THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2015-002417

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

Tommie Rae Brown, Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

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# PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF APPELLANT TERRY BROWN

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John A. Donsbach
South Carolina Bar No. 69681
Donsbach Law Group, LLC
P.O. Box 212139
Martinez, Georgia 30917
Telephone: (706) 650-8750
Facsimile: (706) 651-1399
Email: jdonsbach@donsbachlaw.com
Attorney for Appellant Terry Brown

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Pursuant to SCACR Rule 221(a) and SCACR Rule 240(i) the Appellant Terry Brown respectfully petitions this Court for a rehearing with a suggestion for En Banc rehearing of Opinion No. 5578, dated July 25, 2018(hereinafter "Opinion"). Rehearing is warranted as this Court has overlooked and misapprehended arguments. Kennedy v. S.C. Retirment System, 349 S.C. 531, 564 S.E. 2d 322 (2001).

## Summary of Argument

**Respondent's marriage to Javed Ahmed ("Ahmed") was not bigamous.** The only admissible evidence regarding Ahmed's marital status at the time he married the Respondent is the Ahmed-Respondent marriage application, sworn to under the penalty of perjury, which clearly denotes Ahmed was not married when he married Respondent.[1] Respondent stipulated that she "cannot identify a single person who can testify that Ahmed was married to another person when Respondent and Ahmed participated in the 1997 marriage ceremony."[2] Respondent provides no other evidence supporting her allegations that Ahmed had three other wives. Reducing this argument to simple logic, Respondent has no evidence of Ahmed's bigamy because if she did she would present it. All of Respondent's inadmissible evidence is fabricated. That is why Respondent hides behind the CCFC order annulling Respondent's marriage to Ahmed on April 15, 2004[3]("CCFC Order"). The CCFC Order, interestingly, was pre-prepared by Respondent's counsel prior to any testimony or evidence being presented to the CCFC at the 9:00 AM, April 15, 2004 hearing and signed immediately at the conclusion of the hearing auspiciously with no apparent changes, and thereafter filed at 9:34 AM on the

[1] *See* Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[2] *See* Joint Stipulation of Facts, ¶¶ 9-10. (R., Vol. I, p. 257)
[3] *See* Joint Stipulation of Facts, Exhibit 12. (R., Vol. I, p. 293-296)

same day.[4]

The only support that Respondent can provide that Ahmed was married prior to his marriage to her is the pre-prepared, default CCFC Order solely supported by Respondent's testimony of contrived, manufactured, inadmissible, hearsay evidence. The CCFC Order is an order obtained in the CCFC by an Aiken County resident seeking to annul her Texas marriage through the presentation of contrived, manufactured, inadmissible, hearsay evidence in a proceeding that neither James Brown nor his heirs could legally participate or challenge thereby resulting in a default judgment. At best, Respondent's marriage to Ahmed was voidable for reasons other than bigamy which she presented to the CCFC. It was not void, as it was not bigamous.

This Court has taken the position that the Ahmed-Respondent marriage was factually bigamous. It was not. The summary of this Court's ruling is that a bigamous marriage is revived as a legitimate marriage by a post bigamous marriage annulment *ab initio*, on the grounds of bigamy, regardless of whether the first marriage was factually bigamous or not. Now this Court supports the Respondent via twisted logic and unsupported technicalities, knowing her marriage to Ahmed was not bigamous.

## ARGUMENT

### I. The Court misapprehends the application of the summary judgment standard in this matter.

"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 (Ct. App. 2003). "Summary judgment is appropriate when there is no remaining genuine issue of material fact such that the moving party must

[4] Id.

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 non-moving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 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)(Emphasis added.) 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). This Court misapprehends the application of the summary judgment standards. It was error to disallow discovery in this matter based on the above. Further, every inference of the evidence before this Court, as proven by the argument hereafter, is made and viewed in a light most favorable to Respondent, violating the requisite standards.

**A. Respondent was never in a bigamous relationship with Ahmed and this Court misapprehends the law and facts as they apply to determining the status of James Brown's relationship with Respondent.**

i. Respondent's marriage was not factually void for bigamy as it relates to determining whether she was actually married to James Brown.

This Court makes Appellants' point in its own order when it states: "Respondent is only asserting the family court's order as to the status of her marriage to Ahmed." (Opinion, p. 9). If that were true, then this Court was required to look at the existing facts

underlying the Respondent-Ahmed marriage to determine if Ahmed was in a bigamous relationship prior to marrying Respondent to determine its impact on the Respondent-Brown marriage. By declining to make this analysis, this Court misapprehends the facts of this case thereby improperly applying the law of South Carolina. Undisputedly, the Respondent-Ahmed marriage was annulled. Just because Respondent sneaked off to a venue on the opposite side of the state from where she lived and surreptitiously filed an annulment action from her husband that was granted, does not make the inadmissible, uncontested, self-serving, hearsay allegations contained in the pre-prepared, default CCFC order binding against a third party (i.e. James Brown). To further illustrate the illogical cornerstone to this Court's Opinion, this Court must further be willing to accept if the "facts" from the pre-prepared, default CCFC Order could not be challenged, James Brown could never have sought his own annulment action because he would have been bound by the "facts" presented at a hearing where he was not a party. If such "facts" in any order similar to the CCFC Order were binding, parties could file annulment actions after the death of a bigamously married spouse declaring that that their first and only marriage is annulled for bigamy and they are now an heir of the bigamously married spouse's estate. This Court's ruling allows persons committing bigamy to decide which marriage was the most profitable to maintain. In this instance, Respondent decided it was James Brown. If Ahmed had been a billionaire, or just won the lottery, Appellant suspects that an annulment action would never have been filed. This chaos is what this Court has done with this ruling. With this Court's ruling, the bigamist now has the right to choose which marriage they like, or as in this case, is more profitable.

