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

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

Appellate Case No. 2015-002417

Tommie Rae Brown ..... Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, 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.

RESPONDENT'S RETURN IN OPPOSITION TO MOTIONS FOR HEARING AND SUGGESTION OF REHEARING EN BANC

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Pursuant to Rule 240(e), SCACR, and at the Court's request, Respondent, as and for her Return to all Appellants' Petitions for Rehearing and Suggestion for Rehearing en banc, respectfully shows unto this Court as follows:

OVERVIEW

This is a probate case, and consequently probate law applies. The summary judgment[1] issue before the Court involves Mrs. Brown's status as the surviving spouse of James Brown. That issue arose in the context of Mrs. Brown's claims for her elective share and omitted spouse's share,[2] both of which are probate matters, and for which she must be the surviving spouse to qualify. The Court of Common Pleas heard the partial summary judgment motion as to Mrs. Brown's surviving spouse status in the context of those claims, which were removed from the probate court, so that the Court of Common Pleas was effectively sitting in probate. The South Carolina Probate Code ("SCPC") applies.

Importantly, as noted in footnote 5 of this Court's opinion, after all briefs were filed the Estate (including the charitable trust) settled with Mrs. Brown on the issue of her status as surviving spouse. As this Court recognized in footnote 5 of its opinion, this Court approved the Estate's request to withdraw its appeal. Thus, the Estate no longer contests that Mrs. Brown is the wife of James Brown. Appellants[3] refer to that settlement agreement[4] in their Petition for

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[1] Appellants continue to misstate the origins of Respondent's motion for summary judgment, which was initially filed in 2007. ROA, p. 122.

[2] The omitted spouse's share, pursuant to South Carolina Probate Code ("SCPC") section 62-2-301, applies when the surviving spouse marries the testator after he makes a will and then does not change it before his death. This Court noted in its opinion that Mr. Brown's will "did not name her or their son as beneficiaries," but did not specifically note that the will was executed *before* their marriage and the birth of their son — an obvious reason they were not named in the will.

[3] As this Court did for the "bigamous marriage" issue in its opinion, Respondent refers to Appellants' argument to include the arguments made in their various, separate, but generally duplicative Petitions for Rehearing and Suggestions for Rehearing En Banc ("Petition for Rehearing").

Rehearing, implying that a problem exists because they were unaware of the settlement before it was presented to the Court as part of the Estate's motion to withdraw its appeal.[5] That settlement provides that the Estate would withdraw its appeal, and that Mrs. Brown would dismiss her will and trust contest.[6] After final determination of her surviving spouse status, she will dismiss her elective share and omitted spouse's claim. Thus, the Estate will receive a substantial part of Mrs. Brown's share of the valuable federal copyright termination rights, which Mrs. Brown cannot receive if she is not the surviving spouse and which the Estate cannot receive otherwise under federal law unless she is. The Estate's withdrawal would necessarily support Mrs. Brown's claim to be the surviving spouse. Appellants are disputing Mrs. Brown's status to increase their share of the federal termination rights and concomitantly they seek to eliminate any ability of the Estate and the Charitable Trust to receive any share of those rights.

Appellants' position is that this Court should disregard established and uncontroverted statutory and case law for *all* of the following issues:

1. Appellants contend that the Court of Common Pleas, sitting in probate, has subject matter jurisdiction to review and re-litigate a final unappealed annulment order from the Family Court. To accept Appellants' premise, this Court would have to disregard the clear jurisdictional mandate from the South Carolina General Assembly giving the family court

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[4] Attached to the Estate's request to withdraw.

[5] Of course, there was no requirement that they be made aware of ongoing settlement negotiations.

[6] This Court's opinion notes that Mrs. Brown brought a separate will and trust contest. Pursuant to the terms of her settlement agreement with the Estate, she has dismissed her contest. (The Court's opinion did not note that five of the six putative children named in the will brought their own separate will and trust contest and that, along with those five, the sixth child joined in the settlement agreement restructuring that will and trust that was remanded by the Supreme Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

exclusive jurisdiction over annulments. See S.C. Code Ann. § 63-5-530(A)(6).[7] Moreover, SCPC section 62-1-302, the general probate jurisdictional section, does not give the probate court jurisdiction over annulments but in addition does not afford jurisdiction to even determine the validity of marriages.[8]

In their Petition for Rehearing, Appellants try to sidestep this jurisdictional mandate by asserting that the probate court has the jurisdiction to "determine heirs." That premise falls flat for several reasons. The issue is not a "determination of heirs." The term" heirs" refers to taking by intestacy. Mrs. Brown's partial summary judgment is brought in the context of her elective and omitted spouse's share claims, not as an intestate heir.[9] Moreover, although section 62-1-302(a)(1) does generally afford probate jurisdiction to determine heirs, that section must be read together with section 62-1-302(c), which limits probate jurisdiction as to marriages to only the "interpretation of marital agreements." This is also consistent with section 63-5-530(A)(6), which gives the family court exclusive jurisdiction over annulments. Even if there were probate jurisdiction to determine annulments, the Family Court Order, having occurred first, controls. See *Neely v. Thomasson*, 365 S.C. 345, 354, 618 S.E.2d 884, 889 (2005).

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[7] Appellants fail to address the situation that would arise if this Court agreed to remand for a determination of whether the putative Brown-Ahmed marriage was bigamous. Where would that occur? In the Court of Common Pleas, which has no jurisdiction (but if deciding the family court was wrong would effectively be overturning the family court), or in the family court (where even Appellants admit they have no standing)?

[8] That section limits probate jurisdiction to the "*interpretation* of marital agreements." SCPC § 62-1-302(c).

[9] As such, these claims are governed by SCPC section 62-2-802, which defines a surviving spouse as someone who has not been divorced from the decedent or whose marriage to the decedent has not been annulled, prior to the decedent's death.

2. Appellants, purportedly standing in the shoes of Mr. Brown,[10] want standing to do what Mr. Brown, himself, could not do, and which they admit he could not do. As Appellants admit, Mr. Brown could not intervene in the Brown-Ahmed family court matter. See, for example, this Court's opinion in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006). The only course Mr. Brown had to determine that his ceremonial and licensed marriage to Mrs. Brown was invalid was to bring an action for annulment,[11] which he did and then dismissed, never to bring again. Appellants, purportedly standing in his shoes, want to do what he chose not to do: invalidate his marriage to Mrs. Brown. Moreover, Appellants want to obtain this annulment posthumously, which is not possible.[12] This is the case as to all family court or probate court: SCPC section 62-2-802 determines who is the surviving spouse according to the status at the date of the decedent's death.[13]

3. Appellants want this Court to overturn itself (in *Lukich* and in this case), all other case precedent, and the applicable statute to conclude that a bigamous marriage is valid until a court order of annulment. This has never been the law. The applicable statute, section 20-1-80, and all prior case law require and hold that a bigamous marriage is never valid. To determine

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[10] At the hearing below, Respondent disagreed that Appellants have standing in the elective share and omitted spouse's share because the applicable statutes name only the personal representative as a party, but the trial court ruled against Respondent on that issue. However, Respondent's argument for purposes of the appeal is different: that Appellants lack standing to challenge the Family Court Order.

[11] An annulment is the only way to determine that a marriage is invalid. *See* Roy T. Stuckey, *Marital Litigation in South Carolina* § 3.A (3d ed. 2006).

[12] *See id.* at § 1.E.

[13] Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.E (3d ed. 2006).

otherwise would require this Court to disregard legislative mandate, Supreme Court precedent, and its own precedent.

