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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 Deanna Brown-Thomas, Yamma Brown, and
Venisha Brown are the Petitioners.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

Appellate Case No. 2015-002417

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5578
Heard April 17, 2018 – Filed July 25, 2018

AFFIRMED

Robert C. Byrd and Alyson Smith Podris, both of Parker Poe Adams & Bernstein, LLP, of Charleston; Katon Edwards Dawson, Jr., of Parker Poe Adams & Bernstein, LLP, of Columbia; and Marc Toberoff, of Malibu, CA, all for Appellants Deanna Brown Thomas, Yamma

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SHORT, J.: In this case involving the estate of James Brown, six of Brown's children appeal from the trial court's grant of Tommie Ray Brown's (Respondent's) motion for summary judgment, arguing the trial court erred in finding the marriage between Respondent and Brown was not bigamous. We affirm.

FACTS

Respondent married Javed Ahmed on February 17, 1997. Thereafter, she married Brown on December 14, 2001.¹ Respondent brought an action to annul her marriage to Ahmed on December 15, 2003, and in its April 15, 2004 order, the Charleston County Family Court found her marriage to Ahmed was void ab initio.

¹ On her marriage license to Brown, Respondent stated it was her first marriage. In the parties' joint stipulation of facts filed September 5, 2014, it states, "From the February 17, 1997 marriage ceremony between [Respondent] and [Ahmed] through the December 14, 2001 marriage ceremony between [Respondent] and [Brown], no order of any court or other occurrence of which [Respondent] is aware at this time ended or caused to end any marriage that certain parties assert existed between [Respondent] and [Ahmed]."

The court found Ahmed was married at the time of his marriage to Respondent, and therefore, he lacked capacity to marry her.²

Brown and Respondent separated after Brown was arrested on January 28, 2004, for criminal domestic violence as a result of an altercation between Brown and Respondent. Brown sought an annulment from Respondent on May 6, 2004, asserting Respondent was legally barred from entering into a marriage to Brown because she was married to Ahmed at the time of their marriage ceremony. Respondent filed a counterclaim, seeking a divorce on the grounds of physical cruelty and adultery. In a consent order of dismissal filed by the Aiken County Family Court on August 16, 2004, the parties informed the court they had reached an agreement, and Respondent agreed to "forever waive any claim of a common law marriage to [Brown], both now and in the future." Respondent states she and Brown reconciled and lived together until his death.

Brown died on December 25, 2006. His will devised his personal effects to six named children: Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown (collectively, Appellants). Brown's will was admitted to probate on January 18, 2007. On January 26, 2007, the Aiken County Probate Court removed the matter to the circuit court, and the probate court continued to remove all matters filed in Brown's Estate to the circuit court. On February 1, 2007, Respondent brought an action to set aside Brown's entire will, which did not name her or their son as beneficiaries, based on alleged

² Respondent stated she thought she married Ahmed, but after the marriage ceremony, he told her he would not live with her because he was married to three or more women in Pakistan. She claims the marriage was never consummated, and Ahmed only married her to become a United States citizen. In the parties' joint stipulation of facts, it states Respondent had "no documents or other tangible evidence evidencing [Ahmed] was married to another person when [Respondent] and [Ahmed] participated in the February 17, 1997 marriage ceremony" and Respondent could not identify any person "who can testify that [Ahmed] was married to another person when [Respondent] and [Ahmed] participated in the February 17, 1997 marriage ceremony." According to Respondent, Ahmed was never located, and he did not "appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action."

undue influence and fraud.³ She separately claimed an elective share or an omitted spouse's share of the Brown estate.

Appellants and Respondent participated in mediation on August 10, 2008, and reached a settlement agreement. The agreement states "[t]he settling parties intend for the agreement to be a binding private settlement agreement but also are seeking court approval of the settlement." The parties agreed Respondent "was the legal wife of [Brown], during his lifetime and at the time of his death, and qualifies as his surviving spouse." The court approved the settlement agreement on May 26, 2009. However, on May 8, 2013, the South Carolina Supreme Court reversed and remanded the approval of the settlement to the trial court because of a lack of evidence showing a fair and reasonable settlement of a good faith controversy. *See Wilson v. Dallas*, 403 S.C. 411, 450-51, 743 S.E.2d 746, 767-68 (2013). The court stated that "even if [Respondent was] able to establish a claim as Brown's surviving spouse, she executed a prenuptial agreement, in which she indicated that she had the opportunity to consult with counsel of her own choosing and waived all rights to Brown's property or any statutory claims against his estate," and a valid prenuptial agreement would normally preclude any right to an elective share. *Wilson*, 403 S.C. at 440, 743 S.E.2d at 762.

In the interim, a hearing was held and several other motions were filed, but what is relevant to this appeal is that on April 28, 2014, Respondent filed a motion for summary judgment, asserting there was no genuine issue of material fact as to her marriage to Brown, and she was entitled to summary judgment on the issue of the validity of her marriage as a matter of law. On June 2, 2014, Appellants joined in on a motion for summary judgment, limited to the sole assertion that Respondent was not Brown's surviving spouse at the time of his death.⁴ After a hearing on the motions, the trial court filed its order on January 13, 2015, granting Respondent's motion for summary judgment. The court found Respondent and Ahmed never

³ Brown and Respondent have one son together, J. _____ B _____, who was born on _____ 2001.