Would this Court have a different view of this matter if Respondent had filed a

posthumous annulment? Unfortunately, based on this Court's analysis, the answer does not change. James Brown's estate would be estopped from challenging that Respondent was the wife/heir because a family court issued a posthumous order making her an heir that, according to this Court in its Opinion, could not be challenged and the heirs would not have standing. This is the chaos that the Supreme Court spoke of in its Lukich[5] decision. This is not correct, but is the result that occurs with this Court's analysis.

On December 14, 2001, when Respondent married Mr. Brown, she was legally and factually married to Ahmed. Appellant agrees that bigamist marriages are void *ab initio*. Respondent, however, wants this Court to believe that the factual situation that it is dealing with is one in which Respondent's husband, Ahmed, was married when he married Respondent so that some exception to Lukich applies in analyzing the validity of her alleged marriage with James Brown. The problem is that this set of facts does not exist. These "facts" were fabricated and manufactured by Respondent and never actually proven. At a minimum, the public policy expressed in Johns,[6] requires that such "facts" be proven. Other than the pre-prepared, default CCFC order, Respondent, has never, in any court, document or deposition, provided a scintilla of support that Ahmed was married when he married Respondent. Respondent has never proven Ahmed was in a bigamous relationship. She stipulated that she knows of no witness who can corroborate her fiction. Somehow, she convinced the trial court and this Court as to the validity of her manufactured allegations.

This Court misapprehends, that Respondent's marriage was void for bigamy. Instead, this is a case where her marriage, at best, was voidable as evidenced by the

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[5] Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).
[6] Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992).

numerous grounds she filed in her complaint for annulment.[7] As it relates to James Brown, she has never proven that her relationship with Ahmed was void for bigamy. She has only fabricated and manufactured it to fit the most profitable outcome.

It is an indisputable fact that Respondent married Ahmed on February 17, 1997 ("Respondent-Ahmed Marriage")[8] and Respondent married James Brown on December 14, 2001.[9] In fact, Respondent further stipulated to the following:

> 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.[10]
>
> ...
>
> 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."[11]

As identified above, Respondent stipulated that she is unaware of any evidence that would prove Ahmed a bigamist. The Respondent-Ahmed marriage certificate is evidence demonstrating Respondent's marriage to Ahmed on February 17, 1997.[12] The Respondent-Ahmed marriage license application is additional evidence that was also conveniently not presented prior to obtaining the pre-prepared, default CCFC Order. This marriage license application document contains the only evidence in the form **of sworn testimony from Ahmed that he was, in fact, not married when he married** Respondent.[13]

This Court makes an incredible statement when it states: "[a]s a result, had

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[7] *See* Joint Stipulation of Facts, Exhibit 5. (R., Vol. I, pp. 271-273)
[8] *See* Joint Stipulation of Facts, Exhibit 1. (R., Vol. I, p. 255; 265-266)
[9] Id., at ¶¶ 4 and 5. (R., Vol. I, p. 256)
[10] Id. at ¶ 6. (R., Vol. I, p. 256)
[11] Id. at ¶¶ 9-10. (R., Vol. I, p. 257)
[12] Id. at Exhibit 1. (R., Vol. I, p. 255; 265-266)
[13] *See* Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid." (Opinion, pp. 6-7). No! Based on the foregoing facts, the Record, and the Lukich[14] decision, Appellant would simply ask how? Respondent has no actual proof of Ahmed's alleged bigamy. Quite absurdly, the Respondent does not argue that her marriage to Ahmed was factually bigamous because she cannot. She argues a technicality that it was bigamous because the CCFC Order said it was without considering evidence in a default judgement hearing. Effectively, this Court is now saying, we take her word for it just like the CCFC did, i.e. we do not need evidence either. We, this Court, accept the dubious word of Respondent who lied on her marriage application with James Brown when she said her marriage to James Brown was her first marriage.[15] Based on the foregoing analysis, it becomes clear that **with or without** the pre-prepared, default CCFC Order, the Respondent has no case.

ii. Respondent proved that her marriage to James Brown was void for bigamy *ab initio* with the filing of her own annulment action and entering into the Consent Order with James Brown.

