THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

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

Tommie Rae Brown ..... Respondent,

v.

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

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

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Robert C. Byrd, SC Bar #1069
bobbybyrd@parkerpoe.com
A. Smith Podris, SC Bar #78051
smithpodris@parkerpoe.com
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301 (29401)
Post Office Box 160
Charleston, SC 29402
Telephone: (843) 727-2650
Facsimile: (843) 727-2680
Attorneys for Appellants
Deanna Brown-Thomas, Dr. Yamma Brown, and Venisha Brown

OF COUNSEL
Pro Hac Vice

Marc Toberoff
mtoberoff@toberoffandassociates.com
Toberoff & Associates, P.C.
23823 Pacific Coast Hwy, Suite 50-363
Malibu, CA 90265
Telephone: (310) 246-3333
Facsimile: (310) 246-3101

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Pursuant to Rule 221, SCACR, Terry Brown, Deanna Brown-Thomas, Yamma Brown, and Venisha Brown (collectively, "Appellants") hereby petition the Court for rehearing and suggest rehearing *en banc* of the panel opinion filed on July 25, 2018, in the above-captioned case for the reasons that follow.[1]

ISSUES OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. THE PANEL'S OPINION MISAPPLIED THE SOUTH CAROLINA SUPREME COURT'S DISPOSITIVE HOLDING IN *LUKICH* THAT A *POST-HOC* ANNULMENT OF A PRIOR MARRIAGE FOR ANY REASON CANNOT RELATE BACK TO RETROACTIVELY VALIDATE A SECOND BIGAMOUS MARRIAGE.

2. THE PANEL'S OPINION IGNORED WELL-SETTLED LAW THAT FACTUAL FINDINGS AND CONCLUSIONS OF LAW CONTAINED IN AN *IN REM* ANNULMENT ORDER ARE NOT BINDING UPON NON-PARTIES TO THE ANNULMENT PROCEEDING.

3. APPELLANTS ARE NOT COLLATERALLY ESTOPPED FROM LITIGATING THE ISSUE OF RESPONDENT'S STATUS AS SURVIVING SPOUSE BECAUSE THEY WERE NOT, AND COULD NOT BE, PARTIES TO RESPONDENT'S DEFAULT ANNULMENT ACTION.

4. THERE IS NO ADMISSIBLE EVIDENCE WHATSOEVER TO SUPPORT THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR, AND THE ONLY ADMISSIBLE EVIDENCE COMPELS SUMMARY JUDGMENT IN APPELLANTS' FAVOR.

5. APPELLANTS WERE COMPLETELY BARRED FROM CONDUCTING ANY DISCOVERY AS TO RESPONDENT'S MARITAL STATUS AND HAVE NEVER BEEN AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE THAT ISSUE IN GLARING VIOLATION OF THEIR RIGHT TO DUE PROCESS.

BACKGROUND

Tommie Rae Hynie ("Respondent") and Javed Ahmed ("Ahmed"), after jointly applying for and securing a Texas marriage license, were legally married in Harris County, Texas, on

[1] *In re: The Estate of James Brown*, Op. No. 5578 (S.C. Ct. App. filed July 25, 2018) (Shearouse Ad. Sh. No. 30 at 19). Appellants incorporate by reference the arguments included in the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellant Terry Brown.

February 17, 1997 (the "Hynie/Ahmed marriage"). In obtaining the license, Ahmed signed a sworn declaration that he was not currently married.

Thereafter, on November 27, 2001, James Brown and Respondent executed a Prenuptial Agreement wherein Respondent acknowledged she was entering the agreement knowingly and voluntarily on the advice of counsel of her own choosing. *See Wilson v. Dallas*, 403 S.C. 411, 418, 743 S.E.2d 750, 762 (2013). Therein, Respondent "agreed to waive any claim for an interest in Brown's estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse." *Id.*

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

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

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

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

Brown died on Christmas Day, December 25, 2006, in Atlanta, Georgia. Brown's will devised his personal effects to six named children, including Appellants, and the remainder of his considerable estate was left to an irrevocable trust to provide financial assistance for the education of disadvantaged youth.

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

In 2009, the trial court approved a Compromise Settlement Agreement that provided Respondent 23.75% of Brown's entire estate, notwithstanding his testamentary wishes, but the settlement was sharply rejected by the South Carolina Supreme Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), and the case was remanded to the trial court.

In October, 2013, the probate court and trial court appointed David C. Sojourner, Jr. to serve as Limited Special Administrator and Limited Special Trustee, respectively, to specifically defend the Estate and Trust against the will and trust challenges.

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

On April 28, 2014, Respondent filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for summary judgment, which was joined in by the Appellants, and limited to the threshold question of whether Respondent is Brown's surviving spouse for purposes of her Estate claims.

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

The trial court held a hearing on the motions on November 24, 2014, and on January 13, 2015, entered an order granting Respondent's motion for summary judgment ("MSJ Order"). The trial court ruled that Respondent's 2001 marriage to husband #2 (Brown) was not bigamous because, in its view, Respondent's 1997 marriage to husband #1 (Ahmed) was bigamous, based solely on the unsupported findings in the 2004 Annulment Order terminating Respondent's first marriage. The parties to this action (including Appellants) had no opportunity to litigate or take any discovery as to the factual question of whether Respondent's 1997 marriage to Ahmed was bigamous. Instead, the trial court entirely relied on the family court's

hurried 2004 finding that the 1997 marriage was bigamous, which itself was based solely on Respondent's unopposed hearsay testimony in a default setting.

The LSA and Appellants filed motions to reconsider on January 26, 2015. At the June 30, 2015 hearing on these motions, the trial court requested supplemental briefing on the application of *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), which the parties thereafter filed. On October 20, 2015, the court denied the motions to reconsider ("Order Denying Reconsideration").

Appellants filed their Notice of Appeal of the above orders (collectively, the "Orders") on November 20, 2015. Thereafter, before briefing was finalized, the LSA and Respondent announced a settlement and the LSA was permitted to withdraw from this appeal. At the time the settlement was announced to this Court, Appellants were unaware that the parties were even discussing a resolution, much less that any agreement had been reached. To date, both the LSA and Personal Representative have steadfastly refused to either (1) confirm that the settlement agreement provided to the Court and Appellants contains all terms of their agreement, or (2) disclose the additional terms of their private deal.

THE PANEL OPINION

On July 25, 2018, a panel of the Court of Appeals published an opinion affirming the trial court's ruling that Respondent is the lawful surviving spouse of James Brown, notwithstanding that Respondent was married to Javed Ahmed when she attempted to marry Brown in 2001, had concealed that marriage from Brown and the State of South Carolina, and did not annul her first marriage until 2004. *In re: The Estate of James Brown*, Op. No. 5578 (S.C. Ct. App. filed July 25, 2018) (Shearouse Ad. Sh. No. 30 at 19). In so doing, the panel made the following erroneous rulings (not necessarily in this order):

First, the panel held that Respondent "is only asserting the [family] court's [2004 annulment] order as to the status of her [1997] marriage to Ahmed", and on that basis ruled that Appellants lacked standing to challenge Respondent's unsupported factual claim in this action that her 1997 marriage to Ahmed was bigamous.[2] The panel's opinion thus seriously misapplies well-settled law regarding the limited preclusive effect of such *in rem* orders, under which the factual findings in an *in rem* order are not binding on third-parties (such as Appellants). Moreover, the panel based its opinion solely on the 2004 Annulment Order, even though Respondent had obtained it by default in family court, where unopposed, she presented nothing more than her own hearsay. To this day, Respondent has presented no admissible evidence whatsoever to support her convenient assertion that her 1997 marriage was bigamous, and all admissible evidence is conclusive that her first marriage was not bigamous.