⁴ The Limited Special Administrator (LSA) of the Estate of James Brown filed the motion. In the motion, Appellants' attached as an exhibit an affidavit from an attorney who said he spoke with Ahmed, who was in Pakistan. The attorney stated Ahmed told him he was not married to anyone else when he married Respondent, and he and Respondent lived together as husband and wife for a period of time following the 1997 marriage. Appellants also attached the marriage license between Ahmed and Respondent that stated Ahmed was not married at the time of the application.

had a valid marriage because it was a bigamous marriage, and thus, Respondent had no impediment to her valid marriage to Brown. Appellants filed motions to reconsider. In an order filed October 26, 2015, the trial court denied Appellants' motions to reconsider. These appeals followed.⁵

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Pallares v. Seinar*, 407 S.C. 359, 365, 756 S.E.2d 128, 131 (2014). "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011). "Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." *Id.*

LAW/ANALYSIS

I. Bigamous Marriage

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in not finding Respondent's attempted marriage to Brown was bigamous as a matter of law due to her failure to terminate her first marriage prior to her second marriage.⁶ We disagree.

Section 20-1-80 of the South Carolina Code (2014) provides:

⁵ Michael Deon Brown and Daryl Brown adopted the briefs of the LSA. The LSA notified this court that it reached a settlement with Respondent and sought to withdraw its appeal. On September 19, 2017, this court granted the LSA's request to withdraw its appeal and stated the briefs submitted by the LSA were to be made a part of the record as the briefs of Michael Deon Brown and Daryl Brown.

⁶ Appellants Terry Brown, Michael Deon Brown, and Daryl Brown also make essentially this same argument in their briefs; therefore, we combine the arguments for this issue.

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

Appellants argue the trial court erred in applying the 2004 annulment order to validate Respondent's 2001 marriage to Brown, which they assert was bigamous under section 20-1-80. They maintain a subsequent order declaring a first marriage void ab initio does not relate back so as to validate a second bigamous marriage. Appellants also argue the trial court erred in making a distinction between later-annulled marriages that were "void" and those that were "voidable." They state it does not matter whether Respondent's 1997 marriage to Ahmed was "void" or "voidable" because Respondent's first marriage must be declared void by a competent court before she can remarry.

The trial court in this case stated, "A void marriage is treated differently from a voidable marriage. A voidable marriage is valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose." The court further stated, "South Carolina law precludes this Court from giving any effect whatsoever to a bigamous marriage. Because the Court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage." Therefore, the court held Respondent and Ahmed never had a valid marriage at any point in time, and Respondent had no impediment to her valid marriage to Brown.

The South Carolina Supreme Court in *Lukich v. Lukich* found that under the terms of section 20-1-80, the wife's "'marriage' to [h]usband # 2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'" 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008) (quoting S.C. Code Ann. § 20-1-80). "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); *see also Howell v. Littlefield*, 211 S.C. 462, 466, 46 S.E.2d 47, 48 (1947) ("[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage. . ."); *Johns v. Johns*, 309 S.C.

199, 201, 420 S.E.2d 856, 858 (Ct. App. 1992) ("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 [the] respondent had a subsisting marriage was void as a matter of public policy. . . . It was void from its inception, not merely voidable, and, therefore, cannot be ratified or confirmed and thereby made valid.").

While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second "marriage." Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband # 2 was performed in 1985, there was nothing to be "revived" by the annulment order in 2003.

Lukich, 379 S.C. at 592, 666 S.E.2d at 907.

In *Wilson v. Dallas*, 403 S.C. at 434 n.16, 743 S.E.2d at 759 n.16, our supreme court stated in a footnote:

[Respondent]'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. 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.

In *Lukich*, there was no impediment to the first marriage; thus, the wife had to have the first marriage annulled for the second marriage to be valid. Here, Respondent's first marriage to Ahmed was invalid or void from the beginning because he was already married to someone else at the time of the marriage. As a result, had

Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid. Respondent was married to Brown in a valid ceremonial marriage, as evidenced by a marriage license and certificate. Her marriage to Ahmed was properly held bigamous in a final unappealed judgment by the family court, which provides she had no impediment to her marriage to Brown. Therefore, we find the trial court did not err in finding Respondent was married to Brown.

II. Summary Judgment

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in not granting their motion for summary judgment because Respondent failed to present any admissible evidence that her marriage to Ahmed was invalid.⁷

Appellants argue the trial court granted Respondent's motion for summary judgment on the purported ground that Respondent's marriage to Ahmed was bigamous without any evidentiary support for its finding. They also assert the trial court erred in relying on the annulment order for the truth of the matter asserted in its findings because it was inadmissible hearsay not subject to an exception. Appellants assert the evidence presented to the trial court established that Ahmed was not married when he married Respondent in 1997. Specifically, that Ahmed stated he was not presently married on their Texas marriage license. They assert, in contrast, that the only evidence that Ahmed was married at the time is the annulment order, which was based solely on Respondent's testimony.