This Court ignores the fact that in Respondent's own complaint for annulment she alleges she was married to Ahmed.[16] This Court misconstrues Appellant's argument and interpretation of South Carolina Code §20-1-80 as being contrary to South Carolina law in distinguishing the concepts of void versus voidable. Appellants assert, in concert with the South Carolina law, that bigamous marriages are void, not voidable. 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

[14] Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).
[15] *See* Joint Stipulation of Facts, Exhibit 4. (R., Vol. I, p. 269)
[16] *See* Joint Stipulation of Facts, Exhibit 5. (R., Vol. I, pp. 271-273)

> to be living during that time, not to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. §20-1-80. (Emphasis added.)

The South Carolina Supreme Court in Wilson v. Dallas[17] referenced the Respondent-Ahmed annulment as follows:

> Tommie Rae had claimed her marriage to Ahmed had been procured by fraud because she had discovered that Ahmed already had three or more wives in Pakistan and was merely seeking U.S. citizenship, and that he had refused to live with her as husband and wife. **Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during pendency of Brown's separate annulment action against her.** (Emphasis added.)

Although the Respondent-Ahmed marriage was not an issue before the Court in Wilson v. Dallas, the pre-prepared, default CCFC Order, with its timing and procedural protocol, was taken into consideration when contemplating the legitimacy of the settlement and dissolution of James Brown's testamentary intent. The South Carolina Supreme Court was never requested to opine on the legitimacy of the pre-prepared, default CCFC Order or Respondent's marital status to James Brown in its decision to invalidate the dismembering of James Brown's Will and Trust, but chose to do so.

The Wilson v. Dallas court, in footnote 16, gave some direction regarding bigamous marriages citing Lukich v. Lukich:

> 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.** (Emphasis added.)

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[17] Wilson v. Dallas, 403 S.C. 411, 2013 S.C. Lexis 240 (S.C. 2013), footnote 16.

The following provides clear reasoning why the South Carolina Supreme Court correctly questioned and refused to opine on the lower court's Lukich analysis that Respondent adopted. On December 14, 2001, when Respondent allegedly married Mr. Brown, she was married to Ahmed. Bigamist marriages are void *ab initio*. Respondent, at the time of Wilson v. Dallas, and since, has never, in any court, document or deposition, provided a scintilla of support that Ahmed was married when he married Respondent. The Respondent-Ahmed marriage certificate is evidence demonstrating Respondent's marriage to Ahmed on February 17, 1997.[18] The Respondent-Ahmed marriage license application is additional evidence that was also conveniently not presented prior to obtaining the CCFC Order. This marriage license application document contains the only evidence in the form **of sworn testimony from Ahmed that he was, in fact, not married when he married Respondent.**[19] Further, Respondent and James Brown entered into a Consent Order of Dismissal dated August 14, 2004 ("Consent Order").[20] The Consent Order does not determine that James Brown is married. In fact, it is the opposite. James Brown based his dismissal of his annulment complaint on South Carolina Code §20-1-80 because the CCFC Order **collaterally estopped Respondent** from declaring she was not previously married thereby determining that her relationship to James Brown was void *ab initio*. This Court has ruled that a bigamous marriage is void *ab initio* without a court order: "[a]s a result, had Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid." (Opinion,

[18] Id. at Exhibit 1. (R., Vol. I, p. 255; 265-266)
[19] *See* Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[20] *See* Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

pp. 6-7) Why is the same not true for James Brown? When Respondent filed her complaint seeking annulment, she admitted that she was married to Ahmed. Her marriage to James Brown should have been void *ab initio* at this point. Mr. Brown did not need to continue the pursuit of his annulment. The difference, which this Court misapprehends, is James Brown has facts regarding the Respondent's bigamy by and through her own admissions that proved his marriage to her was void. Respondent, on the other hand, manufactured Ahmed's bigamy. At the point in time that Respondent filed her annulment complaint, she had not had a hearing declaring her voidable marriage annulled. By this Court's ruling, an order of annulment for James Brown would be unnecessary because the application of S.C. Code §20-1-80 voids his relationship with Respondent from the beginning thereby making it unnecessary for James Brown to continue his own annulment action. At the time of the execution of the Consent Order, by and through her complaint for annulment, Respondent admitted that she was married to another man at the time she married James Brown.[21] She had to seek an annulment action to clear her capacity wherein she admitted to such prior marriage because she was not sure what "facts" the CCFC would accept as her grounds for annulment. Presumably, she hoped they would just accept her pre-prepared order with her manufactured bigamy facts, which occurred. By the time her capacity was cleared, her marriage to James Brown had already been annulled for bigamy by operation of the statute. Therefore, there was no need to continue his annulment action as facts necessary to invoke S.C. Code § 20-1-80 had been proven thereby enabling the parties to reach a Consent Order. As such, at the same time Respondent annulled her voidable marriage to Ahmed, she proved

[21] *See* Joint Stipulation of Facts, Exhibit 13, p. 6:17-20. (R., Vol. I, 302, l. 17-20)

that her marriage to James Brown was void for bigamy. No additional action was necessary on the part of James Brown relative to an alleged statutory marriage. This Court misapprehended the facts and application of the law in its Order as to these issues. (Opinion, pp. 4-10)