But, even if this Court ruled that a bigamous marriage is valid until an annulment order is issued[14] and applied it only prospectively, Appellants only want that rule to apply to the putative Brown-Ahmed marriage and not to the Brown-Brown marriage. Even if the Brown-Brown marriage were bigamous, the Browns never obtained an annulment, which according to Appellants is the only way to render a bigamous marriage invalid, and then only prospectively. So by Appellants' own theory, the Browns were married at Mr. Brown's death, and one cannot obtain an annulment posthumously.

Moreover, the order of disputed marriages in this case is not novel for South Carolina. In *State v. Sellars*,[15] a man was accused of the crime of bigamy. However, the Supreme Court concluded that he did not enter into a bigamous marriage because his putative first wife was already married when they attempted to marry, so they were never married and he thus had no impediment to his "second" marriage, which was consequently not bigamous and therefore valid. That is exactly the order of disputed marriages in this case. Similarly, in *Hallums v. Hallums*,[16] the Supreme Court indicated that the alleged widow of the decedent would have been entitled to take from his estate had her first marriage been void ab initio because she alleged her first husband was already married; however, the Court concluded that the first husband was not

[14] As this Court recognized in its opinion, an annulment order is not even necessary because a bigamous marriage by statute is never valid. *See* Roy T. Stuckey, *Marital Litigation in South Carolina* § 3.A (3d ed. 2006).

[15] 140 S.C. 66, 134 S.E. 873 (1926).

[16] 74 S.C. 407, 54 S.E. 613 (1906).

already married and thus her attempted marriage to the decedent was void as bigamous.[17] Thus, every South Carolina case has found that a bigamous marriage is never valid, and particularly these latter two Supreme Court cases dealing with the same order of disputed marriages as in this case.

4. Appellants argue that, even though a family court order "binds the world," they are nevertheless not bound. A family court order as to status is binding against the world; otherwise, chaos would result because status would have to be re-litigated every time someone wanted to dispute its validity. The only relevant issue before this Court is Mrs. Brown's status when she married Mr. Brown, namely, she was not otherwise married. Consequently, even though Appellants attempt to parse the effect of a family court order as not being binding on the world as to findings of fact — and now in their Petition for Rehearing as to conclusions of law — and even though their premise is faulty, it would not matter if they were correct because Mrs. Brown's status is all that matters in this case. And even though Appellants' arguments about collateral estoppel are also flawed, collateral estoppel is a red herring. If Appellants' arguments about collateral estoppel were correct, then a family court order as to marital status could never be binding against the world because there are only two permissible parties to an annulment action.[18]

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[17] The Supreme Court made the determination about the validity of marriages back then because there was no applicable jurisdictional statute and, of course, there was no family court then. Thus, in *Hallums*, there was no prior court order determining that the first marriage was bigamous.

[18] The only person who could have possibly appealed the Family Court Order was Ahmed, and it is too late for him to do so. Appellants cite the affidavit of David Bell (attaching a purported affidavit of one Taha Aliza: ROA, pp. 515-21, which is inadmissible and irrelevant, claiming that he talked to Ahmed by phone in Pakistan. However, Appellants' citing to that affidavit makes the point that, if true, Ahmed knew no later than 2008 of the annulment, and he has yet to appeal or appear in any way.

STATEMENT OF THE CASE

This case presents a dispute over who is the surviving spouse of James Brown ("Mr. Brown"). Mr. Brown's most recent marriage certificate is with Tommie Rae Brown ("Mrs. Brown). (ROA, p. 269)

Mrs. Brown had a prior Texas marriage certificate with Javad Ahmed. However, Mrs. Brown never had a valid marriage with Ahmed because Ahmed was already married to multiple wives in the nation of Pakistan. She presented this to the Charleston County Family Court, which held in 2004 that any purported marriage between Mrs. Brown and Ahmed was void ab initio for Ahmed's bigamy. (J. Stip. ex. 12). Mr. Brown paid the attorney's fees which made that action possible. (J. Stip. § 13.) Soon afterward, Mr. Brown filed an action to annul his marriage to Mrs. Brown on grounds of Mrs. Brown's bigamy. But instead of pursuing that action, he dismissed the action and lived with Mrs. Brown as husband and wife until his death. (J. Stip., Exhibit 19,)

The Court of Common Pleas held that the Family Court judgment of annulment is binding; that there was never a valid marriage between Mrs. Brown and Ahmed; and that Mrs. Brown is therefore Mr. Brown's surviving spouse. This Court affirmed the trial court's order. *In Re Estate of Brown*, No. 2015-002417, 2018 WL 3556564 (S.C. Ct. App. July 25, 2018).

The opposing parties in this action were initially Mr. Brown's Estate (by the Limited Special Administrator "LSA"), plus certain of Mr. Brown's putative children. The Estate has now dismissed its appeal pursuant to its settlement agreement with Mrs. Brown. The remaining defendants, putative children of Mr. Brown, have filed multiple Motions For Rehearing.

ARGUMENT

I. MOTIONS FOR REHEARING AND REHEARING EN BANC ARE DISFAVORED, AND ARE GRANTED ONLY IN RARE CASES.

A motion for rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a). "A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

The Court did not overlook or misapprehend any points. Indeed, the Petitions simply restate their arguments set forth in their briefs. No prior decision of this Court reaches a result contrary to this Court's opinion. Indeed, this Court cited significant precedent in support of the result reached.

The current case is an ordinary dispute about the validity of a marriage, and although it may be of interest because it involves James Brown, it raises no legal question of exceptional importance, and the decision is consistent with all precedent and the applicable statute.[19]

Appellants are not raising any obvious error in this Court's prior opinion. Rather, they have filed extraordinarily long motions for rehearing as a device for rearguing the merits and asking the Court to reach a different result. That is not the proper purpose of a motion to rehear. Because the demanding standards of Rule 219(a) and Rule 221(a), SCACR, are not met, Appellants' motions should be denied.

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[19] As discussed *supra* notes 14, 15, and accompanying text, and *infra* notes 27, 28, and accompanying text, the order of the disputed marriages is not even novel in South Carolina.

II. MRS. BROWN'S MARRIAGE TO MR. BROWN WAS NOT VOID FOR BIGAMY.

Appellants persist in arguing that Mrs. Brown had a valid marriage to Javad Ahmed at the time she married Mr. Brown. For multiple reasons, the Court properly rejected that argument.

A. The Family Court Judgment of Annulment Is Binding In An Action Filed In The Court of Common Pleas.

First, Appellants' argument fails because it has been rejected by a controlling unappealed final judgment of the Family Court. In a final judgment of annulment dated April 15, 2004, the Charleston County Family Court held that the relationship between Ahmed and Mrs. Brown was bigamous and never a marriage because Ahmed himself was already married. (ROA, pp. 325-28).

As this Court properly held, the Family Court has *exclusive* jurisdiction over annulments. S.C. Code Ann. § 63-5-530(A)(6). This case was heard in the Court of Common Pleas as a removed probate matter. "[T]he trial court had no subject matter jurisdiction to relitigate the family court order because only the family court has jurisdiction over annulments." *In Re Estate of Brown*, No. 2015-002417, slip op. at 8, 2018 WL 3556564, at *4 (S.C. Ct. App. July 25, 2018).

Because the Court of Common Pleas has no jurisdiction over annulments, it could not overturn the Family Court's holding that no valid marriage ever existed between Mrs. Brown and Ahmed. The court below properly held that the Family Court judgment of annulment was binding on the question of whether Mrs. Brown and Ahmed ever had a valid marriage.

