

State of South Carolina  
County of Aiken

Court of Common Pleas

Donna M. Rosier )  
)  
Appellant, )  
v. )  
)  
Angelique Michelle Smith, )  
Alexandria R. Downs, )  
individually and as )  
personal representatives )  
for the Estate of )  
Barry E. Rosier and )  
Savannah Rosier, )  
)  
Respondents)

Transcript of Record  
2017-CP-02-0053

**RECEIVED**

JAN 18 2018

SC Court of Appeals

October 11, 2017  
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Lisa Hostetler, Esquire  
Attorney for the Plaintiff

Arthur W. Rich, Esquire  
Attorney for the Defendant

Bethanie K. Creppon  
Circuit Court Reporter

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I N D E X

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## P R O C E E D I N G S

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2  
3 THE COURT: Okay. This is an appeal from the  
4 probate judge in Aiken; is that correct?

5 MR. RICH: Yes, Your Honor.

6 MS. HOSTETLER: Yes, Your Honor.

7 THE COURT: Wherein your client was seeking to  
8 be declared the wife of -- what's his name?

9 MS. HOSTETLER: Mr. Rosier.

10 THE COURT: Mr. Rosier. And she found that she  
11 was not. And you have appealed?

12 MS. HOSTETLER: Yes, Your Honor.

13 THE COURT: Interesting case. The Appellant  
14 was married to A, B, C, D, E. And when C died, she  
15 tried to seek his benefits, and to get those  
16 benefits, she has to be the wife; probate judge  
17 found that she was not, based on a number of  
18 reasonings; one being testimony -- not testimony,  
19 but the assertion she made in a certificate for  
20 marriage license in North Carolina, I think, when  
21 she married number E, five. She's still married to  
22 E, still holds herself out to be the wife of E, but  
23 claiming to be the wife of C. Interesting claims.

24 MS. HOSTETLER: Yes, Your Honor.

25 THE COURT: Now tell me why the probate judge

1 is wrong.

2 MS. HOSTETLER: Yes, Your Honor.

3 THE COURT: Would you like to be seated?

4 You're welcome to.

5 MS. HOSTETLER: Okay. Thank you.

6 Yes, Your Honor. So --

7 THE COURT: And, I'm sorry, your name is?

8 MS. HOSTETLER: Lisa Hostetler.

9 THE COURT: Spell the last name.

10 MS. HOSTETLER: H-O-S-T-E-T-L-E-R.

11 THE COURT: Hostetler. All right.

12 MS. HOSTETLER: Your Honor, in this case, our  
13 client married C -- I'll use what you've given us  
14 for ease -- married C and filed and went to court  
15 with C --

16 THE COURT: Got a legal separation.

17 MS. HOSTETLER: Got a legal separation --

18 THE COURT: Never a divorce decree, as we know  
19 of, in Aiken County from C?

20 MS. HOSTETLER: Yes. And not anywhere in South  
21 Carolina, according to the DHEC records that were in  
22 the file.

23 So in this case, what is happening is, is our  
24 client was married to somebody, got a separation  
25 order, but never a legal divorce. And under South

1 Carolina law, as it stands, I guess unless this case  
2 changes that, there are certain standards for  
3 getting a divorce. And it is the --

4 THE COURT: There's no question you have to  
5 have grounds --

6 MS. HOSTETLER: Yes.

7 THE COURT: -- you know, separation for -- used  
8 to be separation for three years. Now it's --

9 MS. HOSTETLER: Now, it's a year.

10 THE COURT: -- a year, physical cruelty,  
11 habitual use of alcohol or drugs, and adultery.

12 MS. HOSTETLER: Yes.

13 THE COURT: And it looks like the facts in the  
14 record show that she never obtained a divorce --

15 MS. HOSTETLER: Correct.

16 THE COURT: -- nor did C obtain a divorce from  
17 her --

18 MS. HOSTETLER: Yes. And --

19 THE COURT: -- i.e., there was a legal  
20 separation.

21 MS. HOSTETLER: And so in our original  
22 complaint, you know, we alleged marriage and,  
23 obviously, didn't address divorce, we didn't find a  
24 divorce. We looked for a divorce, we couldn't find  
25 any record of it.

1 THE COURT: Of her divorce from C --

2 MS. HOSTETLER: Correct.

3 THE COURT: -- other than a legal separation?

4 MS. HOSTETLER: Correct. All we could find was  
5 a legal separation. So the respondents, in their  
6 answer, agreed that they were married so that she  
7 was married to C, and so --

8 THE COURT: Well, in their brief they agree  
9 their marriage ceremony took place.

10 MS. HOSTETLER: Yes. And there was also a  
11 family court order where Mr. Rosier himself was  
12 actually present. And we would argue that his  
13 estate is bound by his actions and things that he  
14 was bound by during his lifetime.