The complaints filed and subsequent pre-prepared, default CCFC Order is further proof as to why the Consent Order only addressed common law marriage.[22] An alleged statutory marriage was impossible based on the facts that Respondent admitted to in the CCFC proceeding to which **she was bound and collaterally estopped from disputing**. This Court should not confuse the Respondent's binding admitted facts (i.e admissions of a party opponent) with the unsupported hearsay testimony that was created to obtain her pre-prepared, court manufactured, default CCFC Order. In the same vein, Respondent has claimed the language in the Consent Order wherein she "waived any claim of a common law marriage" did not waive an alleged statutory marriage. A waiver of an alleged statutory marriage was unnecessary as James Brown and Respondent were not statutorily married based on her own testimony that resulted in the pre-prepared, default CCFC Order. Therefore, the Consent Order needed only to waive Respondent's right to claim she was James Brown's wife in a common law proceeding or posthumous common law proceeding as contemplated by S.C. Code § 62-2-802(b)(4). Based on the foregoing, Respondent's marriage to James Brown was void for bigamy *ab initio*.

### B. The Court misapprehends the void versus voidable argument thereby misapplying the binding precedent of Lukich v. Lukich.

This Court has misconstrued Appellants' argument and come away with the idea that Appellants' are somehow trying to change the longstanding law in South Carolina

[22] *See* Joint Stipulation of Facts, Exhibit 5 and 12. (R., Vol. I, pp. 271-273, pp. 293-296)

that a bigamous marriage is void *ab initio.* Appellants have never disagreed that a bigamous marriage is void *ab initio.* This case would not even be possible if Respondent had not obtained the pre-prepared, default CCFC Order. She would factually and legally be married to Ahmed when she married James Brown. Obtaining the pre-prepared, default CCFC Order did not change the facts that make her a bigamist. Understanding this legal and factual relationship is why Respondent's argument fails and this Court misapprehends the facts and law. Effectively, this Court is ruling because she filed first she wins. This is wrong.

Based on the facts and record in this matter, had James Brown sued Respondent for annulment prior to her in the CCFC, this Court should have upheld any annulment granted to James Brown by a lower court on the factual and legal basis that she was married prior to and continuing through her alleged marriage to him. There would be no legal or factual basis for voiding her marriage on the grounds of bigamy with Ahmed. The pre-prepared, default CCFC Order does not erase or change this result. This is Lukich.[23] This is the chaos that is so easily identified by this Court and the South Carolina Supreme Court in the Lukich decisions. This Court has misconstrued the facts of this case as being outside of the Lukich decision. They are not. Respondent's marriage to Ahmed was, at best, voidable, not void. She has never actually proven it was void for factual bigamy. That is why this action to determine whether she is the wife/heir of James Brown was necessary in the Probate Court. This is the point that South Carolina Supreme Court makes in its Lukich decision regarding prospective and retrospective analysis. No other facts or law need to be examined.

[23] Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).

Further, this Court indicated that:

> the general rule applicable in situations as before us is stated in 52 Am. Jur. 2d Marriage § 57:
>
> Apart from statute, **bigamous (Respondent-Brown)** marriage does not acquire validity when the prior subsisting **(Respondent-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 **(Respondent-Ahmed)** marriage is annulled **after** the second **(Respondent-Brown)** marriage is contracted, even though the purpose of an **(Respondent-Ahmed)** annulment proceeding is to declare that no valid marriage ever took place between the parties **(Respondent-Ahmed)** or that no valid marriage relation ever existed between the parties **(Respondent-Ahmed)**. Even where the **(Respondent-Ahmed)** annulment decree expressly declares the first **(Respondent-Ahmed)** marriage null and void ab initio, it does not relate back so as to validate the second **(Respondent-Brown)** marriage. In order for the subsequent **(Respondent-Brown)** marriage to be valid, it has been held that there must be a new ceremony **following** the termination of the earlier **(Respondent-Ahmed)** marriage. (Emphasis Added.)

Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (S.C. Ct. App. 2006)

In this case, the Respondent's marriage to Ahmed was valid until she made it voidable with the pre-prepared, default CCFC Order. Because Respondent could have remained married to Ahmed because there is no evidence of bigamy, she chose to annul the marriage thereby making it voidable. Without the hasty, default CCFC Order, Respondent's marriage would never have been declared void because there is absolutely no evidence of bigamy with Ahmed. Therefore, Lukich[24] applies, as Respondent has presented no facts otherwise. As a result, the distinction that this Court attempts to make in this matter related to void versus voidable is irrelevant in the context of this matter. This Court misapprehends that this is a case of a bigamous spouse in the first marital relationship followed by a second attempted marriage. This case is exactly like Lukich because of Respondent's lack of evidence. Respondent's bigamy voids her marriage to

[24]Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).

James Brown *ab initio*.

