)(8) of the SCRCP in that an ex parte, default judgment against Mr. Ahmed was entered. "Service pursuant to this paragraph shall not be the basis for an entry of a default or judgment by default unless the record contains a return receipt showing the acceptance by the

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[88] Joint Stipulation of Facts, ¶ 1 and 2, Exhibit 1. (R., Vol. I, p. 255; 265-266)
[89] Id. at ¶ 7, Exhibit 5. (R., Vol. I, pp. 256; 271-273)
[90] Id. (R., Vol. I, pp. 256; 271-273)
[91] Id. at ¶ 8, Exhibit 13, page 4, line 25, page 5, lines 1-12. (R., Vol. I, pp. 256; 300, l. 25-301, l. 12)
[92] Id. at page 15, lines 10-18. (R., Vol. I, p. 311, l. 10-18)
[93] Id. at ¶ 7, Exhibits 6, 7, 8 and 9. (R., Vol. I, pp. 256; 274-289)
[94] Id. at Exhibit 10. (R., Vol. I, pp. 290-291)
[95] See Rule 2 of the South Carolina Rules of Family Court.

defendant." See. Rule 4(d)(8) of the SCRCP. Ms. Hynie's return receipt attached is blank.[96] Further, her service by affidavit failed as Ahmed was likely located outside of the United States. Finally, her service failed in accordance with the Hague Service Convention, T.I.A.S. No. 6638, 20 U.S.T. 361 (1965). Pakistan is a non-member signatory to the Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters and provides as the proper address for service documents as: The Solicitor, Ministry of Law and Justice, R Block, Pak. Sectt., Islamabad, Pakistan. Since Mr. Brown's death, Ahmed was easily found by attorneys involved with this action and proven not to have any wives prior to marrying Ms. Hynie.[97]

In a decision regarding an appeal of an action brought in both North Carolina and South Carolina, the South Carolina Supreme Court determined the affidavit requesting publication was "fatally defective, under the North Carolina law, on its face, in that it does not show that due diligence was used to find the defendant." Ray v. Pilot Fire Ins. Co., 128 S.C. 323, 324 (1924). The Ray court noted the applicable statute required a showing of due diligence in order to secure the order of publication. Id. In support of its decision, the Ray court noted multiple North Carolina cases that had approved the holding in Wheeler v. Cobb, 75 N.C. 21 (1876), where the Supreme Court of North Carolina held that the service of summons by publication was fatally defective and did not conform to the requirements of the statute because the affidavit requesting service by publication failed to allege that the defendant could not, after due diligence, be found within the state. Id. at 325, 121 S.E. at 780. The affidavit submitted by Ronald Tannell,

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[96] Joint Stipulation of Facts, at ¶ 7, Exhibit 9. (R., Vol. I, pp. 283-289)
[97] Affidavit of David Bell 9/30/2014. (R., Vol. II, pp. 515-521)

clearly did not identify due diligence was made to ascertain the whereabouts of Ahmed, but merely that a "national" data base search did not provide a valid address.[98] The Tannell affidavit states: "The results were inconclusive." Id. It said nothing about searching immigration databases or in Pakistan. Ms. Hynie was clearly aware that Ahmed was from Pakistan and testified to the same.[99] To avoid resolving litigation by default, strict compliance with the publication statute is appropriate strive for disposition of cases on their merits.[100] Therefore, the affidavit for service by publication was defective on its face since Ms. Hynie specifically avoided searching and serving Ahmed where she knew she would most likely find him. The Order for publication was obtained without the necessary diligence thereby making service defective.

iii. Self-serving hearsay evidence is the only evidence presented by Ms. Hynie.

Ms. Hynie's prior statements regarding Ahmed's marital status are not admissible in this proceeding as such statements are hearsay.[101] She was granted an annulment on April 15, 2004 subsequent to a hearing where her unsupported, uncorroborated, self-serving, hearsay testimony laced with allegations fraudulent and criminal in nature against Ahmed, and his attorney, were provided as the sole grounds and information before the court.[102] In the Hynie Annulment Complaint, she claims, without corroboration, Ahmed wanted to marry her to obtain United States citizenship.[103] She also indicated that she was informed by Ahmed he had three or more wives in Pakistan

[98] Joint Stipulation of Facts, ¶ 7, Exhibit 6. (R., Vol. I, p. 274-279)
[99] Id. at ¶ 8, Exhibit 13, Page 7, lines 7-9. (R., Vol. I, pp. 256; 303, l. 7-9)
[100] See Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits").
[101] See Rule 801 of the South Carolina Rules of Evidence.
[102] Joint Stipulation of Facts, ¶ 7, Exhibit 12. (R., Vol. I, pp. 256; 293-296)
[103] Id. at ¶ 7and 8, Exhibit 5 and Exhibit 13, Page 10, lines 16-20. (R., Vol. I, pp. 256; 277; 306, l. 16-20)

the parties married on February 17, 1997.[104] The only indisputable fact in the Hynie Annulment Complaint is that they were married on February 17, 1997 confirming she married Ahmed. There was a hearing for the annulment on April 15, 2004.[105] Ms. Hynie was the only party to testify.[106] Notably absent was her husband, Ahmed, to defend against the criminal allegations alleged by Ms. Hynie. Additionally absent was her "guitar player" whom she testified was with her the day she claims Ahmed told her he was already married to three wives and just married her to get United States citizenship.[107] Equally as important, Ahmed's immigration attorney was absent who could have testified, if it were true, that he was given $350.00 and a signed piece of paper by Ms. Hynie to terminate the marriage.[108] Apparently, like all of Ms. Hynie's evidence, the lawyer referenced in her testimony has vanished as well.[109]