Appellants make the illogical argument that the Family Court's Findings of Fact are inadmissible hearsay. This argument should be rejected. First, Appellants stipulated to the

admissibility of the entire Family Court annulment judgment, which appears as an appendix to a Joint Stipulation. J. Stip., exhibit 12. Appellant cannot accuse the trial court of error in considering material to which Appellants themselves stipulated. *See, e.g., Butler v. Sea Pines Plantation Co.*, 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984).

Further, factual findings which are binding under doctrines of res judicata and collateral estoppel are either admissible outside the rules of evidence,[20] or do not constitute hearsay at all.[21] Otherwise, the hearsay rule would completely swallow res judicata and collateral estoppel. The case cited by Appellants, *Nipper v. Snipes,* 7 F.3d 415 (4th Cir. 1993), involves a prior decision which was not legally binding. For reasons argued by Mrs. Brown and accepted by both the trial court and this Court, the Family Court order in this case is legally binding on all appellants.

Importantly, all that Mrs. Brown relies on is the Family Court's Order ruling that she was never married to Ahmed — a ruling about status.

Appellants argue that this issue involved determining heirs, and thus is within the jurisdiction of the Probate Court. But heirs are defined as those who take by intestacy. Mrs. Brown is asking for summary judgment that she is Mr. Brown's wife for statutory spousal share — elective and omitted spouse — purposes, and not to take by intestacy.[22]

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[20] *See* Mugno v. Casale, Nos. CIV.A. 96–6228, CIV.A. 96–6229, 1997 WL 152793, *6 (E.D.Pa. Mar. 28, 1997) ("if the doctrine of collateral estoppel precludes consideration of a factual issue, that issue is not a fact to be determin[ed] at trial and, thus, the rules of evidence do not apply to that issue"),

[21] *See* Lincoln Ben. Life v. Wilson, No. 4:13CV3210, 2015 WL 4092851, at *8 (D. Neb. July 7, 2015) ("The findings are not hearsay because they are not offered to prove the truth of the matter asserted; rather, they are offered to prove what was decided in the case. See Fed. R. Evid. 801(c)(2). If it is determined that collateral estoppel applies, the result of the prior litigation will be admissible in evidence at trial.")

[22] See *supra*, Overview. In making that determination, the probate court is bound by the status created by the Family Court Order.

The presently contested question is not whether Mrs. Brown receives an elective share, but rather whether Mrs. Brown was Mr. Brown's wife at the time of his death. Section 62-2-802. Clearly, Mrs. Brown proved a valid marriage certificate between herself and Mr. Brown. (ROA, p. 269) This certificate is valid unless impeached, and it can be impeached only by evidence that Mrs. Brown had a valid marriage to Ahmed at the time she married Mr. Brown. That exact question was presented to the Family Court and ruled upon in the annulment action. There is no question that the Family Court had exclusive jurisdiction over the annulment action.

Under S.C. Code Ann. § 62-2-802(c), for probate purposes, "[a] divorce or annulment is not final until signed by the court and filed in the office of the clerk of court." The decree of annulment here was signed by the court and filed in the office of the clerk.[23] Thus, under § 62-2-802(c), the decree of annulment is "final" and cannot be impeached under the Probate Code. If the General Assembly intended to let Probate Courts freely ignore final judgments in annulment actions, there would be no point in putting § 62-2-802(c) in the Code.

The *dispositive* issue in this action was therefore resolved by a decree of annulment, which was within the exclusive jurisdiction of the Family Court. The Probate and Common Pleas courts have no jurisdiction to question the Family Court's ruling. Given that Mrs. Brown never had a valid marriage to Ahmed, because Ahmed was already married, the marriage certificate between Mr. and Mrs. Brown is valid, and she is Mr. Brown's surviving spouse.

[23] *See* ROA Vol I, pages 293-96.

B. The Family Court Judgment of Annulment Is Binding Because Appellants Lack Standing to Question It.

Second, even if the Court of Common Pleas somehow did have jurisdiction over annulments, the Appellants lack standing to question the Family Court order. James Brown, had he lived, would have had no standing to attack the annulment. This Court directly so held, citing a prior case holding that a husband lacked standing to intervene in the wife's annulment proceeding. *Lukich v. Lukich,* 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006).[24] Appellants are putative children of James Brown, their claims are through him, and they cannot assert claims which he himself could not. *See Watson v. Watson,* 172 S.C. 362, 369-70, 174 S.E. 33, 36 (1934) ("[A]s it is only the children of Mr. Watson who are contesting this question, they are completely estopped, as was their father, from disputing the validity of the divorce in question"); *Neely v. Thomasson*, 365 S.C. 345, 354, 618 S.E.2d 884, 889 (2005).

Indeed, the evidence shows that James Brown during his lifetime did for a brief time question the validity of his marriage to Mrs. Brown, bringing an action to have that marriage annulled. But he then reconciled with Mrs. Brown and withdrew the claim. *See* Joint Stipulation, Exhibit 19, stating in Finding 2 that "[t]he parties have resolved their differences and are currently residing together." Mr. and Mrs. Brown then continued to reside together in marriage until Mr. Brown's death. Appellants lack standing to do what their own decedent ultimately refused to do: question the validity of his marriage to Mrs. Brown.

[24] This aspect of *Lukich* was outside the scope of the Supreme Court appeal, *Lukich v. Lukich,* 379 S.C. 589, 666 S.E.2d 906 (2008).

This Court did not hold that Appellants lack standing to be parties to this case. The Court held, properly, that Appellants lack standing to question the Family Court judgment of annulment.

C. The Family Court Judgment of Annulment Is Binding Because Judgments of Annulment Are Binding On All Third Parties.

Third, even if the Judgment of Annulment can be attacked in the Court of Common Pleas, and even if Appellants have standing to do so, the Judgment is still binding, because Judgments of Annulment are binding on all third parties.

The efficient and orderly tracking of marriages within South Carolina requires that annulments be binding upon third parties. Assume that a wife enters into a bigamous marriage when her husband conceals from her a prior relationship. Within a period of months, she learns the truth, recognizes the error, and has the marriage annulled.

The position of Appellants in this case is that the wife in this example can never rest. Her original judgment of annulment, no matter how clearly she proved her case, binds only parties named to the annulment action. Every time the validity of her marriage becomes an issue with regard to anyone not a party to the original annulment, she must file a new annulment action against that third party. For example, if she desires to remarry, she must name her prospective husband as the defendant in an action to annul her first marriage, because otherwise the husband is not bound by the annulment and the second marriage is bigamous. If her marital status becomes an issue when she purchases real property or applies for government benefits, e.g., social security, she must again file an annulment action. These repeated annulment actions,

seeking the same relief against different defendants, would be an impossible burden upon both the wife and the court system.

South Carolina law takes a different approach. S.C. Code Ann. § 20-1-80 provides as follows:

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, *no[r] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.*

(emphasis and bracketed correction added). This statute means just what it says: a bigamous marriage is void and, moreover, a second marriage is not void for bigamy if a first marriage "shall be declared void by the sentence of a competent court." *Id.* That is exactly what happened in this case. The statute makes no reference to who was or was not a party to the annulment action. It makes no reference to whether the first marriage was declared void before or after the date of the second marriage. The statute states, simply and directly, that a bigamous marriage is void and that a marriage is not void for bigamy if a prior marriage has been declared void.