Interestingly enough, the South Carolina Supreme Court affirmed this Court's ruling in Lukich[25] but did not affirm the analysis contained in footnote 2 of such opinion attempting to create a prior bigamous relationship exception. The South Carolina Supreme Court chose to write its own opinion and analysis. The South Carolina Supreme Court opinion was based on a strict statutory construction in the context of bigamous marriages and did not make a void versus voidable distinction and took a more common sense approach. Its Lukich decision simply declared bigamy to be bigamy. It does not matter what type of bigamy occurs. Respondent knew she was previously married when she married James Brown. She should have sought an annulment prior to marrying James Brown. Instead, she chose to conceal it and try to fix the bigamous problem later. The Supreme Court's Lukich analysis is the only sensible and logical result when applied as a snapshot in time to the facts as they relate to the respective parties' marriage relationships, rather than as this Court's ruling would allow, a constantly morphing set of facts and filing dates. How can a bigamous marriage be void if it can later be revived by an annulment? That is what this Court has done. Void *ab initio* is void *ab initio*.

**C. The Court misapprehends that the trial court, handling a matter removed from the probate court, has no subject matter jurisdiction to determine an heir of an estate.**

The pre-prepared, default CCFC Order did not directly determine whether or not Respondent was the wife/heir of James Brown. This action determines whether or not Respondent is an heir of James Brown. The family court in South Carolina does not have this right, as this Court has ruled. (Opinion, p. 7) The Probate Court in South Carolina

[25]Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (S.C. Ct. App. 2006)

has exclusive jurisdiction to determine the heirs of an estate. *See* S.C. Code Ann. § 62-1-302 (a)(1). Whether someone is actually the spouse and validly married to a deceased individual is a proper action heard **exclusively** before the Probate Court in South Carolina because it is determinative of an heir. When the ultimate issue is heirship, the Probate Court (not the family court as determined by this Court) has exclusive jurisdiction over determining marital rights. *See* Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (2014); Thomas v. McGriff, 368 S.C. 485, 629 S.E.2d 359 (2006). As James J. Brown is now deceased, the ultimate issue is heirship. Therefore, the issue left to be determined is whether Respondent is an heir of James Brown's estate. The Court of Common Pleas, sitting in the shoes of Probate Court through removal, has exclusive jurisdiction to review this issue.

For instance, if James Brown died in 2003, prior to Respondent obtaining the pre-prepared, default CFCC Order, then by this Court's ruling, she could file a post mortem annulment action. As this Court contends, neither James Brown nor the Estate through it heirs would have standing to be involved in a Respondent-Ahmed annulment action as they are not parties. The family court where she was applying for the annulment action would have no reason to know about a second alleged, deceased husband, and would not ask about such a fact because it is bigamy. The family court ruling would occur, and based on this Court's ruling, it would be binding on James Brown, the Estate and his heirs posthumously (which is really no different than what she has done in this matter). The only facts that would be necessary, under this Court's ruling for the above to occur, are that she and Ahmed were both alive and still married in accordance with their marriage ceremony and license on the records. Based on this logic, Respondent could

file the annulment action years from now and become James Brown's spouse. This is the chaos that Lukich[26] addresses. It is this Court's ruling and analysis that is the type of prospective/retrospective application that Lukich[27] warns cannot happen. Based on the foregoing, this Court's analysis is logically flawed. This Court's ruling validates the ability of bigamists to obtain an order from the family court invalidating a prior marriage at any point in time, including after the death of a second bigamously married spouse, who, according to this Court, would have no ability to challenge the result. Decedents in South Carolina could become posthumously married even though the relationship was supposed to be void *ab initio* in accordance with S.C. Code Ann. § 20-1-80. Lukich[28] precludes this result.

This Court denotes that Appellants are attempting to re-litigate the pre-prepared, default CCFC Order. (Opinion, p. 7) Appellants are doing no such thing. Instead, they are challenging its loosely alleged "facts" based on timing and collateral impact on James Brown's marital status because it was a default judgment whose loosely alleged "facts" do not bind James Brown in determining his marital status.

## II. The Court misapprehends the elements of collateral estoppel and the proper application of such rule of law to this matter.

"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

[26] Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).
[27] Id.
[28] Id.

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 (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 (Ct. App. 1998) (Emphasis added). 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 (Ct. App. 1997). In this action, Respondent uses the pre-prepared, default 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 (Ct. App. 2001); Beall v. Doe, 281 S.C. 363 (Ct. App. 1984). Respondent has provided no proof that the marital status of James

Brown was actually litigated. In fact, it was not actually litigated. Respondent merely provides a pre-prepared, default CCFC Order that ultimately casts Ahmed as a criminal bigamist as her only evidence.[29] 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 Respondent argued and this Court determined he has no right to intervene. (Opinion, p. 9). Mr. Brown was not in privity with Respondent in the Respondent-Ahmed annulment action, never actually litigated the issue of his marital status in such action, and had no opportunity in such proceeding to effectively litigate such issue in that action. As such, the application of the doctrine of collateral estoppel by this Court was a misapprehension of South Carolina law.