Second, the panel held that Appellants are collaterally estopped from challenging the Annulment Order's factual findings because "(1) the annulment was actually litigated as the court reviewed the evidence presented and found it was sufficient to meet Respondent's burden of proof; (2) the validity of the marriage between Respondent and Ahmed was determined in the annulment action as it was the entire purpose of the action; and (3) the issue was necessary to support the prior judgment."[3] The panel's opinion thus seriously misapplied collateral estoppel by failing to recognize that (1) none of the Appellants, nor James Brown, were parties to, or in privity with parties to, the family court action, a strict requirement for collateral estoppel; (2) no evidence was presented to the family court other than Respondent's own self-serving testimony that she had heard Ahmed was supposedly married to unknown others; (3) as Ahmed never appeared (apparently he had no actual notice), the 2004 Annulment Order was not "actually litigated" and was essentially a default judgment, to which collateral estoppel also does not

[2] Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 28.
[3] Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 29.

apply; and (4) South Carolina has rejected any distinction between "essential" and "non-essential" factual findings, contrary to the panel's ruling. In so holding, the panel misapprehended that while the 2004 Annulment Order is binding on all the world as to the termination of the Hynie/Ahmed marriage in 2004, its underlying factual findings are not preclusive as to third parties, including Appellants and Brown, who were not, nor could have been, parties to that proceeding in the limited-jurisdiction family court.

Third, the panel held that summary judgment was appropriate even though there was zero admissible evidence of the disputed material fact upon which the trial court's decision turned – the allegedly bigamous Hynie/Ahmed marriage.

Fourth, the panel held that Appellants are not entitled to any "discovery" as to that material factual issue because "the parties all agreed to the stipulation of facts in this case, which resolves the material factual issues in the action," even when Appellants had only narrowly stipulated to circumscribed facts, including the limited fact that the Annulment Order was rendered in 2004, but not to any of the Annulment Order's findings.[4] In so holding, the panel also ignored that *Respondent* herself stipulated that she has no evidence of Ahmed's alleged bigamy.

Fifth, the panel misapplied the express dispositive holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906, 907 (2008), that the belated annulment for any reason of a first marriage after an attempted second marriage cannot serve to retroactively validate the second (bigamous) marriage. Contrary to *Lukich*, the panel held, based solely on the *post-hoc* 2004 Annulment Order, that Respondent, after obtaining a marriage license and purporting to legally marry Ahmed in 1997, was not required to annul her marriage (which she instead concealed) before attempting to marry James Brown in 2001.

[4] Panel Op. at 11; Shearouse Adv. Sh. No. 30 at 30.

Appellants respectfully submit that each of these holdings overlooks or misapprehendeds applicable law and is erroneous for the reasons that follow.

SUMMARY OF ARGUMENT

The panel's opinion misapplies the South Carolina Supreme Court's controlling holding in *Lukich v. Lukich*, which is entirely dispositive of this action and appeal. Under *Lukich*, which strictly construed the bigamy statute (S.C. Code Ann. § 20-1-80), a spouse's annulment, for any reason, of her first marriage after her attempted second marriage does not relate back to validate retroactively the bigamous second marriage. 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008). According to the Supreme Court, this bright-line rule is necessary to prevent the "uncertainty and chaos" that would result if a party who failed to annul her first marriage entered into a second, bigamous marriage, and only later challenged the first marriage as void *ab initio*, thereby unilaterally changing the status of her second marriage, and violating South Carolina's strong public policy against bigamy. *Id.* at 593, 666 S.E.2d at 907. The application of *Lukich* to this case is clear: Because Respondent's 1997 marriage to Ahmed had not been dissolved as of 2001, she lacked the legal capacity to marry James Brown at that time. Under South Carolina law, Respondent had a legal obligation, as well as a moral one, to resolve her prior marriage before she married again. Instead, she actively concealed her marriage to Ahmed from James Brown. Respondent's 2004 annulment of the Hynie/Ahmed marriage is effective only as of 2004, and cannot serve as a time machine to resuscitate her illegal attempted marriage to Brown in 2001. By failing to apply *Lukich*'s necessary bright-line rule, the panel committed error, contravened binding precedent and South Carolina's strong public policy against bigamy.

Even if Respondent's claim survived *Lukich*, and her assertion was material that her marriage to Ahmed was bigamous (under *Lukich* it is immaterial), the panel's opinion further erred in several respects by relying on the fact findings and conclusions of law in the 2004

Annulment Order. *First*, because the Annulment Order is an *in rem* order, the factual findings contained therein (including the "finding" that Ahmed was purportedly already married at the time of the 1997 marriage) are not binding on non-parties to the annulment action, as a matter of law. By ruling otherwise, the panel's opinion misapplied South Carolina's well-settled law regarding the preclusive effect of *in rem* orders. *Second*, the panel's opinion ignores the essential requirements of collateral estoppel, under which Appellants cannot be bound by the findings of fact in the Annulment Order because: (i) they were not parties to the annulment action (or in privity with parties), (ii) they had no full and fair opportunity to litigate the bigamy question in the annulment action, and (iii) the bigamy issue was never actually litigated in the unopposed annulment action. The panel's opinion thus erroneously precludes Appellants from ever litigating, the issue of Ahmed's alleged bigamy, though its opinion is solely based on this self-serving factual assertion by Respondent. *Third*, the panel's opinion erroneously affirms summary judgment for Respondent (and the denial of summary judgment for Appellants), even though no shred of admissible evidence exists supporting Respondent's allegation that the Hynie/Ahmed marriage, which she concealed from Brown, was bigamous. *Fourth*, it was clearly erroneous and a violation of due process to bar Appellants from taking any discovery as to the question of Ahmed's alleged bigamy, central to the panel's opinion.

The result of the panel's misapprehension and misapplications of the relevant law is pervasive uncertainty as to marital status in South Carolina, which uncertainty has far-reaching negative implications in many areas of the law. The panel's decision is inconsistent with numerous prior decisions of this Court, and results in the following brand-new rules: *First*, non-parties' unique personal interests are now determined without due process based upon wholly unsupported factual findings by a court of limited jurisdiction in a proceeding in which they were not and could not be parties. *Second*, alleged bigamy of a prior marriage is now an inexplicable

loophole in *Lukich*'s unequivocal prohibition against using belated annulment orders to retroactively validate a subsequent bigamous marriage, sowing uncertainty and chaos where the South Carolina Supreme Court has emphasized that stability and predictability are of the utmost importance.