15 THE COURT: What effect does -- number one,  
16 there's no evidence in the record showing that she  
17 was legally divorced from A or B, which would have  
18 made her a candidate for marriage to C; had she been  
19 married to A or B, obviously the marriage -- the  
20 alleged marriage to C would have been void as a  
21 matter of law. No evidence there.

22 MS. HOSTETLER: Correct, Your Honor. And the  
23 reason why that was not presented at the trial level  
24 is because the answer of the respondents admitted  
25 that they were married. And so the issue of the

1 marriage was not an issue for the trial, it was  
2 really the issue of whether they were divorced.

3 THE COURT: Well, I guess maybe the probate  
4 judge looked at it, maybe not necessarily as an  
5 issue as to the ability for her to marry, but  
6 perhaps as to her credibility when she takes the  
7 position that she's eligible to marry E by signing  
8 the marriage certificate saying that she is  
9 divorced, assuming she would be divorced from A, B,  
10 C and D, and using that maybe to judge her  
11 credibility. I don't know what she did.

12 MS. HOSTETLER: And I think you're right. I  
13 think that that would be an issue of her  
14 credibility. However, at the trial court level, we  
15 presented what we were able to find, which were the  
16 records from DHEC that there's no record of divorce  
17 in South Carolina. There's testimony in the record  
18 from the respondents that there were -- that they  
19 didn't have any knowledge of a divorce, that they  
20 didn't find any records of divorce. One of the  
21 daughters looked through all her -- all his  
22 paperwork of the decedent's and couldn't find --

23 THE COURT: But you would think it would be a  
24 divorce if she's signing a marriage certificate  
25 saying she's eligible to marry E.

1 MS. HOSTETLER: You would think so, but I --  
2 there was not. There was not. And there has, to  
3 this day, never been any evidence that she ever got  
4 divorced from C. And the record is clear that there  
5 is no evidence that she ever went through --

6 THE COURT: Does that automatically make her  
7 still the wife of C?

8 MS. HOSTETLER: Well, I think the law in South  
9 Carolina, that's what it is today, that if you don't  
10 get a legal divorce under the grounds that the  
11 Legislature placed, that you can't get a common law  
12 divorce in South Carolina as of today.

13 THE COURT: No such thing as a common law  
14 divorce, I agree.

15 MS. HOSTETLER: And I think if we let her sign  
16 something later on, a marriage license, to say I'm  
17 divorced, that we are establishing common law  
18 divorce in South Carolina. Because then you could  
19 just say I'm divorced and I'm not married anymore,  
20 and that would be sufficient.

21 THE COURT: How about the legal theory of  
22 estoppel and the brief of the children, child, when  
23 they talk about judicial estoppel where she is  
24 taking a position one way to sign the marriage  
25 license that she's eligible to marry E, when, in

1 fact, if she were still married to C, she would not  
2 be eligible, and now she's taken a totally  
3 inconsistent position by saying that she is the wife  
4 of C, so she's got two husbands?

5 MS. HOSTETLER: Yes, Your Honor. Judicial  
6 estoppel in this case, under the Cothran v. Brown  
7 case in 2004, is five elements. And that position  
8 that was raised by the respondents fails the  
9 judicial estoppel elements in that they're not two  
10 inconsistent positions taken by the same party or  
11 parties in privity with one another.

12 Her position in this case is between her and  
13 Mr. Rosier's estate. And again, we do have a court  
14 order from years prior that they're married and that  
15 they had a separation agreement, no divorce; but it  
16 was between her and him and now his estate. And the  
17 marriage license that she applied for in North  
18 Carolina is unrelated to Mr. Rosier's estate here,  
19 so we don't have the same parties to it.

20 The second element, the positions must be taken  
21 in the same or related proceedings involving the  
22 same party or parties in privity with each other.  
23 Obviously, these are different proceedings. It's  
24 not that -- it would be like, obviously, us  
25 continuing this litigation then changing the

1 position that we have. We're not taking  
2 inconsistent positions within these proceedings.

3 THE COURT: Well, Ms. Hostetler, I've asked you  
4 a lot of questions. I need to let you make your  
5 argument, so I will not ask any more questions. You  
6 can tell me whatever else you like.

7 MS. HOSTETLER: Okay. And then, of course, the  
8 other elements of judicial estoppel: The party  
9 taking the position must have been successful in  
10 maintaining that position have received some  
11 benefit. That would be in a judicial proceeding.

12 Applying for a marriage license is done through  
13 the clerk of court in North Carolina and it's not a  
14 judicial proceeding. So in that case, the judicial  
15 estoppel argument, while it would be a good argument  
16 if it was in the same proceedings, this wasn't a  
17 court proceeding, so judicial estoppel wouldn't  
18 apply in this case.