**A. The CCFC Order was an "in rem" ruling that did not bind non-parties as to its facts thereby making it legal error for the Court to rule that Appellants were collaterally estopped.**

A decree dissolving the marital status of two parties, whether by divorce or annulment, is a judgment *in rem*. Carnie v. Carnie, 262 S.C. 471, 167 S.E.2d 297 (1969); 4 S.C. Jur. Action § 5. However, "[a]lthough a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action ... except as to persons who have appeared and actually litigated the question of the existence of the fact." Id. at cmt. C. *See also* Rediker v. Rediker, 221 P.2d 1, 4 (Cal. 1950) (en banc) ("As between strangers or strangers and parties, however, the decree is res judicata only in that it conclusively determines that the parties are thereafter free to

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

remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon."). "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against the world, ... and conversely establishing facts in not equivalent to a judgment in rem." Beecher v. Contoure Labs, 279 U.S. 388, 391, 49 S.Ct. 356, 357 (1929) (citation omitted). As such, an *in rem* order cannot bind third parties as this Court has ruled. (Opinion, p. 8-9). As the pre-prepared, default CCFC order is *in rem*, it binds third parties only as to its status not its facts. Therefore, the pre-prepared, default CCFC factual findings of bigamy by Ahmed cannot be used against James Brown's Estate (i.e. a third party).

**B. This Court misapprehends the Respondent-Ahmed annulment as it was a default judgment and cannot be used for purposes of collateral estoppel.**

The Supreme Court of South Carolina noted: "Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her." Wilson v. Dallas, 403 S.C. 411, 434, 2013 S.C. LEXIS 240, *35 (2013), footnote 16.

The similarities in the procedural posture in this matter and Lukich are striking. Mrs. Lukich sneaked off and obtained an annulment before Judge Frances Segars-Andrews in Charleston County while the second husband's matter was pending in Berkeley County.[30] In Lukich, "[a]n uncontested hearing was held on October 31, 2003 before Judge Frances Segars-Andrews."[31] The complaint was filed October 21, 2003, the

[30] *See* Respondent's Brief, p.14.
[31] Lukich v. Lukich, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C. Ct. App. 2006).

hearing was held October 31, 2003, and the order annulling that marriage signed the same day as the hearing.[32] As in Lukich, Respondent sneaked off to the Charleston County family court in front of, ironically, the same Judge Frances Segars-Andrews and obtained an uncontested default judgment to have her marriage annulled.[33] Respondent's hearing was held on April 15, 2004 and the order annulling her marriage signed the same day at the hearing.[34] Respondent's Counsel came with a previously prepared order before evidence was even admitted at the 9:00 AM CCFC hearing.[35] The hearing occurred and the order was signed, auspiciously for Respondent with no changes, and entered as of 9:34 AM that very same morning.[36] As occurred in Lukich, this Court should find that the declaration of an annulment with Ahmed did not validate the Brown-Respondent marriage, but conclusively determined that she was not married to either Ahmed or James Brown.

This Court misapprehends the facts and law when it determines that the pre-prepared, default CCFC order was not a default judgment but actually litigated. (Opinion, p. 9) This Court provides no legal analysis for its position. The facts in this matter show Respondent attempted to serve her Summons and Complaint on Ahmed, but failed.[37] In fact, Respondent noted in several affidavits that such documents were never served on Ahmed.[38] The family court ultimately ordered Ahmed served by publication,

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[32] Lukich v. Lukich, 379 S.C. 589, 591, 666 S.E.2d 906 (2008), footnote 1.
[33] *See* Joint Stipulation of Facts, Exhibits 12 and 13. (R., Vol. I, pp. 293-313)
[34] Id.
[35] *See* Joint Stipulation of Facts, Exhibit 11, 12 and 14. (R., Vol. I, pp. 292-295, p. 312, l. 14-16)
[36] Id.
[37] *See* Joint Stipulation of Facts, Exhibits 5, 6, 7, 8, 9, 10, 11, 12. (R., Vol. I, pp. 274-296)
[38] Id.

which resulted in the entry of a default judgment. The Schleicher[39] case supports Appellants' position that Rule 4(d)(8) applies, and as argued in their initial briefs, the pre-prepared CCFC Order is a default judgment. The idea that this Court would validate Respondent's request to use a default judgment as a weapon against James Brown without any actual proof of the self-serving, uncontested, inadmissible hearsay testimony is patently unjust and procedurally deficient. At a minimum, discovery should continue to disprove Respondent's alleged claim of being the wife and therefore an heir of the Estate. In reality, the correct declaration is a remand with direction to enter an order that she is not an heir, as she is not James Brown's wife.

As the pre-prepared CCFC Order was a default judgment, it may not be used for collateral estoppel purposes because it was procured against a party in default. "In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." Kunst v. Loree, 404 S.C. 649, 654, 746 S.E.2d 360, 362 (Ct. App. 2013) (citations omitted).

### C. Alternatively, this Court failed to properly apply the exceptions to collateral estoppel.

There are numerous exceptions, everyone one of which applies in this matter, 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,

[39] Schleicher v. Scheicher, 310 S.C. 275, 423 S.E.2d 147 (Ct. App. 1992).

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

(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. (Emphasis added.)

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**;

(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. (Emphasis added.)

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 Respondent-Ahmed annulment action and as such the issue of her status as the wife of James Brown's was never fully litigated. James Brown's estate and heirs now have the right to challenge any of these facts.