ARGUMENT

I. THE PANEL'S OPINION IGNORED WELL-SETTLED LAW THAT FACTUAL FINDINGS AND CONCLUSIONS OF LAW CONTAINED IN *IN REM* ANNULMENT ORDERS ARE NOT BINDING UPON NON-PARTIES TO THE ANNULMENT PROCEEDING.

A. Appellants Have Standing To Challenge Respondent's Claim To Be James Brown's Surviving Spouse.

As a threshold matter, in holding that Appellants lack standing to challenge the Hynie/Ahmed Annulment Order, the panel misapprehends Appellants' express intent. Appellants neither challenge nor seek to re-litigate the Hynie/Ahmed annulment. Appellants agree that the Hynie/Ahmed marriage was terminated as of the date of the Annulment Order.

By contrast, there can be no question that Appellants have standing to challenge Respondent's claim that she is the surviving spouse of James Brown, which Appellants have never had an opportunity to litigate. If Appellants prevail in this action, the 2004 termination of the Hynie/Ahmed marriage still stands. As the trial court found when naming Appellants parties to this action over Respondent's objection, Appellants are "interested persons" under S.C. Code Ann. § 62-1-201(2) in multiple ways.[5] That unappealed ruling is the law of the case, so the only logical inference from the panel's comment is that it conflated the question of standing with the preclusion questions that must be resolved under South Carolina law in favor of Appellants.

[5] Order Determining Parties to Severed Omitted Spouse Claim, Elective Share Claim, and Pretermitted Child Claim, entered February 7, 2014 in Case No. 2008-CP-02-1647.

B. Appellants Cannot Be Bound By Factual Findings Or Conclusions of Law Contained in the *In Rem* Annulment Order.

The panel's decision is in direct conflict with prior rulings of the United States Supreme Court, as well as South Carolina law regarding the preclusive effect of factual findings contained in an *in rem* order. Tellingly, although this dispute centers on an unsupported factual finding in an *in rem* order, the phrase "*in rem*" never appears in the panel's opinion.

There is no dispute that South Carolina recognizes annulment orders to be *in rem* orders. *Carnie v. Carnie,* 252 S.C. 471, 475, 167 S.E.2d 297, 299 (1969). The United States Supreme Court has likewise made clear that while the status determination of an *in rem* order is binding on all the world, the factual findings and legal conclusions contained in such an *in rem* order are not: "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." *Becher v. Contoure Labs*, 279 U.S. 388, 391, 49 S.Ct. 356, 357, 73 L. Ed. 752 (1929) (citation omitted); *see also Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919) ("[J]udgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.") (citations omitted).

This well-settled rule has been distilled in the Restatement (First) of Judgments §73 (1942), note a, cmt. c: "Although a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." Obviously, as discussed below in Part II.A-B, Appellants did not and could not appear in or litigate any issue in the 2004 family court hearing, yet Appellants were improperly prohibited from taking any discovery and actually litigating the issue of Respondent's spousal status in this action.

When applying the *in rem* rules to an annulment order, the effect of the order is that "[a]s between strangers or strangers and parties, [] the decree is res judicata only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriages against third persons who were not and had no right to be heard thereon." *Rediker v. Rediker*, 221 P.2d 1, 4 (Cal. 1950) (*en banc*) (emphasis added); *see also In re Rowe's Estate*, 141 P.2d 832 (Ore. 1943) (holding that the marital status is the adjudicated res and that the in rem order is "not conclusive for or against any third person in reference to the facts which it necessarily affirms or denies"). The panel thus erred when holding that "the validity of the marriage between Respondent and Ahmed was determined in the annulment action as it was the entire purpose of the action."[6] The law is clear that Appellants are bound by the Annulment Order only insomuch as the Annulment Order terminated the Hynie/Ahmed marriage as of April 15, 2004 (the date of the Order), and left those two parties free to subsequently remarry. However, the Annulment Order's findings of fact and conclusions of law are not binding on those who were not parties to that proceeding, such as James Brown and the Appellants.

This rule makes sense, as the family court is a court of limited jurisdiction. Allowing factual findings in an annulment order to bind persons over whom the family court did not and could not have personal jurisdiction creates dangerous precedent and violates constitutional due process. Parties, like Respondent, litigating their marital relationship in family court might make whatever slanderous allegations they like against their putative spouse who may or, as in this case, may not even have actual notice of the proceeding. But even if the family court chooses to rely on such unsupported allegations (as occurred in the 2004 proceeding), South Carolina law does not permit such findings to be established against all the world. *E.g.*, *Palm v. Gen. Painting*

[6] Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 29.

Co., Inc., 302 S.C. 372, 374, 396 S.E.2d 361, 362 (1990) (court order that relied on stipulated facts in earlier divorce decree cannot bind child who was not a party to such divorce proceeding). Thus, family court factual findings – whether they are of bigamy (as in the 2004 proceeding) or of, for example, domestic abuse or child abuse based upon the testimony of one party against another – do not bind different parties in subsequent actions as a strict matter of law and public policy.

Among the myriad undesirable consequences of the panel's decision is that family court matters now become a "race to the courthouse," inasmuch as James Brown was apparently required to beat Respondent to a hearing if he wished to obtain an annulment of their marriage based upon her previously concealed bigamy.[7] Compounding the error, the panel's opinion may unintentionally infringe the jurisdiction of the probate courts. A family court does not have jurisdiction to adjudicate the status of a decedent's heirs, so it would be manifest error to allow the family court's Annulment Order to effectively preclude the probate court from exercising its own jurisdiction to determine the true status of a decedent's heirs.

The panel's statement that "the [bigamy] issue was necessary to support the [Hynie/Ahmed] judgment," is also in direct conflict with prior decisions of this Court, which has explicitly rejected any distinction between essential or non-essential factual findings. In *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013), the lower court ruled that the preclusion doctrine of collateral estoppel could be applied "as to matters essential to the judgment" obtained in a default proceeding. *Id.* This Court, however, reversed the lower court, and refused to give

[7] The panel's opinion is inconsistent on this point. The panel indicates that "[d]uring his life, Brown availed himself of the method available to him by bringing his own annulment action against Respondent to invalidate his marriage to her" based on her bigamy. The panel's own logic suggests, however, that Brown's pursuit of this action would have been futile, for under the panel's reasoning Brown would have been retroactively bound by the unsupported factual finding in the Hynie/Ahmed Annulment Order, even though he was not and could not have been a party to that family court proceeding. While noting that "Brown and Respondent agreed to dismiss the [Brown/Hynie] action, and Brown did not bring another action prior to his death", the panel overlooked that the resolution of Brown's annulment action was a Consent Settlement Order wherein Respondent expressly agreed never to even "claim to be [Brown's] common law spouse, now or in the future." Such a promise is utterly without meaning if Brown and Respondent believed Respondent to be Brown's statutory spouse.

the factual finding any preclusive effect, holding that South Carolina stood with the majority of states in rejecting the classification of factual findings as essential or non-essential and their differing treatment for preclusion purposes.[8] *Id.*

Rehearing *en banc* is therefore necessary to faithfully apply South Carolina's rules as to the limited effect of *in rem* orders, pursuant to which the Hynie/Ahmed marriage was terminated as of 2004, but the purported factual findings in the Hynie/Ahmed Annulment Order are not binding on non-parties such as Appellants and/or Brown.