There is no question that the only court with subject matter jurisdiction has declared that the marriage between Mrs. Brown and Ahmed was void on the ground of Ahmed's bigamy. Indeed, the Final Order granting the annulment is stipulated by Appellants. (ROA Vol. I, p. 257 at ¶ 11, pp. 293-6)

The effect of S.C. Code Ann. § 20-1-80 is to make annulments binding upon all third parties. This is the strong general rule nationwide. "[*A*]*nnulment decrees are binding upon non-*

parties as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added).

Professor Clark continues:

> No matter how clearly these [third-party] rights may depend on the existence of a marriage, they are not of the same degree of importance, seriousness or consequence as the interests of the spouses themselves in the marriage. It is perhaps this factor that has led to the well-established rule that a decree of divorce is conclusive on third parties with respect to the termination of the marriage. It is the writer's view that a decree of annulment should have the same effect.

Id.

Professor Clark's position was expressly adopted by the South Carolina courts in *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001). There, a husband and wife were divorced, and the husband was ordered to pay alimony. Some years later, the wife remarried. Six months later, her remarriage was annulled for bigamy, as the second husband had never divorced his prior wife. The first husband refused to resume paying alimony after the annulment, and the wife filed a contempt action to enforce the original decree. The first husband then argued that the wife's remarriage, bigamous though it may have been, still terminated his obligation to pay support.

The Court of Appeals resolved the main issue in the case by holding that a bigamous remarriage, which is void *ab initio*, does not terminate a prior spousal support obligation. The husband then argued in the alternative that the wife's remarriage could not be treated as bigamous against him, as he was not a party to the annulment action in which the remarriage was declared void. *This is the same argument that Appellants make in the present case.* The Court of

Appeals rejected the argument, holding directly that the annulment was binding upon the first husband even though he was not a party to the action:

> Yon also argues the court erred in reinstating his alimony obligation because he was not a party to Joye's annulment action. He asserts that he should have been made a party to the annulment action because its outcome directly affected him. We disagree.
>
> Generally, a person must be joined as a party to an action if his absence precludes complete relief among those already parties or his interest in the subject matter is so intertwined that he would not receive complete relief or resolution without his participation. Rule 19(a), SCRCP; *see First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 148, 355 S.E.2d 278, 279 (Ct. App. 1987).
>
> *Since Yon had no standing to challenge the granting of the annulment, it was not necessary for Joye to include him as a party to the action.* Moreover, Yon suffered no prejudice by not being made a party to the action. Under South Carolina law, Joye's marriage to Vance was void *ab initio* and Yon's presence as a party to the action could not have altered the decision to grant the annulment.

Id. at 276, 547 S.E.2d at 894 (emphasis added). Just as the first husband in *Joye* was bound by the annulment of the marriage between the wife and her second husband, so is the estate of James Brown bound by the annulment of Mrs. Brown's previous marriage to Ahmed.

Joye was reversed not as to *the effect* of a bigamous remarriage, but only as to a prior obligation for *alimony*. The Court of Appeals held that alimony always terminates upon a voidable remarriage and never terminates upon a void remarriage. The South Carolina Supreme Court rejected the absolute void/voidable distinction for purposes of alimony, holding instead that the effect of an annulled remarriage upon a previous alimony obligation should be determined under a case-by-case approach. *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003).

But the Supreme Court necessarily agreed with the Court of Appeals regarding the husband's standing to attack the annulment. The Supreme Court's opinion ordered the trial court to apply the case-by-case approach as to the alimony issue. The court therefore accepted that a

valid annulment had occurred; otherwise there would be no annulled remarriage to which the case-by-case approach could be applied. By accepting the existence of an annulment, the Supreme Court agreed with the Court of Appeals that the annulment was binding upon the first husband, even though he was not a party to the annulment proceedings. The Court of Appeals was reversed as to the *effect* of the annulment upon the prior *support obligation*, and *not* as to the *existence* or *validity* of the annulment. Had the Supreme Court intended to hold that the husband was not bound by the annulment of the wife's remarriage, the court would have held that alimony absolutely terminated; there would have been no need to remand the case for application of a rule (the case-by-case approach) which applies only in the presence of a valid annulment.

Appellants are wrong in stating that the Supreme Court in *Joye* "refused to order any back-payments" of alimony, and therefore somehow held that a bigamous marriage was not retroactively valid. Petition for Rehearing of Deanna Brown et al at 11. *Joye remanded* the issue of back payments back to the trial court, for consideration of a case-by-case approach which applies only if a marriage was validly annulled. If the marriage had been annulled only prospectively, there would have been no need for a remand. By remanding the case, the Supreme Court expressly held that the annulment did apply retroactively. In other words, by remanding the case to determine the effect of an annulment on prior payments, *Joye* necessarily held that the annulment applied retroactively.

The result reached in *Joye* is also consistent with S.C. Code Ann. § 20-1-520, which provides that third parties are generally bound by a court's determination that a marriage is valid:

> When the validity of a marriage shall be denied or doubted by either of the parties, the other may institute a suit for affirming the marriage and, upon due

proof of the validity thereof, it shall be decreed to be valid and *such decree shall be conclusive upon all persons concerned.*

S.C. Code Ann. § 20-1-520 § (emphasis added). Since "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" should likewise be deemed bound by a court's finding that a marriage is invalid—that is, by a decree of annulment. Indeed, the decree of annulment is in substance a holding which affirmed the validity of Mrs. Brown's marriage to Mr. Brown. Under § 20-1-520, such an affirmation is binding upon third parties.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. See pages 38-39 of Mrs. Brown's Final Brief.

The result is not any different because annulment proceedings are in rem. This issue is discussed in detail at pages 40-45 of Mrs. Brown's Final Brief. To summarize, "[i]n a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status." Restatement of Judgments § 74(1) (Westlaw 2018) (emphasis added). "It is ancient law that a judgment in rem is res judicata as to all the world with regard to the res or status that is determined therein." *Presbrey v. Presbrey.* 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*, 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960).

Appellants argue that the rule is otherwise for issues of fact, but as both the court below and this Court properly held, the issue here is whether the status determination in the annulment is binding—that is, whether a valid marriage ever existed between Mrs. Brown and Ahmed. The trial court relied upon the status determination holding in the family court judgment—its holding that the marriage between Mrs. Brown and Ahmed was void ab initio for Ahmed's bigamy.

In any event, even the factual findings in an in rem judgment are binding as they effect the issue of status itself. It is absurd to hold that the judgment is binding as to status, but that the

factual findings which underlie the judgment are not binding This case, of course, directly involves status.

Stated differently, if the factual findings which underlie an in rem judgment of status are not binding, then the legal conclusions built upon those findings can never be binding. But there is no question that the status determination itself is binding. Even Appellants admit that. See Petition for Rehearing of Deanna Brown et al at 11. The status determination cannot be binding unless the underlying factual determinations are binding. The rule that factual determinations are not binding applies only to issues collateral to status. Here, the issue is status.

Finally, if the factual findings in an annulment are not binding, then annulment actions will still have to be brought all over again every time the validity of the marriage arises with regard to a party not named in the annulment. This will inevitably require the same annulment action to be relitigated many times over, placing an intolerable and unnecessary burden upon both litigants and the courts. Under S.C. Code Ann. § 20-1-80, judgments of annulment clearly binding upon all third parties.