## III. This Court misapprehends the law and Appellants' arguments when it determined that Appellants did not have standing to contest whether Respondent was an heir of James Brown.

As noted above, this matter is one to determine the heirs of the Estate of James J. Brown. In fact, the first sentence of Respondent's brief states: [t]he issue sub judice is whether Mrs. Brown is the surviving spouse of James Brown for purposes of her elective share and omitted spouse claims ("spousal claims").[40] Respondent apparently agrees that

[40] Respondent's Brief, p. 1.

surviving spouse status is at issue and determined under the South Carolina Probate Code.[41] Therefore, this is clearly a probate action. S.C. Code Ann. § 62-3-105 provides:

> Persons interested in decedents' estates may apply to the court for determination in the informal proceedings provided in this article [Sections 62-3-101 et seq.], and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this article.

Appellants are all clearly interested persons, as defined in the South Carolina Probate Code. As interested persons, Appellants have standing to participate in a determination of the heirs of the Estate. This Court misapprehended the law. (Opinion, p. 9)

**IV. The Court misapprehends that discovery should be stayed in this matter.**

For all of the foregoing reasons, Appellants are not bound by the factual determinations made in the pre-prepared, default CCFC Order. Therefore, they have a continued right to discovery.

**V. This Court has issued conflicting opinions related to the application of the doctrine of collateral estoppel and res judicata in the context of bigamous relationships in South Carolina thereby requiring rehearing En Banc.**

In Opinion No. 5563, dated May 23, 2018, Gary v. Lowcountry Medical Transport, Inc.,[42] this Court determined that when analyzing the competing interests of res judicata and the public policy of determining that a bigamous marriage is void, that this Court must yield to the public policy concerns expressed in Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992). The Gary ruling directly conflicts with the ruling in this matter as this Court has bound a third party by declaring such party is collaterally estopped thereby ignoring the policy considerations of Johns. The Johns case should have the same policy affect here as it does in Gary, which is to get it right based on the

[41] Id., p. 6 (citing to S.C. Code § 62-2-802(a))
[42] A Petition for Rehearing filed on June 6, 2018 remains pending in such case.

actual facts and evidence that exists in a given case.

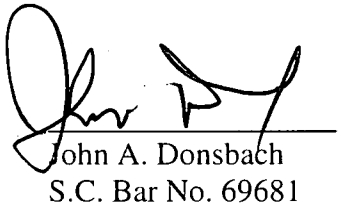
## CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Court, vacate its decision, and, at a minimum, reverse the lower court's grant of summary judgment to Respondent. However, based on Lukich and all arguments placed before this Court, the grant of summary judgment should be reversed with an instructional remand to grant summary judgment to Appellants declaring Respondent is not an heir of the Estate because she is not the surviving spouse of James J. Brown.

## SUGGESTION FOR A REHEARING EN BANC

Appellant suggests that this matter be reheard En Banc under SCACR Rule 219(b). Consideration En Banc should occur to maintain the uniformity of this Court's decisions because Opinion No. 5563, dated May 23, 2018, has been issued in conflict with this Court's decision in this matter; 2) the current panel of this Court has misapprehended the binding precedent of Lukich; and 3) the application of the doctrine of collateral estoppel to factually deficient claims of a bigamous relationship in South Carolina is a question of exceptional importance that will have far reaching impact.

This 7th day of August, 2018.



John A. Donsbach
S.C. Bar No. 69681
Donsbach Law Group, LLC
P.O. Box 212139
Martinez, GA 30917
(706) 650-8750
Attorney for Appellant Terry Brown

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge



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Appellate Case No. 2015-002417

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

Tommie Rae Brown, Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

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## PROOF OF SERVICE

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The undersigned hereby certifies that on August 7, 2018, he has caused a copy of the PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF APPELLANT TERRY BROWN to be served on all counsel in this matter by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

Robert N. Rosen, Esq.
Rosen Law Firm, LLC
18 Broad Street, Suite 201
Charleston, SC 29401
Attorney for Tommie Rae Brown

John F. Beach, Esq.
Lyndey Ritz Zwingelberg, Esq.
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, SC 29201
Attorney for David C. Sojourner, Jr.,
Limited Special Administrator and
Limited Special Trustee

Louis Levenson, Esq.
Levenson & Associates
125 Broad Street, SW
Atlanta, GA 30303
Attorney for Deanna Brown Thomas,
Yamma Brown, Venisha Brown
and Larry Brown

Robert C. Byrd, Esq.
Parker, Poe, Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Attorney for Deanna Brown-Thomas,
Dr. Yamma Brown, and Venisha Brown

Arnold S. Goodstein, Esq.
208 Sumter Avenue
Summerville, SC 29484-2350
Attorney for Tommie Rae Brown

Matthew D. Bodman, Esq.
Matt Bodman, P.A.
1500 Calhoun Street
Columbia, SC 29201
Attorney for Larry Brown and Michael Deon Brown

Daryl Brown
2223 Birnam Place
Augusta, Georgia 30904

David B. Bell, Esq.
Law Offices of David B. Bell
619 Greene Street
Augusta, GA 30903-1011
Attorney for Daryl Brown, Michael Deon Brown and Lisa Sims