II. APPELLANTS ARE NOT COLLATERALLY ESTOPPED FROM LITIGATING THE ISSUE OF RESPONDENT'S STATUS AS SURVIVING SPOUSE BECAUSE THEY WERE NOT, AND COULD NOT BE, PARTIES TO RESPONDENT'S ANNULMENT ACTION.

The panel further erred in ruling that Appellants are collaterally estopped from litigating the validity of the 2001 Hynie/Brown marriage, because the requisite elements of collateral estoppel are plainly absent here. Appellants are squarely entitled to litigate the factual question of whether Ahmed was already legally married in 1997, when Respondent married him. It is black-letter law that collateral estoppel only precludes a party to a prior action (or that party's privy) from re-litigating an issue that was decided in that action. *Carman v. South Carolina Alcoholic Beverage Control Com'n,* 317 S.C. 1, 451 S.E.2d 383 (1994); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994). Moreover, for collateral estoppel to apply, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

[8] Moreover, the panel's conclusion that the factual finding of bigamy was necessary to support the annulment ignores that there were several grounds upon which Respondent based her request for an annulment and upon which the family court made factual findings and conclusions of law. R. p. 272, Exh. 5 to Joint Stipulation at ¶ 10; R. pp. 295-96, Exh. 12 to Joint Stipulation.

A. James Brown and Appellants Were Not (and Could Not Have Been) Parties to the Annulment Action Or in Privity with a Party, and Had No Full and Fair Opportunity To Litigate the Question of Ahmed's Alleged Bigamy.

It is undisputed that none of the Appellants nor James Brown was ever a party to the Hynie/Ahmed Annulment. Nor could they have been parties because, as non-parties to the Hynie/Ahmed marriage, they lacked standing to intervene in that family court action. *Ex Parte GEICO*, 373 S.C. 132, 644 S.E.2d 699 (2007) (holding that a third party with an indirect interest in the validity of a marriage does not have standing to intervene in a family court action); *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (holding that only the parties to a marriage have sufficient interest in the subject matter of a divorce action to be parties to such an action); *Powell ex rep Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (holding that a third party does not have standing to intervene in action to recover life-insurance benefits); *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006) (Trial court "denied [second husband's] motion to intervene [in annulment action], finding he did not have standing because he was not a party to the [first] marriage.").

Moreover, neither Appellants nor James Brown were in privity with Respondent or Ahmed. Under South Carolina law, "privity" is strictly construed. *See Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) (holding that "[t]o be in privity a party's legal interests must have been litigated in the prior proceeding"). Privity is <u>not</u> established merely if a third-party "ha[s] an interest in the same question or in proving or disproving the same set of facts," or "when the litigated question might affect [the third-party's] liability . . . in a subsequent action." *Id.* Here, the lack of privity is particularly clear, because the Hynie/Ahmed annulment action did not even purport to determine any of Appellants' or Brown's legal interests. To the contrary, after Respondent filed her Hynie/Ahmed annulment

action but before the Hynie/Ahmed Annulment Order was entered, Brown filed his own annulment action on January 29, 2004, based upon Respondent's previously concealed bigamy.

Likewise, there is no allegation and no evidence that Brown ever participated in the Hynie/Ahmed annulment action, let alone had a "full and fair opportunity to [] litigate" the issues in that action, as would be required for collateral estoppel to apply. *Carolina Renwal*, 385 S.C. at 555. There is no allegation that Brown ever attended any hearing in that action or that he exerted any control over any legal strategies or decisions in the case, let alone "assumed control over the prior litigation," as would have been required to find privity. *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) (emphasis added). Respondent's reliance upon Brown's subsequent payment of her legal fees is misguided, as the law is also crystal clear that payment of another party's legal fees will not establish privity. Restatement (Second) of Judgments § 39, cmt. c, at 384 (1982); *see also Virginia Hosp. Ass'n*, 830 F.2d at 1313 ("It is not sufficient [for privity], however, that the person merely contributed funds or advice in support of the party, [or] supplied counsel to the party ..."); *see Kunst*, 404 S.C. at 656, 746 S.E.2d at 363 ("South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel."). Put simply, collateral estoppel has no application here, because neither Appellants nor James Brown were parties or privies to the Hynie/Ahmed annulment action and so lacked any "full and fair opportunity" to litigate the question of Amhed's alleged bigamy.

B. The Question of Ahmed's Alleged Bigamy Was Never "Actually Litigated," As Collateral Estoppel Cannot Apply to Default Judgments Such As the Hynie/Ahmed Annulment Order.

Moreover, even if Appellants or James Brown had been parties or privies to the Hynie/Ahmed action, the issue of whether Ahmed was actually married to another when he married Respondent was never "actually litigated" in the Hynie/Ahmed annulment, which the

Supreme Court described *sua sponte* as "hastily granted." *Wilson v. Dallas*, 403 S.C. 411, 434, n. 16 ("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."). As Respondent has stipulated, Ahmed never appeared or participated in the action in any respect, such that her assertions went unopposed.[9] In fact, there is no evidence that Ahmed ever received actual notice of the annulment action. The sole "evidence" presented at the Hynie/Ahmed annulment hearing was the self-serving hearsay testimony of Respondent, who by that point was a defendant in James Brown's own annulment action against her.

The Annulment Order was thus in every respect a default judgment. Under Rule 55, SCRCP, a default occurs "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend," exactly as in this case. It is well established that collateral estoppel does not apply to default judgments, because the issues in a default action are not actually litigated. *State v. Bacote*, 331 S.C. 328, 330 S.E.2d 161 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply"); *Kunst*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) (in cases of default judgment, "the essential element requiring that the claim sought to be precluded actually have been litigated in the earlier action is not met"). Collateral estoppel thus does not apply, as no party – least of all Appellants – has ever "actually litigated" the issue of Respondent's true spousal status at the time she attempted to marry James Brown.[10]

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[9] R. p. 257, Joint Stipulation ¶ 17 ("Javed Ahmed failed to appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action.").