The denial of a motion for summary judgment is not directly appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994). Therefore, we decline to address this issue. However, to the extent Appellants also argue the trial court erred in granting Respondent's motion for summary judgment, we find the trial court had no subject matter jurisdiction to relitigate the family court order because only the family court has jurisdiction over annulments. S.C. Code Ann. § 63-3-530(A)(6) (2010) ("The family court has exclusive jurisdiction . . . to hear and determine actions for the annulment of marriage."). As a result, the trial court did not err in granting Respondent's motion for summary judgment because the annulment order was conclusive as to Respondent's marriage to Ahmed.

⁷ Appellant Terry Brown makes essentially this same argument in his brief; therefore, we combine the arguments for this issue.

III. Collateral Estoppel

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in holding the findings of fact and conclusions of law in the annulment order were preclusive as to Appellants.⁸ We disagree.

"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." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (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." *Id.*

Appellants argue the annulment order binds "all the world" as to the marital status of Respondent and Ahmed as of April 15, 2004, the date the order was filed. However, they assert 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 Brown and Appellants.

Appellants also argue the trial court erred in finding they are collaterally estopped from contesting the findings of fact and conclusions of law in the annulment order. They assert the first element of collateral estoppel is not met because the order was essentially granted by default and the issue of Ahmed's alleged bigamy was never actually litigated. Appellants also assert Ahmed was not properly served with Respondent's summons and complaint because the publication was buried in the Houston Chronicle on page two of the classified section and the process server did not state he searched United States immigration databases or looked for Ahmed in Pakistan. Appellants further argue collateral estoppel only applies to parties to the prior action and their privies, and the only named parties in the annulment action were Respondent and Ahmed. They assert Brown was not in privity with Respondent due to his alleged interest in the outcome, and Brown's and Appellants' interests are neither identical to nor closely aligned with Respondent or Ahmed. Appellants assert merely paying Respondent's legal fees for the annulment action did not place him in privity with Respondent and did not give him control over the

⁸ Appellants Terry Brown, Michael Deon Brown, and Daryl Brown all make essentially this same argument in their briefs; therefore, we combine the arguments for this issue.

litigation. Finally, Appellants argue that even if the elements of collateral estoppel were present, application of the doctrine is discretionary and should not be applied to this case because it would be inequitable to bar Appellants from challenging the hasty findings of a prior action in which Brown was not a named party, had no right to intervene, did not control the proceedings, and his interests were not heard or adjudicated.

We find Appellants lacked standing to contest the annulment order, just as Brown did not have standing to intervene in the annulment action between Respondent and Ahmed. *See Lukich*, 368 S.C. at 51, 627 S.E.2d at 756 (denying the husband's motion to intervene in the wife's annulment proceeding and finding he did not have standing because he was not a party to the marriage). Any rights Appellants have are derivative from Brown. *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. If they cannot dispute the validity of the divorce, then there is no question of the validity of the marriage to the demandant which they can make, and hence there is no question of her right of dower in the real estate which he owned during coverture."); *Neely v. Thomasson*, 365 S.C. 345, 354, 618 S.E.2d 884, 889 (2005) ("Because the issue of paternity was raised and ruled upon in a prior action, Decedent, if alive, would have been barred from challenging paternity at a later date. As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. Moreover, we find that it would be unjust to allow Decedent's siblings to assert a claim that Decedent himself never chose to assert during his lifetime." (citations omitted)). During 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. However, Brown and Respondent agreed to dismiss the action, and Brown did not bring another action prior to his death.

Appellants also argue that while the annulment order binds them as to the marital status of Respondent and Ahmed as of April 15, 2004, the annulment order's findings of fact and conclusions of law are not binding on those who were not parties to that proceeding. However, Respondent is only asserting the family court's order as to the status of her marriage to Ahmed. As for Appellants' collateral estoppel argument, (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. Therefore, we find

the trial court did not err in holding the findings of fact and conclusions of law in the annulment order were preclusive as to Appellants.

IV. Discovery Stay

Appellants Deanna Brown-Thomas, Yamma Brown, and Venisha Brown argue the trial court erred in staying discovery and granting Respondent's motion for summary judgment despite genuine issues of material fact. We disagree.

Appellants argue the court erred in not allowing the parties to conduct any discovery pending its ruling on Respondent's motion, yet allowed her to file two self-serving affidavits in support of her motion, and the court sealed her handwritten diaries. They assert this prevented them from using potentially relevant evidence that may have been adverse to Respondent.

The parties all agreed to the stipulation of facts in this case, which resolves the material factual issues in the action. The reason Appellants seek additional discovery is to relitigate the annulment order. We already determined Appellants are bound by the annulment order. Therefore, we find the trial court did not err in staying discovery pending the decision on Respondent's motion for summary judgment as to the status of her marriage to Brown.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

THOMAS and HILL, JJ., concur.

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AUG 08 2018

SC Court of Appeals

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.