Appellants argue that the Family Court judgment of annulment was a default judgment. The record is clear that this is simply not true. ROA, p. 300. This Court had already rejected Appellants' argument, holding that "the annulment was actually litigated as the court reviewed the evidence presented and found it was sufficient to meet Respondent's burden of proof." *In Re Estate of Brown*, No. 2015-002417, slip op. at 10, 2018 WL 3556564, at *6 (S.C. Ct. App. July 25, 2018).

The Court's holding was correct. Under South Carolina law, an annulment *cannot* be entered as a traditional default judgment. Rather, the trial court has a strict legal duty in every annulment action to rule upon the sufficiency of the evidence:

> The marriage status being a matter of the deepest public interest and concern, the trial judge has the power, *and it is his duty*, to see that such a status is not disturbed except under circumstances and for causes fully sanctioned by law. In this class of cases, probably more than all others, the state exercises a jealous and exclusive dominion. These fundamental considerations are, or should be, scrupulously regarded and enforced, and it is of great importance that the presiding judge shall, when necessary, prevent, to the utmost exercise of his judicial power, the dissolution of a marriage contract by collusion, default, or coercive pressure exerted upon either or both of the parties.

Fogel v. McDonald, 170 S.C. 506, 157 S.E. 830, 833 (1931) (emphasis added).

> In a controversy relating to marriage the Court is concerned not only with the rights of the individuals involved but also with the public interest. A duty rests upon the Court to encourage the parties to live together, to see that the marriage status is not disturbed except under circumstances and for causes fully sanctioned by law, and to prevent fraudulent and collusive divorces.

Davis v. Davis, 236 S.C. 277, 284, 113 S.E.2d 819, 823 (1960), quoting *Holliday v. Holliday*, 235 S.C. 246, 253-54, 111 S.E.2d 205, 210 (1959).

Because the trial court is required to examine the sufficiency of the evidence, there is no such thing as a default judgment of annulment. Even when an annulment is uncontested, the court must rule upon the sufficiency of the evidence.

Moreover, even if it were possible to issue a default judgment in an annulment case, Mrs. Brown's counsel expressly asked the court *not* to issue a default judgment, but rather to comply with its legal duty to examine the sufficiency of the evidence:

> The Defendant, I guess, arguably is in default *but we're not moving to put him in default.* He has notice of this—he has been served by publication as will appear by affidavit. He was give notice of this hearing personal to Rule 17, proper motion, as will appear by affidavit. So, we're here to proceed.

ROA, pp. 299-300.

The Family Court could not issue a default judgment when the plaintiff expressly refused to request one. The Family Court could only do what it actually did—rule upon the sufficiency of evidence to establish the grounds of annulment asserted.

Contrary to Appellants' assertion, the fact that Ahmed was in default does not necessarily mean that the judgment was a default judgment. Appellants confuse the concept of default with the concept of a default judgment. Under Rule 55(a), SCRCP, Ahmed was technically in default. Rule 55(b) then sets forth certain ways in which "[j]udgment by default *may* be entered." (Emphasis added.)

As the discretionary verb "may" shows, entry of a default judgment is discretionary. The plaintiff is not required to pursue a default judgment against a defendant in default, particular when the case involves an area of law such as annulments, in which the court has a strict duty to review the sufficiency of the evidence. In actual fact, Mrs. Brown expressly refused on the record to request a default judgment. She asked for, and received, a judgment on the merits.

Appellants argue that Mr. Brown was not heard on the annulment issue. This argument is disingenuous. Mr. Brown fully supported the annulment action, and even paid the attorney's fees which made the action possible. (J. Stip. § 13.) He was advised of each step in the annulment action. Joint Stipulation Paragraph 14 states: "James Brown was aware of the Ahmed

annulment litigation as his attorney received a copy of the Summons and Complaint in February, 2004, and the Final Order of Annulment in April, 2004, a true copy of both communications attached as Exhibits 14." ROA, p. 14, pp. 314-28. He would not have done these things if he did not support the annulment. Later, Mr. Brown did in fact bring an annulment action against Mrs. Brown. But he then reconciled with Mrs. Brown and withdrew that action. Joint Stipulation, Exhibit 19. Against this background, to claim that Mr. Brown had no right to make his position on the annulment known is fundamentally misleading. Mr. Brown had every chance to make his position known—and his position was that he had a valid marriage to Mrs. Brown.

Appellants further speculate about what would have happened if James Brown had sought an annulment of his marriage to Mrs. Brown before her action to annul her marriage to Ahmed. James Brown actually did bring such an action, though at a later point in time, but as noted above, he voluntarily withdrew it and reconciled with Mrs. Brown. There is no reason to believe he would have done otherwise at an earlier point in time.

In short, Mrs. Brown did not win because she filed first; she won because the Family Court heard her evidence and found it to be credible. That holding is binding in this action and against these Appellants.

D. The Family Court Judgment of Annulment Is Binding Because Appellants Are Collaterally Estopped From Attacking It.

Fourth, even if the Judgment of Annulment can be attacked in the Court of Common Pleas, and even if Appellants have standing to do so, and even if annulments do not bind third parties generally, the annulment in this case is binding upon Appellants under the doctrine of collateral estoppel.

The elements of collateral estoppel are as follows:

> Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support 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).

As noted above, the annulment action was actually litigated because the court itself had a strict legal duty to test the sufficiency of the evidence. The existence of a valid marriage between Mrs. Brown and Ahmed was obviously directly determined; indeed, resolving that issue was the entire purpose of the annulment action. A finding that no valid marriage ever existed was obviously necessary to support the court's judgment of annulment.[25] All three elements of collateral estoppel are therefore met here.

Contrary to appellants' arguments, Mr. Brown was in privity with Mrs. Brown in the annulment action. This point is covered in detail on pages 49-55 of Mrs. Brown's Final Brief. To summarize, a person is in privity with a party if the person provides essential support for an action which that party files. *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912). Mr. Brown

[25] The Appellants' reliance upon *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) is clearly unjustified, as *Kunst* involved a default judgment, while the Family Court judgment of annulment here is expressly not a default judgment, and could not have been one because of the Family Court's strict duty to review the sufficiency of the evidence.

clearly provided substantial support for Mrs. Brown's annulment action; indeed, he paid the fees for Mrs. Brown's attorney. (J. Stip. § 13). A person who pays the attorney's fees for a party has provided essential support for the action, and is in privity with that party for purposes of collateral estoppel. *Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394, 396 (1934). Thus, Mr. Brown was in privity with Mrs. Brown.

There is no question that Appellants are in privity with Mr. Brown, as heirs are generally in privity with their ancestors. *Thompson v. Hudgens*, 159 S.E. 807, 812 (S.C. 1931).

Mr. Brown also benefitted from the annulment judgment during his lifetime, as the annulment resolved uncertainty in the validity of marriage. Indeed, in his own annulment action, Mr. Brown expressly argued that Mrs. Brown "is collaterally and judicially estopped from denying" the holding in her own annulment action. (ROA, pp. 333-34) Having argued expressly that the annulment judgment was binding, and having benefitted from the judgment, Mr. Brown could not have changed course 180 degrees and argued that the annulment was not binding. *See Salley v. McCoy*, 186 S.C. 1, 195 S.E. 132, 135 (1937) (citing "[t]he elementary principle that counsel will not be permitted to take inconsistent positions at successive stages of a cause"). Appellants have no greater right than Mr. Brown.

The Court therefore correctly held that Appellants are estopped to attack the validity of the annulment. *In Re Estate of Brown*, No. 2015-002417, slip op. at 9-11, 2018 WL 3556564, at *5-*6 (S.C. Ct. App. July 25, 2018).