[10] Ahmed was not even properly served with Respondent's summons and complaint in the annulment action. Ahmed was purportedly served by publication, but the affidavit of Respondent's process server does not reflect any due diligence to locate Ahmed – merely that the process server did not find a valid address in a "national" database, and that "[t]he results were inconclusive." (R. p. 256, Joint Stipulation ¶ 7; R. pp. 283-289, Exhibit 9.) The ensuing "service by publication" was buried in the Houston Chronicle on page 2 of the classified section. (R. p. 256, Joint Stipulation ¶ 7; R. pp. 274-289, Exhibits 6, 7, 8, and 9.) Such a non-attempt at service does not satisfy the due diligence requirements for service by publication. *See Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324 (1924). Further,

It was plain error to find otherwise. Courts must determine "with particular care" whether a matter has been "actually litigated" in a prior action. *In re Raynor*, 922 F.2d 1146, 1148 (4th Cir. 1991) (internal quotation marks omitted). In *Palm v. General Painting Co.*, for example, the family court, presiding over a name-change action brought by a mother and her daughter, relied on an earlier divorce decree to rule on the identity of the daughter's birth father. 302 S.C. at 373, 396 S.E.2d at 362. In the daughter's subsequent action for death benefits, she sought to challenge the family court's paternity ruling. *Id.* The Supreme Court held that the daughter was not collaterally estopped from challenging the paternity ruling, because that issue had not been actually litigated in the name-change action (despite the daughter's participation in that action), because the family court had "merely relied upon the earlier divorce decree in establishing" paternity – and, as a result, the paternity issue was "was not 'actually litigated.'" 302 S.C. at 374, 396 S.E.2d at 362. In this action, it is even clearer that Respondent's spousal status was never actually litigated, as Ahmed did not appear in the annulment action and likely had no actual notice of it. Thus, there was no one to oppose or object to Respondent's self-serving hearsay.

Moreover, "[e]ven where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) (citing *State v. Bacote*, 331 S.C. at 331, 503 S.E.2d at 163).

Less than three months ago, this Court published an opinion indicating that the public policy against bigamy overrode the application of estoppel even against a party who had changed its position as to a marriage's validity. *Gary v. Gary*, Op. No. 5563 (S.C. Ct. App. filed May 23, 2018) (Shearouse Adv. Sh. No. 21 at 113). In that case, the personal representative of an estate

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Respondent knew that Ahmed was from Pakistan, but made no effort to locate and serve him there pursuant to Rule 4(h)(5) SCRCP, for foreign service of process.

filed pleadings in a wrongful death action stating that Charles Gary was the surviving spouse of Blondell Gary. Subsequent to the filing of those pleadings and the settlement of the lawsuit, the personal representative became aware of facts indicating that the marriage between Charles and Blondell may have been void due to bigamy, and filed a petition to determine the heirs to the estate. Charles Gary argued that the personal representative was estopped from denying him as the surviving spouse. This Court disagreed, stating 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." *Id.* (emphasis added; citing *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) (holding that the public policy of not recognizing bigamous marriages outweighs the public policy favoring the finality of judgments)). The *Gary* decision determined that when it came to bigamy, estoppel did not even preclude a party who had prevailed on the opposite assertion in a prior action.

By contrast here, Appellants were strangers to the limited Hynie/Ahmed family court proceeding, and have never been afforded any due process regarding Respondent's unsupported, yet allegedly pivotal, claim that her marriage to Ahmed was bigamous. In *Gary*, this Court reaffirmed long-standing policies as to the sanctity of marriage and the importance of a bigamy claim. It makes no sense to abandon these public policy concerns here where Respondent's convenient allegation that her concealed first marriage was bigamous is employed as a defense to her bigamous second marriage.

Because the panel's application of collateral estoppel to Appellants is erroneous on multiple levels, strips Appellants of due process and results in fundamental unfairness and injustice, rehearing *en banc* is necessary to correct the error.

III. THERE IS NO ADMISSIBLE EVIDENCE TO SUPPORT THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN RESPONDENT'S FAVOR, AND THE ONLY ADMISSIBLE EVIDENCE SUPPORTS GRANTING SUMMARY JUDGMENT TO APPELLANTS.

The panel further erred in affirming the trial court's summary judgment order, because there was no admissible evidence whatsoever to find that the Hynie/Ahmed marriage was bigamous. In fact, the only evidence before the court compelled a finding that the Hynie/Ahmed marriage was not bigamous.

A. Respondent Bore the Burden of Proving She Was James Brown's "Surviving Spouse."

Respondent had the burden of proving she was the Decedent's "surviving spouse" in each of her will and trust challenges. *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982). Although Appellants bore the burden of establishing that Respondent's purported marriage to Brown was invalid, that burden was discharged by the parties' Joint Stipulation, which admits that: (1) Respondent entered into a marriage with Ahmed on February 17, 1997; and (2) Respondent's marriage to Ahmed did not end until the 2004 Annulment Order, which occurred after Respondent's attempted 2001 marriage to Brown.[11]

The Joint Stipulation thus entirely overcame any presumption that the Hynie/Ahmed marriage was dissolved prior to the attempted 2001 Hynie/Brown marriage, thus creating a presumption in favor of the validity of the Hynie/Ahmed marriage. *Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906); *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). Because Respondent here is challenging the validity of the Hynie/Ahmed marriage on the ground of alleged bigamy, she bears the burden of presenting *admissible* evidence that Ahmed was already married on February 17, 1997 – a burden she entirely failed to

[11] R. pp. 269-270, Joint Stipulation, Exhibit 4; R. p. 256, Joint Stipulation ¶ 6.

meet. In fact, Hynie stipulated that she had no evidence that Ahmed committed bigamy.[12] Thus, the trial court and panel erred in granting summary judgment to Respondent, without any admissible evidence supporting her challenge to the Hynie/Ahmed marriage.

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

It was plain error for the panel to rely on the Annulment Order for the truth of the matters asserted in its findings of fact, because in South Carolina such findings are inadmissible hearsay not subject to an exception. Under the South Carolina Rules of Evidence (as under the Federal Rules of Evidence), "hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. *Compare* Rule 801(c), SCRE, *with* Rule 801(c), FRE.[13]

Here, the trial court based its finding that the Hynie/Ahmed marriage was bigamous solely on the findings of fact in the Annulment Order. Nothing else was presented to support Respondent's contention that Ahmed was already married, and Respondent expressly stipulated that she had nothing more to support her assertion.[14] But those findings of fact were inadmissible hearsay as a matter of law. In *Nipper v. Snipes*, 7 F.3d 415, 416-17 (4th Cir. 1993), the Fourth Circuit held that the South Carolina district court erred in allowing into evidence a state court order from an earlier case (indeed, one involving the same parties as in the latter case). *Id.* at 417. Under *Nipper*, a state court order in a separate proceeding was inadmissible hearsay that did not fall within any FRE exception. *Id.* The Court further found that at common

[12] R. p. 257, Joint Stipulation ¶¶ 9-10 ("Except as may be contained in the Ahmed Annulment Action Transcript and the Family Court documents attached herein as Exhibits 5-13, Petitioner at this time can identify no documents or other tangible evidence evidencing Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony. . . . Except as may be contained in Ahmed Annulment Action Transcript, Petitioner at this time can identify no person (except Javed Ahmed and the wives to whom he was allegedly married) who can testify that Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.").

[13] South Carolina courts often look to and adopt the federal courts' interpretation of the Rules of Evidence. *See State v. Broadnax*, 414 S.C. 468, 477 S.E.2d 789, 793 (2015), *reh'g granted* (Sept. 8, 2015).