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

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

Summary of Argument

Respondent’s marriage to Javed Ahmed (“Ahmed”) was not bigamous. The only admissible evidence regarding Ahmed’s marital status at the time he married the Respondent is the Ahmed-Respondent marriage application, sworn to under the penalty of perjury, which clearly denotes Ahmed was not married when he married Respondent.¹ Respondent stipulated that she “cannot identify a single person who can testify that Ahmed was married to another person when Respondent and Ahmed participated in the 1997 marriage ceremony.”² Respondent provides no other evidence supporting her allegations that Ahmed had three other wives. Reducing this argument to simple logic, Respondent has no evidence of Ahmed’s bigamy because if she did she would present it. All of Respondent’s inadmissible evidence is fabricated. That is why Respondent hides behind the CCFC order annulling Respondent’s marriage to Ahmed on April 15, 2004³(“CCFC Order”). The CCFC Order, interestingly, was pre-prepared by Respondent’s counsel prior to any testimony or evidence being presented to the CCFC at the 9:00 AM, April 15, 2004 hearing and signed immediately at the conclusion of the hearing auspiciously with no apparent changes, and thereafter filed at 9:34 AM on the

¹ See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

² See Joint Stipulation of Facts, ¶¶ 9-10. (R., Vol. I, p. 257)

³ See Joint Stipulation of Facts, Exhibit 12. (R., Vol. I, p. 293-296)

same day.⁴

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

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

ARGUMENT

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

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" Schmidt v. Courtney, 357 S.C. 310, 319 (Ct. App. 2003). "Summary judgment is appropriate when there is no remaining genuine issue of material fact such that the moving party must

⁴ Id.

prevail as a matter of law.” SCRCP 56(c), Fleming v. Rose, 350 S.C. 488, 493 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493 (1994). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 378 (2000). “To withstand a motion for summary judgment ‘in cases applying the preponderance of the evidence burden of proof, **the non-moving party is only required to submit a mere scintilla of evidence.**” Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330 (2009)(Emphasis added.) On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976). This Court misapprehends the application of the summary judgment standards. It was error to disallow discovery in this matter based on the above. Further, every inference of the evidence before this Court, as proven by the argument hereafter, is made and viewed in a light most favorable to Respondent, violating the requisite standards.

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

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

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

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

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

posthumous annulment? Unfortunately, based on this Court's analysis, the answer does not change. James Brown's estate would be estopped from challenging that Respondent was the wife/heir because a family court issued a posthumous order making her an heir that, according to this Court in its Opinion, could not be challenged and the heirs would not have standing. This is the chaos that the Supreme Court spoke of in its Lukich⁵ decision. This is not correct, but is the result that occurs with this Court's analysis.

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

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

⁵ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).

⁶ Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992).

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

It is an indisputable fact that Respondent married Ahmed on February 17, 1997 ("Respondent-Ahmed Marriage")⁸ and Respondent married James Brown on December 14, 2001.⁹ In fact, Respondent further stipulated to the following:

no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between her and Ahmed.¹⁰

...
cannot identify a single person who can testify that Ahmed was married to another person when Tommie Rae and Ahmed participated in the 1997 marriage ceremony."¹¹

As identified above, Respondent stipulated that she is unaware of any evidence that would prove Ahmed a bigamist. The Respondent-Ahmed marriage certificate is evidence demonstrating Respondent's marriage to Ahmed on February 17, 1997.¹² The Respondent-Ahmed marriage license application is additional evidence that was also conveniently not presented prior to obtaining the pre-prepared, default CCFC Order. This marriage license application document contains the only evidence in the form of **sworn testimony from Ahmed that he was, in fact, not married when he married Respondent.**¹³

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

⁷ See Joint Stipulation of Facts, Exhibit 5. (R., Vol. I, pp. 271-273)

⁸ See Joint Stipulation of Facts, Exhibit 1. (R., Vol. I, p. 255; 265-266)

⁹ Id., at ¶¶ 4 and 5. (R., Vol. I, p. 256)

¹⁰ Id. at ¶ 6. (R., Vol. I, p. 256)

¹¹ Id. at ¶¶ 9-10. (R., Vol. I, p. 257)

¹² Id. at Exhibit 1. (R., Vol. I, p. 255; 265-266)

¹³ See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid." (Opinion, pp. 6-7). No! Based on the foregoing facts, the Record, and the Lukich¹⁴ decision, Appellant would simply ask how? Respondent has no actual proof of Ahmed's alleged bigamy. Quite absurdly, the Respondent does not argue that her marriage to Ahmed was factually bigamous because she cannot. She argues a technicality that it was bigamous because the CCFC Order said it was without considering evidence in a default judgement hearing. Effectively, this Court is now saying, we take her word for it just like the CCFC did, i.e. we do not need evidence either. We, this Court, accept the dubious word of Respondent who lied on her marriage application with James Brown when she said her marriage to James Brown was her first marriage.¹⁵ Based on the foregoing analysis, it becomes clear that **with or without** the pre-prepared, default CCFC Order, the Respondent has no case.

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

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

All marriages contracted while either of the parties has a former wife or husband living **shall be void**. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other

¹⁴ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).

¹⁵ See Joint Stipulation of Facts, Exhibit 4. (R., Vol. I, p. 269)

¹⁶ See Joint Stipulation of Facts, Exhibit 5. (R., Vol. I, pp. 271-273)

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

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

The South Carolina Supreme Court in Wilson v. Dallas¹⁷ referenced the Respondent-Ahmed annulment as follows:

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

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

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

The circuit court noted the decision of the Court of Appeals in Lukich v. Lukich, 368 S.C. 47, 627 S.E. 2d 754 (Ct. App. 2006), **in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage.** The circuit court distinguished Brown's situation, opining that the rule in Lukich did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed Lukich, in Lukich, 379 S.C. 589, 666 S.E. 2D 906 (2008). **We express no opinion, however, on the circuit court's interpretation here.** (Emphasis added.)