E. This Court's Order Is Fully Consistent With The Summary Judgment Standard.

The trial court held, and this Court agreed, that Appellants are not permitted to attack the judgment of annulment. They are asking the Court of Common Pleas to effectively overturn a Family Court judgment of annulment, and act outside the Court of Common Pleas' jurisdiction. They lack standing to attack the annulment, and they are collaterally estopped from doing so. In any event, under South Carolina law, annulments are binding upon all third parties.

None of the above holdings turns upon any genuine issue of material fact. Indeed, all material facts regarding the annulment have been stipulated by the parties. There is no question that the judgment of annulment exists. The exclusive nature of the Family Court's jurisdiction over annulments is clear from the face of S.C. Code Ann. § 63-5-530(A)(6). As the Court recognized, the fact that James Brown himself could not have attacked the annulment is clear from *Lukich v. Lukich,* 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006). No one argues in this case whether Appellants are children of James Brown and claim through him.

While a genuine issue of material fact prevents entry of summary judgment, "it is not sufficient that one create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Dispute as to an immaterial fact does not preclude entry of summary judgment. In the words of the United States Supreme Court, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis by the court). "Only disputes over facts that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

The question of whether annulments bind third parties is a question of law. The prior annulment is a matter of record; the status of Appellants as James Brown's children is not disputed. All *material* facts are contained within the Joint Stipulation. Where there is no material factual dispute, a question of law is properly resolved upon summary judgment:

> [T]he fact that there exists an important, difficult or complicated question of law is not a bar to a summary judgment where it is clear there is no genuine issue of a material fact. *Resolution of the legal issues will not be rendered easier by going through the trial when there is no issue of fact to be tried.*

Lewis v. Coleman, 257 F. Supp. 38, 40 (S.D.W. Va. 1966) (emphasis added); *see also Taylor v. Cardiology Clinic, Inc.*, 195 F. Supp. 3d 865, 869 (W.D. Va. 2016) ("[S]ummary judgment is appropriate '[w]here the unresolved issues are primarily legal rather than factual'") (quoting *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir.2004)); *Doyle v. Milton*, 73 F. Supp. 281, 284 (S.D.N.Y. 1947) ("where the issue is one of law only, summary judgment is an appropriate remedy for the disposition of the issues").

Appellants raise a cloud of speculation on various points, but their points are all *immaterial.* The key point in this case is that the Family Court annulment is binding in the Common Pleas Court and binding upon Appellants and all third parties. The facts necessary to establish this point have all been stipulated by the parties. Of the cloud of immaterial issues raised by the Appellants, none "might affect the outcome of the suit." *Anderson,* 477 U.S. at 247–48.

Here, as in *Lewis*, resolution of the legal issue will not be rendered easier by trying immaterial issues of fact. Appellants simply want to relitigate the annulment action. The Court properly held that the Court of Common Pleas lacks jurisdiction over annulments, that the Appellants lack standing to attack a judgment which their decedent could not have attacked and in fact chose not to attack, that Appellants are collaterally estopped from attacking the annulment, and that annulments are binding upon all third parties. None of these points depends on any material factual dispute. Summary judgment was therefore properly granted, and the Court should decline the Petitions For Rehearing.

III. *Lukich v. Lukich* Does Not Require A Contrary Result.

Appellants argue that the Court misconstrued the *Lukich* decision. On the contrary, the Court's construction of *Lukich* is correct.

Lukich involved an appeal from Family Court, not an appeal from The Court of Common Pleas. The limited jurisdiction of the Court of Common Pleas over annulment actions was therefore not involved in *Lukich.* Here, unlike *Lukich,* the court below lacked jurisdiction to question the annulment decision.

Lukich holds that when a voidable marriage is annulled, the annulment takes effect only prospectively from the date of the annulment decree forward. That holding makes perfect sense, as a voidable marriage is invalid only if it is attacked. The parties to a voidable marriage always have the option of waiving the defect and ratifying the marriage.

But a void marriage is fundamentally different. A void marriage is never a valid marriage. A bigamous marriage is void and never a valid marriage. The parties are not permitted to waive the defect; the marriage is automatically invalid. *See Johns v. Johns*, 309

S.C. 199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992) (bigamous marriage "was void from its inception, not merely voidable, and, therefore, cannot be ratified or confirmed and thereby made valid"). The annulment in this case was granted on grounds of bigamy, which is the most serious and substantial of all grounds for rendering a marriage void: bigamy. Many South Carolina cases holds that a bigamous marriage never a marriage at all:

> At the time the parties began residing together in September 1983, and throughout their cohabitation, the respondent was legally married to another woman. Thus, any marriage between the parties while respondent had a subsisting marriage was void as a matter of public policy. S.C. Code Ann. § 20-1-80 (1985) ("All marriages contracted while either of the parties has a former wife or husband living shall be void"). It was void from its inception, not merely voidable, and, therefore, *cannot be ratified or confirmed and thereby made valid.*

Johns v. Johns, 309 S.C. 199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992) (emphasis added).

> 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."

Splawn v. Splawn, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993) (emphasis by the court).

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

Day v. Day, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

> There could not have been a valid marriage between the appellant, Maggie (Craft) Blizzard, and William Blizzard, as William Blizzard had a lawful living wife at the time of the claimed marriage.

Ex parte Blizzard, 185 S.C. 131, 193 S.E. 633, 634 (1937).

> When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present.

Callen v. Callen, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added).

By asking the Court to hold that the bigamous marriage between Mrs. Brown and Mr. Ahmed was valid retrospectively, Appellants asks this Court to become the first appellate court in the long history of South Carolina to give any legal effect to a bigamous marriage as well as to disregard the plain mandate of section 20-1-80. This Court quite properly rejected that request. South Carolina law forbids this Court from giving any effect whatsoever to a bigamous marriage, either presently, prospective or retrospectively. There was never, at any point in time, a valid marriage between Mrs. Brown and Mr. Ahmed.

The Court of Appeals opinion in *Lukich* expressly notes that the result would have been different if the first marriage in that case had been void ab initio for bigamy, rather than being merely voidable for intoxication:

> We note that our holding is limited to the facts of the case at bar, e.g. the situation where the annulled marriage would be valid but for an annulment decree declaring the marriage *ab initio. Our holding is not meant to affect a party who enters into one of the three types of marriages that never have legal validity in South Carolina, namely marriages that are void ab initio by operation of statute: (1) bigamous marriages*, . . . ; (2) same sex marriages, . . . ; and (3) marriages of minors under the age of 16[.]

368 S.C. at 55 n.2, 627 S.E.2d at 758 n.2 (emphasis added).

There is nothing in the Supreme Court opinion inconsistent with this footnote. On the contrary, the result of the Supreme Court opinion confirms that bigamous marriages are void from their inception. In *Lukich*, a woman sought alimony during a divorce from her second

husband (Marriage 2). During the divorce, the second husband learned that the woman had previously been married in Las Vegas (Marriage 1) and had never obtained a divorce or an annulment from the first husband. She quickly obtained an annulment, without her husband's knowledge in another venue, for Marriage 1, on the grounds of intoxication. Both appellate courts concluded that the annulment of Marriage 1 was voidable.

But *Lukich* also dealt with the validity of Marriage 2, and both appellate courts concluded that Marriage 2 was void ab initio because it was bigamous. Consequently, Marriage 2 was never a marriage, so that the divorce was unnecessary and the second husband could not owe alimony. *Lukich* does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage 2 in Lukich) is void from its inception and never a valid marriage at any point in time.