[14] R. p. 257, Joint Stipulation ¶¶ 9-10.

law, a judgment from another case could not be admitted as evidence of the facts set forth therein. *Id.*

The South Carolina Supreme Court adopted the holding of *Nipper* and other federal courts that "judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial." *Mizell v. Glover*, 351 S.C. 392, 402, 570 S.E.2d 176, 181 (2002). In *Mizell*, the Court held that evidence of a jury interrogatory from a previous case was inadmissible hearsay in a subsequent case, where a party sought to introduce it to impeach an expert witness. *Id.* at 398, 570 S.E.2d at 179 (reversing Court of Appeals and remanding for new trial). Likewise, in *Hill v. USA Truck, Inc.*, C.A. No. 8:06-CV-1010-GRA, 2007 WL 1574545 (D.S.C. May 30, 2007), the South Carolina district court held that it was error for the court to admit a probate court order from a different case to prove the truth of its findings of fact, because the probate court order was hearsay not within any exception to the hearsay rules. *Id.* at *4, *6.

It was thus was plainly erroneous for the trial court and panel to rely on the Annulment Order as support for Respondent's contention that Ahmed was already married as of 1997. Without any evidence to support an independent finding of Ahmed's alleged bigamy, the trial court had no basis to grant summary judgment, and the panel had no basis to affirm.

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

The panel further erred in affirming the trial court's denial of summary judgment for Appellants, because whereas Respondent provided zero admissible evidence to support her self-serving assertion that Ahmed was supposedly already married when she married him in 1997, the record before the trial court contains Ahmed's sworn, notarized statement on his and Respondent's Texas Marriage License Application that he was not married when he married

Respondent.[15] As the Marriage License Application is a sworn statement and a certified public record, it is admissible in this proceeding. S.C. Code Ann. § 19-5-10, Rules 803(8), 902(4) and 1005, SCRE.

In contrast, the sole "evidence" before the trial court that Ahmed was already married on February 17, 1997, was the "finding" in the 2004 Annulment Order, which was based solely on Respondent's uncorroborated (and self-serving) assertion. In fact, in the 21 years since the Hynie/Ahmed marriage, in the 16 years since the attempted Hynie/Brown marriage, in the 14 years since Respondent filed her annulment action, and in the 11 years since Respondent filed her spousal claim in this case, Respondent has not provided any admissible evidence to support her *post-hoc* assertion that her marriage to Ahmed was bigamous.

The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). As to an issue on which the non-moving party bears the burden, the moving party need only point to the lack of evidence supporting the non-movant's position (as Appellants have done here). *Id.* Then, the non-movant must come forward with specific facts and evidence that indicates there is a genuine issue of material fact. *Id. See also Fairfield County Sch. Dist. Bd. of Trs. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014) ("[T]he non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence . . . in support of its proposition.").

Thus, to oppose Appellants' summary judgment motion, Respondent would have had to present some admissible evidence supporting her bald assertion that her marriage to Ahmed was bigamous. *See Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

[15] R. p. 648, Application for Marriage License attached as Exh. 3 to Memorandum of Law Supporting Limited Special Administrator's (LSA") Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse.

Because Respondent utterly failed to provide such evidence, the panel further erred in affirming the trial courts' denial of summary judgment to Appellants.

IV. APPELLANTS WERE COMPLETELY BARRED FROM CONDUCTING ANY DISCOVERY AS TO RESPONDENT'S MARITAL STATUS IN VIOLATION OF THEIR RIGHT TO DUE PROCESS.

It is axiomatic that summary judgment is a drastic remedy and should not be entered before the parties have "had a full and fair opportunity for discovery." *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (internal quotation marks omitted). By contrast, here, the trial court barred the parties from conducting any discovery pending its ruling on Respondent's motion for summary judgment.

In affirming the trial court's rulings, the panel's opinion misapprehends the scope of the parties' Joint Stipulation, which stipulated only that the Hynie/Ahmed Annulment Order had been entered in 2004, but clearly did not stipulate to any of the factual findings and/or conclusions of law contained therein. The panel likewise mischaracterized Appellants' entitlement to discovery regarding Respondent's unsupported factual allegations as an attempt to "relitigate" the Hynie/Ahmed Annulment Order. On the contrary, Appellants expressly accepted that the Hynie/Ahmed marriage was terminated in 2004 by the Annulment Order and do not seek to revive that marriage. Instead, Appellants merely seek a full and fair opportunity to discover all evidence related to Respondent's claim that she is the surviving spouse of their father, James Brown, notwithstanding her failure to annul her 1997 marriage to Ahmed before she attempted to marry their father. Due to this serious deprivation of due process, rehearing *en banc* is necessary and appropriate.

V. THE PANEL'S OPINION MISAPPLIED THE SOUTH CAROLINA SUPREME COURT'S EXPRESS DISPOSITIVE HOLDING IN *LUKICH* THAT A *POST-HOC* ANNULMENT OF AN EARLIER MARRIAGE CANNOT RELATE BACK TO RETROACTIVELY VALIDATE A SECOND BIGAMOUS MARRIAGE.

Notwithstanding the above, the clear holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) is dispositive of this long-running case and brings it to a welcome end. The straightforward application of *Lukich* results in a clean, predictable and equitable result: Respondent's attempted 2001 marriage to Brown was void for bigamy, because at that time Respondent had not bothered to obtain an annulment of her 1997 marriage to Ahmed. *Lukich's* clear mandate is that the annulment of a marriage for any alleged reason subsequent to an attempted second marriage will not retroactively revive the bigamous second marriage. The Supreme Court expressly reasoned that this is the only way to avoid the obvious "uncertainty and chaos" that would result from the retroactive application a *post-hoc* annulment. 379 S.C. at 593, 666 S.E.2d at 907. By failing to follow this binding dispositive precedent, the trial court and panel unnecessarily opened a Pandora's box, committed the multiple errors of law shown above, and established a dangerous precedent for parties to retroactively transform their marital status when and if it serves their particular interests to do so.

A. The Clear Holding of *Lukich v. Lukich* Provides That the 2004 Annulment Order Cannot Be Given Retroactive Effect To Validate Respondent's 2001 Bigamous Marriage.

The unequivocal holding of *Lukich*, which strictly construed the bigamy statute, S.C. Code Ann. § 20-1-80, is dispositive of this appeal. *Lukich* holds that even though a subsequent annulment order declares a first marriage void *ab initio*, it does not relate back so as to validate or revive a subsequent bigamous marriage. Applied here, the 2004 Hynie/Ahmed Annulment Order does not retroactively revive Respondent's then-bigamous 2001 marriage to James Brown.

The central question in *Lukich* is one of simple timing: At what point do we examine the marrying parties' legal status to determine the validity of their marriage? The answer is equally clear: The validity of a marriage is based upon the parties' status as of the date that the marriage was contracted. "The statute speaks to the status quo at the time the marriage was contracted and does not contemplate either a prospective or retroactive perspective." *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907 (emphasis added). *Lukich* thus reflects the strict rule in 52 Am. Jur. 2d *Marriage* § 57 that irrespective of the grounds for the *post-hoc* annulment of the first marriage, it "does not related back so as to validate the second marriage. In order for the subsequent marriage to be valid . . . there must be a new ceremony *following* the termination of the earlier marriage." *Id.* (emphasis added); *see Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006) (quoting 52 Am. Jur. 2d *Marriage* § 57).