William J. Barr, Esq.
108 N. Academy St.
Kingstree, SC 29556
Attorney for Tonya Brown a/k/a Sarah LaTonya Brown-Fegan, Jeanette Mitchell and Ciara Petitt and Cheraquarius Williams for LaRhonda Petitt

Vera Gilford, Esq.
P.O. Box 12553
Miami, FL 33101
Attorney for Tonya Brown a/k/a Sarah LaTonya Brown-Fegan, Jeanette Mitchell and Ciara Petitt and Cheraquarius Williams for LaRhonda Petitt

J. David Black, Esq.
Nexsen Pruet, LLC
P.O. Drawer 2426
Columbia, SC 29201
Attorney for Russell Bauknight

C. Havird Jones, Jr., Esq.
Office of the SC Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

James Mixon Griffin, Esq.
Griffin & Davis Law Firm
1527 Blanding Street
Columbia, SC 29201

S. Alan Medlin, Esq.
1713 Phelps Street
Columbia, SC 29205
Attorney for Tommie Rae Brown

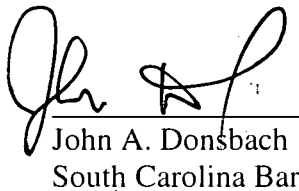
T. Heyward Carter, Jr., Esq.
Evans, Carter, Kumes & Bennett, PA
115 Church Street
P.O. Box 369
Charleston, SC 29401
Attorney for Tommie Rae Brown

David L. Michel, Esq.
Michel Law Firm, LLC
192 East Bay Street, Suite 202
Charleston, SC 29401
Attorney for Tommie Rae Brown

Itriss J. Jenkins, Esq.
Itriss J. Jenkins, LLC
215 E. Bay St., Suite 203
Charleston, SC 29401
Attorney for Respondents Tonya Brown a/k/a Sarah LaTonya Brown-Fegan, Jeanette Mitchell and Ciara Petitt and Cheraquarius Williams for LaRhonda Petitt

A. Peter Shahid, Jr., Esq.
Shahid Law Office, LLC
89 Broad Street
Charleston, SC 29401
Attorney for Guardian ad Litem
Stephen M. Slotchiver

Scott Keniley, Esq.
Keniley Kumar, LLC
Two Ravinia Drive, Suite 500
Atlanta, Georgia 30346
Attorney for Terry Brown



John A. Donsbach
South Carolina Bar No. 69681
Donsbach Law Group, LLC
P.O. Box 212139
Martinez, Georgia 30917
Telephone: (706) 650-8750
Facsimile: (706) 651-1399
Email: jdonsbach@donsbachlaw.com
Attorney for Appellant Terry Brown

# DONSBACH LAW GROUP, LLC
ATTORNEYS AT LAW

**John A. Donsbach** (AL, GA, SC)
**Judith M. Becker** (GA)
**David K. Anderson** (GA, NC)

Telephone (706) 650-8750

StreetAddress:
504 Blackburn Drive
Augusta, GA 30907

www.donsbachlaw.com

Mailing Address:
P.O. Box 212139
Martinez, GA 30917-2139

Facsimile (706) 651-1399


August 7, 2018



**VIA UPS OVERNIGHT DELIVERY**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Estate of James Brown a/k/a James Joseph Brown
*Tommie Rae Brown, Respondent v. David C. Sojourner, Jr., et al.*
Appellate Case No. 2015-002417
Civil Action No.: 2013-CP-02-2849 and 2013-CP-02-2850
C/M No.: 2497/1

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Petition for Rehearing and Suggestion for Rehearing En Banc of Appellant Terry Brown and Proof of Service Thereof. Also enclosed please find our firm's check in the amount of $25.00 for the filing fee. Please file the original and six copies and return one copy to me in the enclosed self-addressed, stamped envelope. If you have any questions, please feel free to contact me. Thank you.

Sincerely,

John A. Donsbach

JAD/djg

Enclosures

cc: Robert N. Rosen, Esq. (w/encl.)
John F. Beach, Esq. (w/encl.)
Lyndey Ritz Zwingelberg, Esq. (w/encl.)
Louis Levenson, Esq. (w/encl.)

Robert C. Byrd, Esq. (w/encl.)
Arnold S. Goodstein, Esq. (w/encl.)
David B. Bell, Esq. (w/encl.)
William J. Barr, Esq. (w/encl.)
Vera Gilford, Esq. (w/encl.)
J. David Black, Esq. (w/encl.)
C. Havird Jones, Jr., Esq. (w/encl.)
James M. Griffin, Esq. (w/encl.)
S. Alan Medlin, Esq. (w/encl.)
T. Heyward Carter, Jr., Esq. (w/encl.)
David L. Michel, Esq. (w/encl.)
Matthew D. Bodman, Esq. (w/encl.)
Itriss J. Jenkins, Esq. (w/encl.)
A. Peter Shahid, Jr., Esq. (w/encl.)
Daryl Brown (w/encl.)
Scott Keniley, Esq. (w/encl.)