19 THE COURT: Well, how about just the pure  
20 fairness of this whole situation where you have a  
21 lady who has been separated from C under a legal  
22 separation for some 20-odd years, only stayed with  
23 him two years, has since married D, fourth husband,  
24 apparently divorces him, even though she now says  
25 she's still married to C, and then still saying

1 she's eligible for marriage after she divorced the  
2 fourth husband, marries the fifth husband, living  
3 with him as a married woman, as his wife, and then  
4 when her third husband dies, she comes back in the  
5 picture and says, hey, I'm still his wife, give me  
6 the money, don't give it to the children? That  
7 smells to high heaven to me.

8 MS. HOSTETLER: Yes, Your Honor. I would agree  
9 that my client is not the most upstanding citizen  
10 that we would necessarily all want to aspire to be,  
11 however --

12 THE COURT: Well, I'm not condemning her for  
13 having five husbands. But she may not -- either she  
14 is eligible to marry the fifth one or she's not.

15 MS. HOSTETLER: Well, Your Honor, I think the  
16 issue of her being eligible to marry the fifth one  
17 is outside the scope of what we have to worry about  
18 in these proceedings. Probably an issue for someone  
19 else --

20 THE COURT: Outside what you have to worry  
21 about, I'm not so sure it's outside what I have to  
22 worry about. How much money is involved?

23 MS. HOSTETLER: There is a pension or  
24 retirement through his employer.

25 THE COURT: I understand that, but I asked the

1 amount.

2 MS. HOSTETLER: I think the actual probate  
3 amount is not very much.

4 Do you know?

5 MR. RICH: I think about \$1,600 a month --

6 THE COURT: How much?

7 MR. RICH: \$1,600 a month for five years, so  
8 it's substantial.

9 UNIDENTIFIED MALE: I think that's if the  
10 children are entitled to it. I think if she's  
11 entitled to it, it's 2,100 a month for her life.

12 THE COURT: For her life. How old is she? I  
13 mean, she's got to be up there if she's had five  
14 husbands.

15 UNIDENTIFIED MALE: I try not to ask those  
16 questions, Your Honor.

17 MS. HOSTETLER: Maybe early 60's.

18 THE COURT: She's young. Young to me, old to  
19 you, and you don't have to agree with that.

20 MS. HOSTETLER: No, Your Honor, I will not  
21 answer that one.

22 THE COURT: Very good lawyer. Well, you see  
23 where I'm coming from.

24 MS. HOSTETLER: I do.

25 THE COURT: I mean, it's an interesting factual

1 situation, it's an interesting legal situation. And  
2 then, of course, I'm sitting as an appellate court  
3 for the probate judge -- probate court, and my scope  
4 of review, standard of review, is sort of limited in  
5 some respects.

6 MS. HOSTETLER: Yes, Your Honor. I think --  
7 and in this case, you know, the fairness and what's  
8 the right thing to do in this case -- you know, they  
9 say bad facts make bad law sometimes.  
10 Unfortunately, I think that if we find that it would  
11 be better to give this to her children, I think that  
12 you, in that case, would be establishing that you  
13 can, by affidavit, divorce or have the divorce be  
14 recognized.

15 THE COURT: Well, it's a little more than that.  
16 I mean, you have to look at her actions subsequent  
17 to leaving him some many, many, many years ago.  
18 She's held herself out, continues to hold herself  
19 out, as the wife of E and also claiming to be the  
20 wife of C. You certainly can't be the wife of two  
21 people. It's sort of an interesting situation.

22 MS. HOSTETLER: And under the law now, those  
23 subsequent marriages would be void.

24 THE COURT: Well, if, in fact, she's still  
25 married to C.

1 MS. HOSTETLER: Uh-huh.

2 THE COURT: All right. Mr. Rich?

3 MR. RICH: Sit or stand, Your Honor?

4 THE COURT: However you want to do it. I  
5 normally make you stand, but we don't have anybody  
6 in here today.

7 MR. RICH: I'm happy to do that. Thank you,  
8 Your Honor. You've made some of my arguments for  
9 me, which I appreciate.

10 Under the limited scope of review, I think if  
11 there are -- you know, all we've got to show is that  
12 there's some facts found by the lower court to --

13 THE COURT: Well, as I understand it, I have to  
14 review the record and if it shows there's no  
15 evidence to support her order or then I have to  
16 maybe reverse it, but if there's some evidence to  
17 support it, then I can't change it.

18 MR. RICH: Exactly.

19 THE COURT: That's my understanding of the  
20 review that I'm under. And, obviously, she looked  
21 at the totality of the facts, made a credibility --  
22 judged the credibility as she has to do in a nonjury  
23 matter, found that she was not credible, number one,  
24 and found that there was evidence to support the  
25 fact that she was not -- continue to be the wife of

1 C, or whatever the guy's name is, Rosier, third  
2 husband. So how can I change it based on if there  
3 is some evidence?