The reasoning for this rule is as simple as it is logical: marital status is too important in our society for the validity of a marriage to chaotically see-saw back and forth in time. If someone, like Respondent, marries, it is incumbent upon her to annul that marriage before attempting a second marriage. Instead, Respondent applied for a license to marry Ahmed; participated in a legal marriage ceremony with Ahmed in 1997; and just four years later in 2001 purported to marry James Brown, while actively concealing her prior marriage from Brown and the State of South Carolina.

Thus, *Lukich* firmly establishes that, for the sake of stability and as a matter of public policy, Respondent's attempted 2001 marriage to Brown was bigamous, because prior to that time Respondent did not bother to annul her 1997 marriage to Ahmed. Pursuant to this binding precedent, Respondent's subsequent 2004 annulment of her first marriage, for any reason, has no "retroactive" application. *Lukich*, 379 S.C. at 593, 666 S.E.d2d at 907 ("Any other construction

of S.C. Code Ann. § 20-1-80 would lead to uncertainty and chaos.").[16] This result is both fair and assigns the burden and risk where it should be placed. Respondent was well aware of her 1997 marriage to Ahmed, and it was her responsibility to obtain her annulment during the four years between her marriage to Ahmed and her attempted marriage to James Brown, instead of concealing her earlier marriage.

The panel opinion incorrectly posits that Respondent never needed an annulment order to be legally free to marry James Brown. But if Respondent applies for a marriage license and purports to engage in a legal marriage, what other way is there to legally establish her freedom to re-marry? In this respect, the panel's reasoning is circular inasmuch as the panel's conclusion that Respondent was free to remarry in 2001 is solely based upon the retroactive application of her 2004 Annulment Order, contrary to *Lukich*.

Removing any doubt on this question, the South Carolina Supreme Court has already held that not even annulment orders finding actual bigamy can have retroactive effect. In *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003), Husband 1's alimony obligations were discharged when Wife 1 remarried. Subsequently, however, Wife 1's remarriage was annulled due to the bigamy of Husband 2, and Wife 1 demanded that her alimony payments be reinstated and back-paid for the duration of her bigamous marriage. While the Supreme Court reinstated the alimony payments, it refused to order any back-payments for the months that Wife 1 and bigamous Husband 2 were purportedly married, thereby refusing to give retroactive effect to the annulment order even though it was based upon bigamy.

[16] As discussed above at Part III.B-C, even if *Lukich* were not adhered to, Respondent, who has the burden of proof on her bigamy claim, would lose hands down on summary judgment because Respondent admitted that she has no admissible evidence to support such claim, and the only admissible evidence (Ahmed's sworn declaration) contradicts Respondent's wholly unsupported claim. Appellants should have been granted summary judgment under *Lukich*, but at a minimum if Respondent's spousal claim is somehow held to survive *Lukich*, Appellants, as a matter of due process, must be afforded the opportunity to take discovery on this issue.

Contrary to the plain wording of the bigamy statute, the Supreme Court's clear mandate in *Lukich*, and the general rule in this country, the panel adopted Respondent's circular argument that her subsisting 1997 marriage was no longer an impediment to her contracting marriage in 2001 because her 1997 marriage was supposedly bigamous as well. This conclusion was erroneous as a matter of law and must be corrected by a rehearing *en banc*.

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

Although this Court's *Lukich* opinion noted in a footnote a potential distinction between prior marriages that are "void" and those that are "voidable," the Supreme Court did not adopt any such distinction in its *Lukich* decision. Instead, *Lukich* established a bright-line rule that the subsequent annulment of a prior marriage for any reason does not have retroactive effect so as to validate a second marriage, because any other interpretation of Section 20-1-80 of the South Carolina Code "would lead to uncertainty and chaos" as to this important institution. *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

As an initial matter, all annulments declare the subject marriage to be void *ab initio*, regardless of the basis for the annulment. *Splawn v. Spawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993) ("There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy. Legally, they are both void *ab initio*, 'from the inception.'"). This is, of course, the primary difference between an annulment (which declares the marriage to never have existed) and a divorce (which declares the marriage to have ended). The "void" versus "voidable" distinction matters as to whether a party is entitled to an annulment in the first place; whether the grounds for the requested annulment point to a "void" or "voidable" marriage will control what the party must show to receive the requested remedy of annulment. But while the "void" or "voidable" nature of the marriage matters walking into family court, it makes no difference walking out. All annulled marriages are declared void *ab*

initio, which means they all share the same limitations as to their effect. Indeed, the *Lukich* Court expressly stated that its holding applies in the very scenario presented by this case: "It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes[.]" 379 S.C. at 593, 666 S.E.2d at 907 (emphasis added). In addition to *Lukich*, the Supreme Court's refusal to award retroactive alimony payments in *Joye v. Yon*, discussed hereinabove, further affirms this fundamental point.

The Supreme Court's decision to leave behind the void/voidable distinction makes sense given South Carolina's strong public policy against bigamy and the need for certainty regarding the venerable institution of marriage. A bigamous relationship may be void *ab initio*, but the legal capacity to contract a new marriage is not cleared until after an annulment order is issued by a competent court. S.C. Code Ann. § 20-1-80. Thus, the effect of *Lukich* is that parties are charged with simply clearing their own marriage records before attempting to remarry – an essential requirement given the important role marriage plays in our civic society and the often-secret nature of the facts surrounding personal relationships. As seen here, spouses are not always candid with one another or with the government when requesting the civic benefits associated with lawful marriage. Rather than engage in a loop-de-loop of unweaving prior relationships *post-hoc*, the simple, clean solution recognized by *Lukich* is to require parties, like Respondent, who have previously obtained a marriage license and voluntarily participated in a marriage ceremony to annul such marriage before attempting to marry again.

As discussed above, South Carolina's strong public policy against bigamy was recently reaffirmed by this Court in *Gary v. Gary*, Op. No. 5563 (S.C. Ct. App. filed May 23, 2018) (Shearouse Adv. Sh. No. 21 at 113). The importance of the issues presented in this high-profile case merits rehearing *en banc* to correct the serious issues misapprehended or overlooked by the

panel decision, to adhere to binding Supreme Court precedent, and to avoid confusion as to the law.

