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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

JUN 06 2018

SC Court of Appeals

Judge Perry M. Buckner, III, Circuit Court Judge

CASE NO. 2012-CP-25-402

Angel Y. Gary as Personal Representative of the Estate of  
Blondell M. Gary, ..... Respondent,

v.

Lowcountry Medical Transport, Inc., American Medical Response, Inc.,  
d/b/a Access2care, and Eugene A. Kirkland, In re: Charles Gary, Purported  
Surviving Spouse, Defendants,

Of Whom Charles Gary, Purported Surviving Spouse, is ..... Appellant.

APPELLANT'S PETITION FOR REHEARING

Joseph Dawson, III  
Post Office Box 41367  
North Charleston, South Carolina 29423  
(843) 207-9004

Attorney for Appellant Charles Gary

## ARGUMENT

Charles Gary respectfully submits that this Court overlooked or misapprehended the legal grounds and reasoning of the lower court's order and that either a rehearing should be granted, or the Opinion vacated, on the following grounds.

**I. THE COURT OF APPEALS MISAPPLIED THE JOHNS COURT'S PUBLIC POLICY AGAINST BIGAMOUS MARRIAGES TO THE FACTS OF THIS CASE, BECAUSE THERE IS NO ALLEGATION THAT THE APPELLANT WAS MARRIED TO SOMEONE ELSE AT THE TIME OF THE DECEDANT'S DEATH.**

The Court of Appeals misapplied Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992) to the facts of this case when it held that “[w]hile ordinarily the Estate may be bound to its previous assertions, we find that policy should yield to the overriding policy against bigamous marriages, as expressed by the General Assembly.” Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary v. Charles Gary, 2018-Opinion No. 5563 (Ct.App. 2016). In Johns, the Court of Appeals found that “[a]t the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy.” Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct.App.1992). Accordingly, the Johns Court found that although the parties' consent order is not void, the marriage it affirms is void because the public policy expressed in S.C. Code Ann. § 20-1-80 (1985) overrides the public policy of res judicata. Id. Therefore, at no time during their relationship was Mr. John's unmarried.

The case at bar is distinguishable from the Johns case. First, it is undisputed that the Estate in its Wrongful Death Case complaint alleged that “Blondell Gary (hereinafter

“Blondell”), on behalf of her husband, Charles Gary, contracted with American Medical Response to provide non-emergency medical transport on the day in question.” (R. p. 076, Wrongful Death and Survival Action, Complaint ¶15). The Estate maintained this position throughout the Wrongful Death Case, despite knowledge of a possible defect in the decedent and Appellant’s marriage license in 1999. Blondell M. Gary died on January 31, 2012, more than a decade after the events alleged by the Respondent in its Petition. The Estate does not allege a bigamous marriage at the time of the decedent’s death. Rather it argues that a common law marriage was not established. This is not a Johns public policy impediment; therefore, there is no competing public policy to yield to in this case.

On the other hand, South Carolina law is clear, the Respondent is judicially bound by its pleadings and it cannot contradict its previous position that Mr. Gary is the decedent’s spouse and a beneficiary of the Estate notwithstanding the factual basis to support common law marriage. South Carolina law provides that:

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 418 S.E.2d 322 (Ct.App.1992).

The Estate is judicially bound by the admissions in its pleadings in the Wrongful Death Case and in two other companion cases where it admitted that Mr. Gary is the surviving spouse and a beneficiary of the Estate of Blondell M. Gary. This Court correctly noted “. . . the doctrine of binding a party to its pleadings exists to protect the integrity of the court

process.”<sup>1</sup> This Court should protect the integrity of the judicial process here.

There is no public policy conflict in this case. Instead, the pleadings on file with the court clearly show that Mr. Gary had only one wife on the date of the decedent’s death (January 31, 2012) and that the Respondent cannot contradict this judicial admission based on its pleadings. Therefore, this Court should find that the trial court erred when it allowed the Respondent to argue and introduce documents that sought to contradict its pleadings.