4 MR. RICH: I agree there is some evidence. And  
5 I think under the scope of review, this Court should  
6 uphold the verdict.

7 THE COURT: Well, the other side of the coin is  
8 if she was never divorced from C, simply legally  
9 separated, and her marriage to D and E would be void  
10 as a bigamous marriage, therefore, she was not  
11 married to D and E, she would still be married to C.  
12 It is a convoluted factual and legal -- how do you  
13 apply those facts to the law in the case?

14 MR. RICH: We don't take the position that we  
15 proved conclusively that she was divorced from C; we  
16 take the position that there's sufficient evidence  
17 in the record for the Court to make that finding.  
18 And for that matter, there's no evidence in the  
19 record that she was ever divorced from A and B.  
20 That could have been put into the record.

21 As far as what we've agreed to in terms of the  
22 complaint in the lower court, we agree that she went  
23 through a marriage -- got a license and went through  
24 a marriage ceremony, but that alone does not make a  
25 valid marriage. If that's all it takes --

1 THE COURT: Well, she did that with E.

2 MR. RICH: Exactly. If that's a valid  
3 marriage, then she -- we concede that's all it  
4 takes, she's married to E, end of the case.

5 THE COURT: Well, you know, you sit up here --  
6 I've been doing it almost 14 years and practiced for  
7 30 years. You think you've seen everything and, lo  
8 and behold, you start reading these briefs and  
9 trying to figure out husband A, husband B, husband  
10 C, husband D, husband E. I thought I was reading  
11 some fairytale.

12 MR. RICH: It's a matter a fundamental  
13 fairness. For this lady to be married less than two  
14 years and come back 30 years later and cut out the  
15 three daughters and get this when she's married to  
16 someone else?

17 THE COURT: That may not be fair, but had she  
18 not married D and E, four and five, she would be  
19 entitled to it.

20 MR. RICH: But she did.

21 THE COURT: But she did. So what effect does  
22 those marriages to husband four and five have on a  
23 legal separation that we know of, that's all in the  
24 record --

25 MR. RICH: She could have been married in any

1 other state. All states have differences, different  
2 requirements. As I remember, we had a lieutenant  
3 governor in this state one year who went to Costa  
4 Rico or somewhere and got divorced back in the '70s.  
5 It was Earl Morris. Divorces can be gotten anywhere  
6 under different jurisdictions. She signed ---

7 THE COURT: Well, we had a lawyer from  
8 Walterboro who did the same thing who later became a  
9 circuit court judge. Then we had one governor that  
10 went on the Appalachian Trail, but he didn't get  
11 married, did he?

12 MR. RICH: That's a different story.

13 THE COURT: All right. Obviously you've both  
14 got interesting positions and I've got to review it  
15 from the standard I have to review it from. And  
16 I'll re-read the briefs and I'll consider anything  
17 else y'all want to send me, which is something I'll  
18 do very shortly. I appreciate the honesty of both  
19 of you and the candidness you've had with this. It  
20 is what it is and it may be -- notwithstanding as  
21 bad as it smells, she might be entitled to it.

22 We'll see.

23 Anything else you want to add? Anything  
24 supplemental or anything you want to do?

25 MS. HOSTETLER: Thank you, Your Honor.

1 MR. RICH: Thank you, Your Honor.

2 THE COURT: Thank y'all.

3 -- END OF TRANSCRIPT OF RECORD --

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## C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Aiken County, South Carolina, on the 11th of October, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

January 15, 2018

s/Bethanie K. CrepponBethanie K. Creppon  
Circuit Court Reporter

# LAWYERLISA

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January 16, 2018

The Honorable Jenny Abbott Kitchings  
Clerk of Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Rosier v. Smith, et al.  
Appellate Case No.: 2017-002344  
Our File No.: 021734-00002

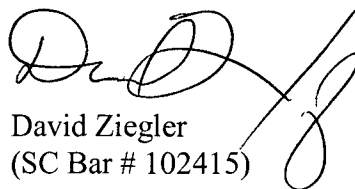
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SC Court of Appeals

Dear Ms. Kitchings,

Enclosed please find the Transcript of Record from the Aiken County Court of Common Pleas with regard to the above-referenced matter. We would appreciate your filing same and returning a clocked-in copy to our office in the envelope provided for your convenience. By copy of this letter, we have served a copy on Arthur W. Rich, counsel for Respondents.

Should you have any questions concerning this matter, please do not hesitate to contact me at (803) 563-5163 or by e-mail at [David@LawyerLisa.com](mailto:David@LawyerLisa.com).

Sincerely,



David Ziegler  
(SC Bar # 102415)

DZ/jl

cc: Arthur W. Rich, Esq.