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

The following provides clear reasoning why the South Carolina Supreme Court correctly questioned and refused to opine on the lower court's Lukich analysis that Respondent adopted. On December 14, 2001, when Respondent allegedly married Mr. Brown, she was married to Ahmed. Bigamist marriages are void *ab initio*. Respondent, at the time of Wilson v. Dallas, and since, has never, in any court, document or deposition, provided a scintilla of support that Ahmed was married when he married Respondent. The Respondent-Ahmed marriage certificate is evidence demonstrating Respondent's marriage to Ahmed on February 17, 1997.¹⁸ The Respondent-Ahmed marriage license application is additional evidence that was also conveniently not presented prior to obtaining the CCFC Order. This marriage license application document contains the only evidence in the form of **sworn testimony from Ahmed that he was, in fact, not married when he married Respondent.**¹⁹ Further, Respondent and James Brown entered into a Consent Order of Dismissal dated August 14, 2004 ("Consent Order").²⁰ The Consent Order does not determine that James Brown is married. In fact, it is the opposite. James Brown based his dismissal of his annulment complaint on South Carolina Code §20-1-80 because the CCFC Order **collaterally estopped Respondent** from declaring she was not previously married thereby determining that her relationship to James Brown was void *ab initio*. This Court has ruled that a bigamous marriage is void *ab initio* without a court order: "[a]s a result, had Respondent's marriage to Ahmed not been annulled, the second marriage to Brown would still have been valid." (Opinion,

¹⁸ Id. at Exhibit 1. (R., Vol. I, p. 255; 265-266)

¹⁹ See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

²⁰ See Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

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

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

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

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

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

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

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

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

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

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

Further, this Court indicated that:

the general rule applicable in situations as before us is stated in 52 Am. Jur. 2d Marriage § 57:

Apart from statute, **bigamous (Respondent-Brown)** marriage does not acquire validity when the prior subsisting **(Respondent-Ahmed)** marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting **(Respondent-Ahmed)** marriage is annulled **after** the second **(Respondent-Brown)** marriage is contracted, even though the purpose of an **(Respondent-Ahmed)** annulment proceeding is to declare that no valid marriage ever took place between the parties **(Respondent-Ahmed)** or that no valid marriage relation ever existed between the parties **(Respondent-Ahmed)**. Even where the **(Respondent-Ahmed)** annulment decree expressly declares the first **(Respondent-Ahmed)** marriage null and void ab initio, it does not relate back so as to validate the second **(Respondent-Brown)** marriage. In order for the subsequent **(Respondent-Brown)** marriage to be valid, it has been held that there must be a new ceremony **following** the termination of the earlier **(Respondent-Ahmed)** marriage. (Emphasis Added.)

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

In this case, the Respondent's marriage to Ahmed was valid until she made it voidable with the pre-prepared, default CCFC Order. Because Respondent could have remained married to Ahmed because there is no evidence of bigamy, she chose to annul the marriage thereby making it voidable. Without the hasty, default CCFC Order, Respondent's marriage would never have been declared void because there is absolutely no evidence of bigamy with Ahmed. Therefore, Lukich²⁴ applies, as Respondent has presented no facts otherwise. As a result, the distinction that this Court attempts to make in this matter related to void versus voidable is irrelevant in the context of this matter. This Court misapprehends that this is a case of a bigamous spouse in the first marital relationship followed by a second attempted marriage. This case is exactly like Lukich because of Respondent's lack of evidence. Respondent's bigamy voids her marriage to

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

James Brown *ab initio*.

Interestingly enough, the South Carolina Supreme Court affirmed this Court's ruling in Lukich²⁵ but did not affirm the analysis contained in footnote 2 of such opinion attempting to create a prior bigamous relationship exception. The South Carolina Supreme Court chose to write its own opinion and analysis. The South Carolina Supreme Court opinion was based on a strict statutory construction in the context of bigamous marriages and did not make a void versus voidable distinction and took a more common sense approach. Its Lukich decision simply declared bigamy to be bigamy. It does not matter what type of bigamy occurs. Respondent knew she was previously married when she married James Brown. She should have sought an annulment prior to marrying James Brown. Instead, she chose to conceal it and try to fix the bigamous problem later. The Supreme Court's Lukich analysis is the only sensible and logical result when applied as a snapshot in time to the facts as they relate to the respective parties' marriage relationships, rather than as this Court's ruling would allow, a constantly morphing set of facts and filing dates. How can a bigamous marriage be void if it can later be revived by an annulment? That is what this Court has done. Void *ab initio* is void *ab initio*.

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

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

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

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

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

file the annulment action years from now and become James Brown's spouse. This is the chaos that Lukich²⁶ addresses. It is this Court's ruling and analysis that is the type of prospective/retrospective application that Lukich²⁷ warns cannot happen. Based on the foregoing, this Court's analysis is logically flawed. This Court's ruling validates the ability of bigamists to obtain an order from the family court invalidating a prior marriage at any point in time, including after the death of a second bigamously married spouse, who, according to this Court, would have no ability to challenge the result. Decedents in South Carolina could become posthumously married even though the relationship was supposed to be void *ab initio* in accordance with S.C. Code Ann. § 20-1-80. Lukich²⁸ precludes this result.