**II. THE COURT OF APPEALS OVERLOOKED THE LEGAL EFFECT OF THE CONSENT ORDER OF DISMISSAL WITH PREJUDICE WHICH WAS AN ADJUDICATION ON THE MERITS WHICH PRECLUDES SUBSEQUENT LITIGATION.**

The Court of Appeals overlooked the legal effect of the Consent Order of Dismissal when the circuit court failed to dismiss the Estate’s Petition because the Estate consented to an Order of Dismissal with prejudice prior to filing its Petition challenging Mr. Gary’s spousal status. The Appellant asserted at the Petition hearing that the trial court should dismiss the Petition as it relates to Mr. Gary because the Court’s earlier dismissal of the underlying case bars subsequent litigation on the issues raised in the Estate’s complaint. South Carolina law provides that:

A dismissal ‘with prejudice’ indicates an adjudication on the merits and, operating as *res judicata*, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. [Citations Omitted]. Where an action has been so dismissed, the judgment

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<sup>1</sup> The Estate claimed that Mr. Gary must and/or it intended to compel him to seek recovery of certain damages in the Wrongful Death Case as the surviving spouse even though he was also seeking to recover the same in his Personal Injury Case. Due to this controversy over damages recoverable in the two cases, Mr. Gary filed a Declaratory Judgment Action against the Estate in the Beaufort County Circuit Court to resolve this dispute, on October 20, 2014. (R. pp. 088-096, Declaratory Judgment Action Complaint). Notwithstanding this dispute, the Estate settled the Wrongful Death case without retracting its claim that Mr. Gary was the surviving spouse and that his damages must be included in its case.

operates, in a subsequent action involving the same subject matter, 'so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.'

Nunnery v. Brantley Constr. Co., 289 S.C. 205, 345 S.E.2d 740 (Ct.App.1986)

It is undisputed that the Estate alleged that Mr. Gary was the husband of Blondell Gary. (R. p. 076, Wrongful Death and Survival Action, Complaint ¶15). Equally, it is undisputed that American Medical Response failed to Answer the Respondent's Complaint within 30 days of service; and therefore, it was held in default. The Estate objected to American Medical Response's motion to answer out of time. Moreover, the Estate did not seek to amend its pleadings to strike the reference that Mr. Gary was the decedent's spouse, over the course of the litigation in the Wrongful Death Case. South Carolina law is clear:

It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form that the issue may take in the subsequent action.

Laughon v. O'Braitis, 360 S.C. 520, 602 S.E.2d 108 (Ct.App.2004).

There is no allegation that Mr. Gary was married to another woman at the time of the decedent's death. The Estate judicially admitted that Mr. Gary was the spouse of the decedent at the time of Blondell Gary's death. That fact is conclusively settled by Judge Buckner's November 13, 2015, Consent Order of Dismissal with Prejudice. Mr. Gary's spousal status is the law of the case, whether rightly or wrongly decided and may not again be litigated in a subsequent action, regardless of the form that the issue may take. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (an unchallenged ruling, "right or wrong, is the law of this case and

requires affirmance.").

**CONCLUSION**

For the foregoing reasons, the Appellant Charles Gary respectfully requests that this Court vacate its decision.

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph Dawson, III". The signature is written in a cursive style and is positioned above a solid horizontal line.

**JOSEPH DAWSON, III, Esquire**  
Post Office Box 41367  
North Charleston, South Carolina 29423  
(843) 207-9004

**ATTORNEY FOR APPELLANT  
CHARLES GARY**

North Charleston, South Carolina  
June 5, 2018

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM HAMPTON COUNTY  
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Judge Perry M. Buckner, III, Circuit Court Judge

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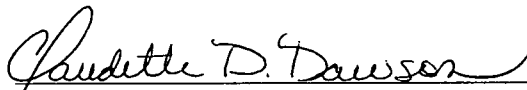
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d/b/a Access2care, and Eugene A. Kirkland, In re: Charles Gary, Purported  
Surviving Spouse, Defendants,

Of Whom Charles Gary, Purported Surviving Spouse, is ..... Appellant.

**PROOF OF SERVICE**

I certify that I have served the **Appellant's Petition for Rehearing** upon Respondent  
Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary by depositing a copy  
of the same in the United States Mail, postage prepaid, on June 6, 2018, addressed as follows:

R. Alexander Murdaugh, Esquire  
Bert G. Utsey, Esquire  
Austin H. Crosby, Esquire  
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.  
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\_\_\_\_\_  
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June 5, 2018

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SC Court of Appeals

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

RE: Angel Y. Gary as Personal Representative of the Estate of Blondell M. Gary v. Lowcountry Medical et. al., Appellate Case No. 2016-000222

Dear Ms. Kitchings:

In accordance with Rules 221 and 240, SCACR, enclosed please find for filing an original and six (6) copies of Respondent's Petition for Rehearing along with the Certificate of Service and check in the amount of \$25.00 for the filing fee. I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies and returning them to me in the enclosed envelope.

By copy of this letter, I am serving all parties with these documents. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,



Joseph Dawson, III, Esq.

cc: R. Alexander Murdaugh, Esq.  
Bert G. Utsey, Esq.  
Austin H. Crosby, Esq.