CONCLUSION

Lukich is binding precedent, directly on point, and it mandates summary judgment in Appellants' favor as to Respondents' spousal claim. Under *Lukich's* unequivocal holding, Respondent's belated 2004 annulment of her 1997 marriage for any reason could not and did not revive her facially bigamous 2001 marriage to James Brown as a matter of law. Alternatively, if Respondent's wholly unsupported spousal claim were somehow held to survive *Lukich*, Appellants must be permitted, as a matter of due process, to take discovery and try the factual issue of whether the Hynie/Ahmed marriage was actually bigamous. The law is crystal clear that because neither Appellants nor James Brown were parties to the Hynie/Ahmed family court action, and could not have been parties thereto, Appellants are not bound by the factual findings and conclusions of law contained in the resulting *in rem* Annulment Order. Nor are the well-worn requirements of collateral estoppel met here in any respect. The panel's opinion is contrary to multiple prior decisions of this Court and conflicts with both the letter and spirit of South Carolina's specific jurisprudence regarding bigamy. Rehearing *en banc* is necessary to maintain consistency in this Court's decisions, avoid uncertainty in this fundamental area of the law, and afford basic due process to Appellants regarding the lawful handling of their father's estate.

Respectfully submitted,

Kate E D on behalf of Robert C. Byrd

Robert C. Byrd, SC Bar #1069
bobbybyrd@parkerpoe.com
A. Smith Podris, SC Bar #78051
smithpodris@parkerpoe.com
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301 (29401)
Post Office Box 160
Charleston, SC 29402
Telephone: (843) 727-2650
Facsimile: (843) 727-2680

Attorneys for Appellants
Deanna Brown-Thomas, Dr. Yamma Brown, and Venisha Brown

OF COUNSEL
Pro Hac Vice:

Marc Toberoff
mtoberoff@toberoffandassociates.com
Toberoff & Associates, P.C.
23823 Pacific Coast Hwy, Suite 50-363
Malibu, CA 90265
Telephone: (310) 246-3333
Facsimile: (310) 246-3101

August 9, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

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

Tommie Rae Brown ..... Respondent,

v.

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

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

PROOF OF SERVICE

The undersigned hereby certifies that on August 9, 2018, s/he has caused a copy of the **APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** to be served upon all parties of record by mailing a copy of the same addressed as follows:

Robert N. Rosen, Esq.
Erin Casey, Esq.
Rosen Law Firm, LLC
18 Broad Street, Suite 201
Charleston, SC 29401

S. Alan Medlin, Esq.
USC School of Law
1713 Phelps Street
Columbia, SC 29205

T. Heyward Carter, Jr., Esq.
Andrew Chandler, Esq.
M. Jean Lee, Esq.
Evans, Carter, Kumes & Bennett, PA
115 Church Street (29401)
PO Box 369
Charleston, SC 29402-0369

David L. Michel, Esq.
192 East Bay Street, Ste. 202
Charleston, SC 29401

Sen. Arnold S. Goodstein
Goodstein Law Firm, LLC
PO Box 2350
Summerville, SC 29484-2350

John F. Beach, Esq.
Lyndey Ritz Zwing, Esq.
Adams and Reese LLP
1501 Main Street, 5th Floor (29201)
PO Box 2285
Columbia, SC 29202

Davis C. Sojourner, Jr.,
Limited Special Trustee
Sojourner Caughman & Thomas
PO Box 12127
Columbia, SC 29211

David B. Bell, Esq.
David Bell Law Firm
619 Greene Street (30901)
PO Box 1011
Augusta, GA 30903-1011

Matthew Day Bodman, Esq.
Matt Bodman, P.A.
1500 Calhoun Street
Columbia, SC 29201

Louis Levenson, Esq.
Levenson & Associates
125 Broad Street, SW
Atlanta, GA 30303

Scott Keniley, Esq.
Keniley Kumar LLC
Two Ravinia Drive, Suite 500
Atlanta, GA 30346

John A. Donsbach, Esq.
Donsbach Law Group, LLC
PO Box 212139
Martinez, GA 30917

A. Peter Shahid, Jr., Esq.
Shahid Law Office, LLC
89 Broad Street
Charleston, SC 29401

William Joseph Barr, Esq.
Vera Gilford, Esq.
Barr Law LLC
108 N. Academy Street
Kingstree, SC 29556-3422

J. David Black, Esq.
Fred L. Kingsmore, Jr., Esq.
Nexsen Pruet, LLC
1230 Main Street, Suite 700 (29201)
PO Drawer 2426
Columbia, SC 29202-2426

Russell L. Bauknight, Estate Trustee
and Personal Representative
Bauknight Pietras & Stormer, P.A.
1517 Gervais Street (29201)
PO Box 1330
Columbia, SC 29202

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

James Mixon Griffin, Esq.
Griffin Davis
1116 Blanding Street (29201)
PO Box 999
Columbia, SC 29202

Vera Gilford, Esq.
PO Box 12553
Miami, FL 33101

Itriss J. Jenkins
Itiriss J. Jenkins LLC
215 E. Bay Street, Suite 203
Charleston, SC 29401

Sen. Arnold S. Goodstein
208 Sumter Avenue
Summerville, SC 29484

Daryl Brown
2223 Birnam Place
Augusta, GA 30904

RCB D on behalf of Robert C. Byrd

Robert C. Byrd, SC Bar #1069
bobbybyrd@parkerpoe.com
A. Smith Podris, SC Bar #78051
smithpodris@parkerpoe.com
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301 (29401)
Post Office Box 160
Charleston, SC 29402
Telephone: (843) 727-2650
Facsimile: (843) 727-2680

Attorneys for Appellants
Deanna Brown-Thomas, Dr. Yamma Brown,
and Venisha Brown

Charleston, South Carolina

Parker Poe

Katon E. Dawson, Jr.
Associate
Telephone: 803.253.6854
Direct Fax: 803.255.8017
katondawson@parkerpoe.com

Atlanta, GA
Charleston, SC
Charlotte, NC
Columbia, SC
Greenville, SC
Raleigh, NC
Spartanburg, SC

August 9, 2018

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: In Re: The Estate of James Brown a/k/a James Joseph Brown, Tommie Rae Brown v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417

Dear Mrs. Kitchings:

Enclosed for filing please find an original and seven (7) copies of *Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc* along with a Proof of Service in the above-referenced appeal. Please return a filed-stamped copy of the petition.

By copy of this letter, we are serving all parties of record with a copy of the *Petition*. Should you have any questions regarding this matter, please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

Katon E. Dawson, Jr.

KED:mem
Enclosures

cc w/enc.: (please see the following page)

cc: Robert N. Rosen, Esq.
Erin Casey, Esq.
S. Alan Medlin, Esq.
T. Heyward Carter, Jr., Esq.
Andrew Chandler, Esq.
M. Jean Lee, Esq.
David L. Michel, Esq.
Sen. Arnold S. Goodstein
John F. Beach, Esq.
Lyndey Ritz Zwing, Esq.
Davis C. Sojourner, Jr.,
Limited Special Trustee
David B. Bell, Esq.
Matthew Day Bodman, Esq.
Louis Levenson, Esq.
Scott Keniley, Esq.
John A. Donsbach, Esq.
A. Peter Shahid, Jr., Esq.
William Joseph Barr, Esq.
Vera Gilford, Esq.
J. David Black, Esq.
Fred L. Kingsmore, Jr., Esq.
Russell L. Bauknight, Estate Trustee and
Personal Representative
C. Havird Jones, Jr., Esq.
James Mixon Griffin, E