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

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

"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the re-litigation of those issues **actually and necessarily litigated** and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434 (1986); see also State v. Bacote, 331 S.C. 328, 330 (1998) ("When an issue of

²⁶ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008).

²⁷ Id.

²⁸ Id.

fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.”);

McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275 (Ct. App. 1996) (noting that collateral estoppel will bar re-litigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit).

A party may assert non-mutual collateral estoppel to thwart re-litigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to re-litigate the issue.

Wade v. Berkeley County, 330 S.C. 311 (Ct. App. 1998) (Emphasis added). The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: (1) whether privity exists, (2) whether the doctrine is used offensively or defensively, and (3) whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426 (Ct. App. 1997). In this action,

Respondent uses the pre-prepared, default CCFC Order as a weapon and indisputably, Mr. Brown was not a party and never had any opportunity, much less a full and fair opportunity to litigate the issue determining his own marital status. The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75 (Ct. App. 2001); Beall v. Doe, 281 S.C. 363 (Ct. App. 1984). Respondent has provided no proof that the marital status of James

Brown was actually litigated. In fact, it was not actually litigated. Respondent merely provides a pre-prepared, default CCFC Order that ultimately casts Ahmed as a criminal bigamist as her only evidence.²⁹ Only a party to a prior action or one in privity with the party can be precluded from re-litigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770. Again, how can it be argued that Mr. Brown was a party when Respondent argued and this Court determined he has no right to intervene. (Opinion, p. 9). Mr. Brown was not in privity with Respondent in the Respondent-Ahmed annulment action, never actually litigated the issue of his marital status in such action, and had no opportunity in such proceeding to effectively litigate such issue in that action. As such, the application of the doctrine of collateral estoppel by this Court was a misapprehension of South Carolina law.

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

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

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

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

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

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

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

³⁰ See Respondent’s Brief, p. 14.

³¹ Lukich v. Lukich, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C. Ct. App. 2006).

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

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

³² Lukich v. Lukich, 379 S.C. 589, 591, 666 S.E.2d 906 (2008), footnote 1.

³³ See Joint Stipulation of Facts, Exhibits 12 and 13. (R., Vol. I, pp. 293-313)

³⁴ Id.

³⁵ See Joint Stipulation of Facts, Exhibit 11, 12 and 14. (R., Vol. I, pp. 292-295, p. 312, l. 14-16)

³⁶ Id.

³⁷ See Joint Stipulation of Facts, Exhibits 5, 6, 7, 8, 9, 10, 11, 12. (R., Vol. I, pp. 274-296)

³⁸ Id.

which resulted in the entry of a default judgment. The Schleicher³⁹ case supports Appellants' position that Rule 4(d)(8) applies, and as argued in their initial briefs, the pre-prepared CCFC Order is a default judgment. The idea that this Court would validate Respondent's request to use a default judgment as a weapon against James Brown without any actual proof of the self-serving, uncontested, inadmissible hearsay testimony is patently unjust and procedurally deficient. At a minimum, discovery should continue to disprove Respondent's alleged claim of being the wife and therefore an heir of the Estate. In reality, the correct declaration is a remand with direction to enter an order that she is not an heir, as she is not James Brown's wife.

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

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

There are numerous exceptions, everyone one of which applies in this matter, to the application of res judicata and collateral estoppel. In Pye, the court adopted the Restatement (Second) of Judgments section 28, which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law,

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

have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38. (Emphasis added.)

In Beall v. Doe, the court adopted section 29 of the Restatement (Second) of Judgments:

A party precluded from re-litigating an issue **with an opposing party**, in accordance with §§ 27 and 28, is also precluded from doing so with another person **unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue.** The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

(1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) **The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;**

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his

present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue.

Beall, 281 S.C. at 371. (Emphasis added.)

The elements outlined in Beall v. Doe, adopting section 29 of the Restatement (Second) of Judgments, express exactly the issues in this case. Mr. Brown and his heirs were not party and had no right to intervene in the Respondent-Ahmed annulment action and as such the issue of her status as the wife of James Brown's was never fully litigated. James Brown's estate and heirs now have the right to challenge any of these facts.

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

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

⁴⁰ Respondent's Brief, p. 1.

surviving spouse status is at issue and determined under the South Carolina Probate

Code.⁴¹ Therefore, this is clearly a probate action. S.C. Code Ann. § 62-3-105 provides:

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

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

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

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

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

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

⁴¹ Id., p. 6 (citing to S.C. Code § 62-2-802(a))

⁴² A Petition for Rehearing filed on June 6, 2018 remains pending in such case.

actual facts and evidence that exists in a given case.

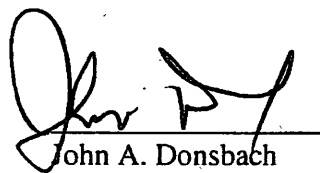
CONCLUSION

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

SUGGESTION FOR A REHEARING EN BANC

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

This 7th day of August, 2018.