Lukich therefore hold only that a voidable marriage is invalid prospectively. When a marriage is void ab initio, it is invalid from its inception; it *never* exists as a valid marriage.

Moreover, even if appellants' construction of *Lukich* is correct, that does not help their position. If *Lukich* holds that bigamous marriages are invalid until they annulled, then Mrs. Brown's marriage to Mr. Ahmed was valid at the time she married Mr. Brown, and her marriage to Mr. Brown was bigamous. But Mr. Brown's marriage to Mrs. Brown was not annulled for bigamy during Mr. Brown's lifetime, and it cannot be annulled after his death. If Mrs. Brown's marriage to Mr. Ahmed is retrospectively valid even if bigamous, then by the exact same reasoning, Mrs. Brown's marriage to Mr. Brown is valid even if bigamous, and Mrs. Brown is still Mr. Brown's surviving spouse. (See Trial Court Opinion at 16, expressly accepting this argument.) Appellants prevail only if their construction of *Lukich* applies to one marriage

(between Mrs. Brown and Mr. Ahmed) but not to another marriage (between Mrs. Brown and Mr. Brown). There is no reason to apply different construction of *Lukich* to different marriages.

Appellants attempt to manufacture favorable language from the South Carolina's Supreme Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). As Appellants recognize, *Wilson* expressly refused to rule upon the validity of Mrs. Brown's marriage to Mr. Brown. The court did note, however, the language in the trial court's order that the *Lukich* case supported the validity of Mrs. Brown's marriage to Mr. Brown. *Wilson* did not reverse that conclusion although the Supreme Court had the opportunity to do so.[26] Had the Supreme Court believed Mrs. Brown was not Mr. Brown's wife under *Lukich*, it could easily have said so. If the effect of *Lukich* was that Mrs. Brown was not Mr. Brown's wife, this would have been the most compelling point that the Supreme Court could have made to invalidate the settlement agreement. Apparently, the Supreme Court understood that, not only does *Lukich* not invalidate the marriage of Mrs. Brown and Mr. Brown, it confirms the validity of that marriage.

South Carolina law on this issue is simple: a bigamous marriage does not exist for any purpose at any time, either presently, prospectively or retrospectively. Mrs. Brown therefore never had a marriage to Mr. Ahmed. Because Mrs. Brown never had a marriage to Mr. Ahmed, her marriage to Mr. Brown was simply not bigamous. She is therefore Mr. Brown's surviving spouse. This is the exact result reached in the *Lukich* case with regard to Marriage 2.

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[26] The opinion expressly declined to comment on the *Lukich* issue:

> 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 v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

403 S.C. at 434 n.16.

Nor is the order of disputed marriages in this case new to South Carolina jurisprudence. As discussed above, in *State v. Sellars*,[27] a man was accused of the crime of bigamy. However, the Supreme Court concluded that he did not enter into a bigamous marriage because his putative first wife was already married when they attempted to marry, so they were never married and he thus had no impediment to his second marriage, which was consequently not bigamous. That is exactly the order of disputed marriages in this case. Similarly, in *Hallums v. Hallums,*[28] the Supreme Court indicated that the alleged widow of the decedent would have been entitled to take from his estate had her first marriage been invalid ab initio because she alleged her first husband was already married; however, the Court concluded that the first husband was not already married and thus her attempted marriage to the decedent was void as bigamous.[29] Thus, Appellants argue against precedent — every case decided which finds that a bigamous marriage is never valid, and particularly these latter two cases dealing with the same order of disputed marriages as in this case.

IV. The Appellants Completely Misstate The Burden of Proof In This Action.

Appellants persist in arguing that Mrs. Brown had a burden to prove that her marriage to James Brown was not bigamous. This point is not directly relevant, because the trial court and this Court both properly held that the Court of Common Pleas lacks jurisdiction to question the Family Court decree of annulment, that the Appellants lack standing to question that decree, that the Appellants are estopped from attacking the decree, and that the decree in any events binds all

[27] 140 S.C. 66, 134 S.E. 873 (1926).

[28] 74 S.C. 407, 54 S.E. 613 (1906).

[29] The Supreme Court made the determination about the validity of marriages back then because there was no applicable jurisdictional statute and, of course, there was no family court then.

third parties. Even if Mrs. Brown had the burden of proof to show that her marriage to Mr. Brown was valid, she has clearly met her burden.

But Mrs. Brown cannot allow Appellants' misstatement of the burden of proof to pass without notice. Mrs. Brown bears one burden of proof in this action: the burden of proving a prima facie marriage to Mr. Brown. She met this burden by producing a valid certificate of marriage between herself and Mr. Brown, which all parties stipulate is authentic. (J. Stip. § 4 & Exh. 4.) "The party attacking the validity of a marriage bears the burden of proof." *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992).

All of the opposing briefs throughout this case have been built on the foundation that Mrs. Brown had the burden of proving that her marriage to Mr. Brown was not bigamous. *This premise is fundamentally wrong.* Mrs. Brown met her burden of proof by presenting a facially valid marriage certificate for James Brown's most recent marriage.

Appellants Deanna Brown et al claim that Mrs. Brown stipulated to the invalidity of her marriage to Mr. Brown. That claim misrepresents the record. Mrs. Brown did not stipulate, as Appellants Deanna Brown et al claim that she did, Petition for Rehearing of Deanna Brown et al at 20, that she "entered into a marriage" with Ahmed. She stipulated, very carefully, that she "participated in a marriage ceremony" with Ahmed. J. Stip. § 2. She did not stipulate that a valid marriage resulted from the ceremony, and in fact has contended consistently for many years that a valid marriage could not result, as Ahmed was already married to at least one other woman. Likewise, Mrs. Brown did not stipulate that her "marriage to Ahmed did not end until the 2004 annulment order." She stipulated that she was not aware of any court order terminating "any marriage that certain parties assert existed," J. Stip. § 6, but this leaves open the question of

whether a marriage existed in the first place. Mrs. Brown has never admitted that she had a valid marriage with Ahmed.

The burden of proof lies fully and completely upon the Appellants to rebut the presumption that the marriage between Mrs. Brown and Ahmed no longer existed at the time when Mrs. Brown married Mr. Brown. It is not Mrs. Brown's burden to prove the she had no marriage to Ahmed; it is Appellants' burden to prove that Mrs. Brown's did have a marriage to Ahmed, and that that marriage was still in force when Mrs. Brown married Mr. Brown. Mrs. Brown has already proven to the Family Court that she was not married to Ahmed.

Appellants must necessarily admit that the mere presence of a marriage certificate does not make a marriage valid. Otherwise, the presence of a marriage certificate between Mr. and Mrs. Brown would be conclusive proof of a valid marriage. Appellants clearly believe they are allowed to look behind the face of that marriage certificate and accuse Mrs. Brown of bigamy. But the Appellants then claim that the mere existence of a marriage certificate between Mrs. Brown and Ahmed makes than marriage an "indisputable fact." Motion to Rehear of Terry Brown at 6. This is a blatant double standard. Mrs. Brown's marriage certificate with Ahmed is subject to attack on the exact same grounds (bigamy) that Appellant assert against Mrs. Brown. The Family Court held that there was never a valid marriage between Ahmed and Mrs. Brown, because Ahmed had other wives. That holding is binding in this action and against these Appellants.[30]

[30] Ahmed, the only person who had standing, has never contested the Family Court Order, and it is now too late. *See supra* note 18.