Rule 802 of the South Carolina Rules of Evidence indicates that the general rule of evidence with regard to hearsay is that it is not admissible unless an exception applies. "[W]here there is difficulty in obtaining other equally probative evidence and in the particular circumstances of the case there are sufficient guarantees that it is trustworthy, hearsay may be admitted as an exception to the general rule of exclusion." Need alone is not sufficient, though.[110] There must also be sufficient guarantees of trustworthiness to serve as the substitute for cross-examination.[111] The proponent of a statement alleged to be within a hearsay exception bears the burden of proving that the requirements of the

[104] Id at ¶8, Exhibit 13, Page 10, lines 11-13. (R., Vol. I, p. 256; 306, l.11-13)
[105] Id. (R., Vol. I, p. 297)
[106] Id. (R., Vol. I, pp. 297-313)
[107] Id. at Page 8, lines 10-20. (R., Vol. I, p. 304, l. 10-20)
[108] Id. at Page 11, lines 1-21. (R., Vol. I, p. 307, l. 1-21)
[109] Id. (R., Vol. I, p. 307, l. 1-21)
[110] State v. Thomas, 159 S.C. 76 (1930).
[111] See Idaho v. Wright, 497 U.S. 805 (1990).

particular exception are satisfied.[112] When the requirements of the proposed exception are not satisfied, the offered statement or record is inadmissible hearsay.[113]

Ms. Hynie's prior statements about Ahmed's marital status, while proven to be untrue by Ahmed's own testimony on the Ahmed-Hynie Marriage License Application, are not admissible because of the hearsay rules. Ms. Hynie attempts to admit such statements to prove the truth of the matter asserted (i.e. that Ahmed was previously married). She has failed to meet her burden by proving that such statements are not hearsay or subject to an exception. As a result, this Court should not consider such evidence and should exclude the same thereby leaving the only evidence that is admissible is that Ms. Hynie was married to Ahmed at the time she married Mr. Brown.[114]

iv. Common sense dictates that Ms. Hynie's citizenship assertions are fabricated for economic gain.

Ms. Hynie alleged in her self-serving, non-corroborated, non-cross examined testimony that Ahmed told her on her wedding day that "he just needed to stay in the country."[115] She further testified that she went to Mr. Ahmed's immigration attorney and told him "This guy just wanted to get into the country."[116] This line of testimony is certainly questionable when Ahmed was legally in the United States and had a Social Security Number ("SSN") issued in Texas in 1995. Ms. Hynie knew this when she testified because she provided the CCFC Ahmed's SSN in her attempted service exhibits.

As part of her fabrication, Ms. Hynie asserts that she had to obtain the annulment

[112] See Marshall v. Thomason, 241 S.C. 84 (177) (1962).
[113] See Anders v. Nash, 356 S.C. 102 (1971).
[114] Joint Stipulation of Facts, ¶¶ 1 and 2. (R., Vol. I, p. 255)
[115] Id. at ¶ 8, Exhibit 13, Page 8, lines 19-20. (R., Vol. I, p. 304, l. 19-20)
[116] Id. at Page 9, lines 4-8. (R., Vol. I, p. 305, l. 4-8)

thereby making her marriage to Ahmed void ab initio because Ahmed merely married her in order to stay in the United States. She further added that the marriage to Ahmed was never consummated.[117] If a marriage ceremony was the only requirement to staying in the United States, Ms. Hynie's testimony might have some shred of believability. However, United States immigration law regarding marriage for a green card requires substantially more. Any immigration attorney, such as the one Ms. Hynie claims Ahmed had, would know that.

Immigration law is concerned more with the couple's matrimonial intention at the time of marriage, rather than consummation or engaging in sexual relations. Immigration marriage fraud is governed by the Immigration Marriage Fraud Amendment ("IMFA") of 1986. (8 U.S.C. § 1186a(g) (2000). <u>The IMFA specifically provides that couples married for less than twenty-four months are subject to more scrutiny and must wait an additional two years before obtaining permanent residence.</u>[118] During that time, the immigrant spouse has only "conditional" permanent residency and is subject to deportation if the marriage is determined to not be bona fide. Id § 216 (b). With the passage of IMFA, the Immigration Naturalization Services ("INS") promulgated regulations illustrating how a couple could demonstrate that their marriage was bona fide when entered. <u>Under the regulation, the couple must attach evidence to their joint petition that demonstrates that the marriage was not entered into for the purposes of evading United States immigration law.</u> Our courts have determined that a marriage is a sham if the bride and groom did not intend to establish a life together at the time that they married.[119] Although different than the standard applied by the IMFA, nevertheless, the regulations encourage petitioners to