Because Mrs. Brown's most recent marriage was to James Brown, it was Appellants' burden to prove that Mrs. Brown's marriage to Ahmed was valid, and that it still existed when she married James Brown. The trial court properly held that appellants did not meet that burden.

Appellants make much of a statement by Ahmed, in his Texas application to marry Mrs. Brown, that he had not been married before. This statement had no probative value, and the trial court correctly gave it no weight. To begin with, the statement was made out of court, and Appellant seek to use it to prove the truth of the matter asserted. The statement is therefore inadmissible hearsay.

Moreover, Mrs. Brown testified (ROA, pp. 299-312), and the Family Court held (ROA, pp. 293-96), that Mr. Ahmed married her in order to obtain a more favorable immigration status. Given that Mr. Ahmed's intent was to defraud the government, any statement he made is inherently suspect. Ahmed had every reason to lie about his marital status, and no reason to tell the truth. The trial court properly refused to credit his statement. In any event, the Family Court has decided this issue.

Appellants further claim that by seeking an annulment, Mrs. Brown admitted she was married to Ahmed. Mrs. Brown admitted no such thing. She sought an annulment on grounds of bigamy, and a bigamous marriage is no marriage at all for any purpose. The entire point of an action for annulment on grounds of bigamy is not to invalidate a marriage which once existed, but rather to obtain an authoritative declaration that no valid marriage ever existed in the first place. Mrs. Brown therefore did not admit the existence of a valid marriage by seeking to have the marriage annulled for bigamy. If Appellants are correct, no marriage could never be annulled for bigamy, as the mere act of filing an action to annul such a marriage would be an admission that marriage was valid.

Appellants further assert that Mrs. Brown had some sort of choice whether to be married to Mr. Brown or Ahmed. This assertion is ridiculous. Mrs. Brown was never married to Ahmed; that marriage was void because Ahmed had other wives at the time he attempted to marry Mrs. Brown. If Ahmed was still alive when Mrs. Brown married Mr. Brown and Ahmed had won the lottery, as Appellants speculate, Ahmed would have had his marriage to Mrs. Brown annulled and she would have received nothing. Mrs. Brown never had a valid marriage to Ahmed, and because Ahmed had other wives at the time, there was nothing she could have done to create one.

Appellants further speculate about the effects of a posthumous annulment obtained by Mrs. Brown. This point is immaterial because Mrs. Brown obtained no such annulment.

Appellants did not present any evidence sufficient to create a material question of fact on whether they had met their burden of rebutting the legal presumption that Mrs. Brown was not married to Ahmed when she married Mr. Brown. The trial court's determination that Appellants bore the burden of proof, and that Appellant failed to meet that burden, is completely correct.

V. THIS COURT'S OPINION IS FULLY CONSISTENT WITH *GARY V. LOWCOUNTRY MEDICAL TRANSPORT, INC.*

Appellants finally argue that this court's opinion is inconsistent with *Gary v. Lowcountry Med. Transp., Inc.*, No. 2016-000222, 2018 WL 2324951 (S.C. Ct. App. May 23, 2018). Rather, it is consistent with *Gary* and every other case that has looked at the issue of a bigamous marriage: it is void and never a marriage.

Appellants' argument is clearly wrong. *Gary* required the court to determine who was married to Blondell Gary at the time of her death. The facts showed that in 1982, Charles

married Doretha, and in 2001 he divorced her. Before his divorce with Doretha was final, he attempted to remarry Blondell. Blondell then died in a vehicle accident.

The facts of *Gary* were clear that the marriages between Charles and Blondell was bigamous; Charles has not yet been divorced from Doretha when he married Blondell. Blondell's estate nevertheless claimed in its pleading that Charles was Blondell's husband at the time of her death. Charles argued that the estate was bound by this admission. The trial court and this Court both held otherwise, reasoning that South Carolina's strong public policy against bigamy is stronger than the policy behind estoppel by pleading.

Gary has no application to the facts sub judice. That case involved a marriage which was clearly bigamous on the facts. Charles had no defense to the charge of bigamy, other than estoppel by pleading. Here, *a binding Family Court judgment holds that Mrs. Brown was never married to Ahmed because Ahmed had prior wives from whom he had not been divorced.* [31] The only bigamy committed in this case was committed by Ahmed. The decision below is fully consistent with this finding of bigamy, as it confirms that Mrs. Brown's marriage to Ahmed was void ab initio for Ahmed's bigamy.

There is simply no conflict here between the public policy against bigamy and any other policy. All relevant policies favor a finding that the marriage between Ahmed and Mrs. Brown was void ab initio for Ahmed's bigamy. The marriage between Ahmed and Mrs. Brown is void, so the marriage between Mr. Brown and Mrs. Brown is not bigamous, and is clearly valid.

Appellants attempt to manufacture a conflict with *Gary* by asserting that the marriage between Mr. and Mrs. Brown was bigamous. But for the public policy against bigamy to apply, bigamy must exist on the facts. Appellants make a bootstrapping argument: "we say there was

[31] Moreover, in *Gary* there was no pre-existing family court order, as there is in this case.

bigamy; therefore the public policy against bigamy applies; therefore all defenses to bigamy must fail; therefore there was bigamy." Under this logic, the courts would be required to accept every bare claim of bigamy and could never reject bigamy on the facts. No matter how loudly the Appellant shout "bigamy!" the simple fact is that the only bigamy present in this case was committed by Ahmed, not by Mrs. Brown. And this issue, again, was determined by the court with jurisdiction.

The Family Court in this case held that the putative marriage between Ahmed and Mrs. Brown was bigamous, and its holding is binding upon the Court of Common Pleas and against Appellants. Mrs. Brown notes the irony in Appellants citing *Gary*. As does every other case in South Carolina jurisprudence, *Gary* recognized a very strong public policy that bigamous marriages are never valid at any point in time. *See Gary*, 2018 WL 2324951, at *2 (holding that marriage between Charles and Blondell "was void *from its inception*" (emphasis added). This policy is so strong that it overcomes the policy of estoppel by pleading and even the policy of finality of judgment.

Appellants in this case, however, spend substantial time construing *Lukich* to hold that a bigamous marriage is not invalid until a court finds that it is invalid. It would be quite odd if a bigamous marriage is valid retroactively, but so invalid prospectively that it overcomes all other competing public policies. *Gary*, as does every other bigamous marriage case, completely rejects Appellants' argument that a bigamous marriage is valid until a court declares otherwise. This is the law only with regard to *voidable* marriages; it is not the law with regard to marriages which are *void ab initio.*

On the facts of this case, the only bigamy at issue was committed by Ahmed. The public policy against bigamy requires the court to hold that Ahmed and Mrs. Brown never had a valid

marriage, and that the marriage between Mr. Brown and Mrs. Brown was never bigamous at all. There is no conflict here between the trial court's decision and the public policy against bigamy.

CONCLUSION

The trial court correctly held that Mrs. Brown never had a valid marriage to Ahmed, as Ahmed was already married, so that Ahmed was guilty of bigamy. This fact is established by the holding in the judgment of annulment, which the Court of Common Pleas had no jurisdiction to question. That judgment was binding upon Mr. Brown, who was in privity with Mrs. Brown, and it is binding upon these Appellants, and it is binding on the world. There was thus no impediment to Mrs. Brown's marriage to Mr. Brown, and she is his surviving spouse. A panel of this Court agreed in a thoughtful opinion.

For the reasons set forth above, Mrs. Brown respectfully requests that the Petitions for Rehearing be denied.

This 21 day of August, 2018.

Respectfully submitted,

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