[117] <u>Id.</u> at Page 10, lines 2-10. (R., Vol. I, p. 306, l. 2-10)
[118] (INA § 216 (c)-(d); 8 U.S.C. § 1186a(c)-(d) (2000).

produce evidence in support of their petitions that is responsive to both Bark and IMFA. Such evidence includes:

> (1) documentation showing joint ownership of property, (2) lease showing joint tenancy of a common residence, (3) documentation showing commingling of financial resources, (4) birth certificates of children born to the marriage, (5) affidavits of third parties having knowledge of the bona fides of the marital relationship, and (6) other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.[120]

All of these factors involve events that happen after the marriage and courts use these events to try to determine what the couple intended at the moment of marriage.[121]

In order to prove the bona fide marriage and ultimately for Ahmed to receive status to stay in the United States, retroactive to the laws of 1997 (the year of the Hynie-Ahmed Marriage), several documents needed to be filed. First, Ms. Hynie was required to file a Form I-130 Alien Relative Visa Petition to adjust Ahmed's immigration status on the basis that they were husband and wife. Ahmed, concurrently, would file a Form I-485 Application to Register Permanent Residence or to Adjust Status. Thereafter, there shall, in the facts of the marriage between Ms. Hynie and Ahmed, be a Form I-130 Petition interview. In the Hynie-Ahmed Marriage, as the facts stated by Ms. Hynie in her testimony on April 15, 2004, the I-130 and I -485 would have been concurrently filed. With few exceptions, the I-130 Petition Interview would have been mandatory.[122]

This begs the question, why would Ahmed marry a United States Citizen to acquire permanent residential status and a green card and not go through all of the steps required, i.e. filing a concurrent I-130 Form and I-485 Form and the required I-130

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[119] Bark v. INS, 573 F.2d 1200, 1201 (9th Cir. 1975),
[120] 8 C.F.R. 216.4(a)(5)(i)-(iv).
[121] Bark, 573 F.2d at 1202 (conduct occurring after the wedding may be considered to the extent that it "bears upon the subjective state of mind" at the time of the wedding.")
[122] See Operating Instruction 245.28 C.F.R. §§ 1245.6; Operating instruction 245.2.

interview? Maybe Ms. Hynie did not know and presumes Ahmed did not know there were procedural steps after the marriage ceremony. Ms. Hynie, interestingly, disposed of this possibility when she testified that Ahmed had an immigration attorney and it therefore should be assumed that the attorney knew the steps required subsequent to the marriage and counseled his clients accordingly.[123] The marriage for a green card argument does not hold water. A fact known by Ms. Hynie is that Ahmed was already legally in the United States with a SSN issued in Texas in 1995. Ms. Hynie's testimony is a fabrication that was created to further her own interests.

CONCLUSION

Most importantly, and supportive of an immediate reversal and remand with an order granting summary judgment to Appellants, is the analysis of Lukich v. Lukich. This Court may dispose of this entire action, as it relates to Ms. Hynie, in one swift ruling. The parties stipulated to the facts. Ms. Hynie was married to Ahmed when she allegedly married Mr. Brown on December 14, 2001. She did not annul her relationship with Ahmed until April 15, 2004. Ms. Hynie never had another marriage ceremony of any type with Mr. Brown after her annulment. No other facts are necessary in discovery. When the Lukich analysis is applied to these facts, this Court can reach but one conclusion, Ms. Hynie is a bigamist.

Additionally, collateral estoppel does not apply in this matter as Mr. Brown was neither a party nor did he have the opportunity to litigate the issue of his marriage to Ms. Hynie in the Charleston Court. As a result, Mr. Brown had no privity with the Hynie-Ahmed Annulment Action. Therefore, his heirs and estate also had no privity and are not collaterally estopped from pursuing the issue of Ms. Hynie's bigamy.

[123] Joint Stipulation of Facts, ¶8, Exhibit 13, p. 8, l. 23-24. (R., Vol. I, p. 304, l. 23-24)

Finally, if this Court were not inclined to enforce Lukich, and as Appellants are not collaterally estopped to pursue Ms. Hynie's bigamy, the Appellants should be allowed additional discovery to prove Ms. Hynie's bigamy. Appellants have proven the existence of additional evidence on which discovery should continue in the form of the Ahmed-Hynie marriage license, the marriage license application, the Brown-Hynie Consent Order, and Diaries. Discovery should continue based on these available items of evidence. Appellants have a right to challenge the facts as presented in the Hynie-Annulment Action without the application of res judicata or collateral estoppel.

For the reasons stated above, the Appellant respectfully requests that this Court at a minimum reverse the lower court's grant of summary judgment to Appellee. However, based on Lukich, this court should reverse and remand with a grant of summary judgment to Appellants.

This 12th day of June, 2017.

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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

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SC Court of Appeals

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 certifies that this Final Brief complies with Rule 211(b), SCACR.

June 12, 2017.

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