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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

Appellate Case No. 2015-002417

RECEIVED

AUG 08 2018

SC Court of Appeals

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

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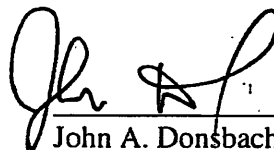
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August 7, 2018

VIA UPS OVERNIGHT DELIVERY

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South Carolina Court of Appeals
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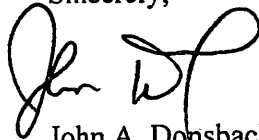
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AUG 08 2018
SC Court of Appeals

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

Dear Ms. Kitchings:

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

Sincerely,



John A. Donsbach

JAD/djg

Enclosures

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The Honorable Jenny Abbott Kitchings

August 7, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

AUG 09 2018

SC Court of Appeals

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.

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EN BANC

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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.
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Appellants respectfully submit that each of these holdings overlooks or misapprehends 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.
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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 inasmuch 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.
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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.

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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 not 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, SCRPC, 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

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, PPAB 4381222v1

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

Respondent knew that Ahmed was from Pakistan, but made no effort to locate and serve him there pursuant to Rule 4(h)(5) SCRPC, for foreign service of process.
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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.
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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.2d 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,

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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

RECEIVED
AUG 09 2018
SC Court of Appeals

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
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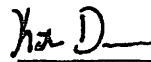
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate case No. 2015-002417

RECEIVED

AUG 09 2018

SC Court of Appeals

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.

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Appellant Michael Deon Brown respectfully petitions the Court for a rehearing and suggests a Rehearing En Banc of Opinion No. 5578, dated, July 25, 2018, pursuant to SCACR Rule 221(a), SCACR Rule 240(i) and SCACR Rule 219(b), as this Court has overlooked and misapprehended points at issue.

ARGUMENT

1. The Court misapprehended Lukich v. Lukich

When Tommie Rae Brown married James Brown on December 14, 2001, she was married to Javed Ahmed, whom she married on February 17, 1997 . This Court has overlooked or misapprehended that the facts of this case are not applicable to Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008), when the facts are directly on point. This Court said:

The general rule applicable in situations as before us is stated in 52 Am. Jr. 2d Marriage 57:

Apart from statute, bigamous marriage does not acquire validity when the prior subsisting marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting marriage is annulled after the second marriage is contracted, even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage.

Lukich. v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (S.C. Ct. App. 2006). In this case, because she was married to Ahmed at the time she married James Brown, Tommie Rae Brown's marriage to James Brown was void ab initio. Futhermore, the South Carolina Supreme Court said in footnote 16 in the Wilson v.

Dallas decision:

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

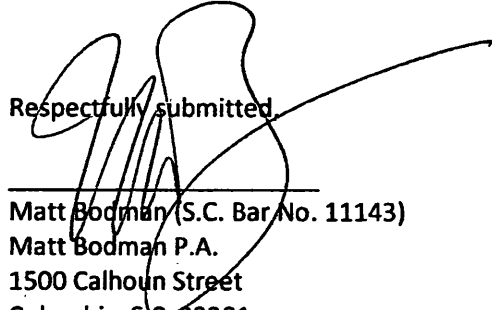
Wilson v. Dallas, 403 S.C. 411, 2013 S.C. Lexis 240, (S.C. 2013), footnote 16.

2. The Court misapprehended summary judgment

On appeal from an order granting summary judgment, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976). Because of the reasons above and below, the Court misapprehended the law and evidence as it applies to this case as every inference was improperly decided in favor of the Respondent.

3. Appellant Michael Deon Brown also hereby adopts all the arguments advanced by co-Appellants Deanna Brown Thomas, Yamma brown, Venisha Brown, and Terry Brown in their Petitions for Rehearing

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IN 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

Appellate Case No. 2015-002417

RECEIVED

AUG 09 2018

SC Court of Appeals

Tommie Rae Brown,.....Respondent

v.

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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

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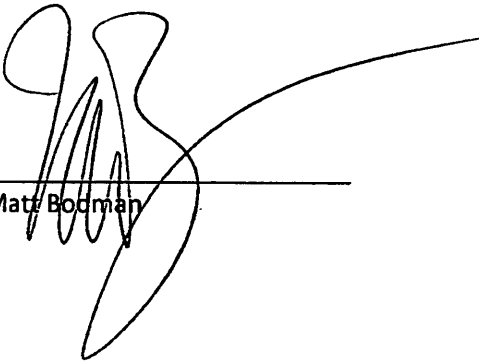
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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM AIKEN COUNTY
Court of Common Pleas**

Doyet A. Early III, Circuit Court Judge

RECEIVED

AUG 22 2018

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850 SC Court of Appeals

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.

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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 judgment¹ 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. Appellants³ refer to that settlement agreement⁴ in their Petition for

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

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).

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

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 issued¹⁴ 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

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.

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

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 1, 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.

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 she had no marriage to Ahmed; it is Appellants' burden to prove that Mrs. Brown 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 that 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 Appellants 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

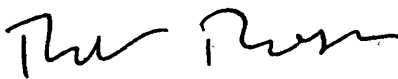
The trial court correctly held that Mrs. Brown never had a valid marriage to Ahmed, as Ahmed was already married, so that Ahmed was guilty of bigamy. This fact is established by the holding in the judgment of annulment, which the Court of Common Pleas had no jurisdiction to question. That judgment was 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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TOMMIE RAE

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

Appellate Case No. 2015-002417

RECEIVED
AUG 29 2018
SC Court of Appeals

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.

**REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO MOTIONS FOR
REHEARING AND SUGGESTION OF REHEARING EN BANC OF APPELLANT
TERRY BROWN**

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Pursuant to SCACR Rule 240(f), without restating the issues or making redundant arguments that have been thoroughly set forth in Appellant's opening Petition for Rehearing, Appellant offers the following points¹ of clarification and rebuttal to the arguments raised by the Respondent in her Return.

Dissection of Respondent's Argument

"Law is whatever is boldly asserted and plausibly maintained."² This is what Respondent has done in this matter. Once again, not once in thirty-nine (39) pages of her Return does Respondent cite or point to any evidence that Javed Ahmed ("Ahmed") had three wives in Pakistan, which is the foundation of the lower court granting and this Court affirming summary judgment that she is the spouse of James Brown. Therefore, at the precise moment Respondent married James Brown, she was, in fact, still married to Ahmed. Bigamist marriages are void ab initio. Period. End of discussion. Not void unless and until someone runs off to a remote court to annul the first marriage and merely testifies without proof or evidence that the first husband told me he had three wives in Pakistan. That genie cannot be put back in the bottle. As in this case, the Respondent cannot resuscitate the alleged marriage with James Brown as it was void ab initio in accordance with S.C. Code § 20-1-80. Respondent's alleged marriage with James Brown was void before she even walked through a courthouse door in 2004.

After eleven years, Respondent continues to ask this Court to assume, through her bold assertions and plausible argument, that the Charleston County Family Court ("CCFC") Order ("CCFC Order") converts her mere, self-serving and baseless

¹ Appellant incorporates all other Petitions for Rehearing and Replies filed by the other Appellants in this matter herein.

² Aaron Burr's sarcastic quote on how law is created in this Country more than applies in this matter.

allegations of Ahmed's bigamy into a retroactive fact. It does not. A panel of this Court has most recently recognized this in Gary v. Lowcountry Med. Transp., Inc., No. 2016-000222, 2018 S.C. App. LEXIS 37, *6-7 (Ct. App. 2018, Rehearing Denied) when it states:

We find the same public policy concerns expressed by this court in *Johns* drive our decision in this case. On one side, we have a marriage which contravened public policy as expressed by the General Assembly. *See* § 20-1-80 (2014). On the other, the doctrine of binding a party to its pleadings exists to protect the integrity of the court process. *See, e.g., Hayne Fed. Credit Union*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (noting the purpose behind the related doctrine of judicial estoppel is to "protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries"). While 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. *See Johns*, 309 S.C. at 203, 420 S.E.2d at 859 ("[T]he courts must weigh the competing public policies."); *id.* (finding the public policy of not recognizing bigamous marriages outweighs the public policy favoring finality of judgments).

Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37, *6-7 (Ct. App. 2018).

This Court is bound by Gary and cannot, absent en banc review, overturn this precedent.

While one panel of this court cannot overturn prior published precedent of another panel of this court absent en banc review, we need not do so in order to apply controlling South Carolina Supreme Court precedent.

State v. Hoyle, 397 S.C. 622, 629, 725 S.E.2d 720, 724 (Ct. App. 2012).

For the purposes of the Estate of James Joseph Brown and this action, the bigamist marriage under review is the marriage between James Brown and the Respondent. The question belies whether the Respondent was married at the time she married Mr. Brown. The answer is unquestionably, YES.

1. Respondent married Ahmed on February 17, 1997;³

³ Even now, Respondent continues her attempt to parse and shade the facts when she argues in her Return that she never entered into a marriage with Ahmed, but only

2. Respondent stipulated that no court order concluded or terminated the Respondent-Ahmed marriage prior to the Brown-Respondent marriage;⁴
3. Respondent's marriage to James Brown was less than 5 years after the marriage to Ahmed thereby demonstrating that Ahmed was not missing for more than 5 years;⁵ and
4. Respondent and James Brown obtained a marriage license and participated in a marriage ceremony.⁶

Even though it is Respondent's burden to prove the validity of her alleged marriage to James Brown, the above presentation of evidence provided the prima facie elements of bigamy and more than proved that James Brown was not married to Respondent. See 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); Hallums v. Hallums, 74 S.C. 407, 54 S.E.2d 613 (1906); Yarbrough v. Yarbrough, 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984); Day v. Secretary of Health and Human Services, 519 F. Supp. 872, 878 (D.S.C. 1982); 52 Am. Jur. (2d) Marriages Section 129 (1970). This proof was established very simply by presentation of both the Brown-Respondent and Respondent-Ahmed marriage certificates and the joint stipulation of facts. The Respondent's sole enumeration of counter arguments to the lower court and this Court is best summed up as; the Respondent's marriage to Ahmed may not have been factually bigamous, but that does not matter because the CCFC signed an order saying the marriage to Ahmed was

stipulated that she "participated in a marriage ceremony." See Respondent's Return, p. 33. This is completely controverted by the actual facts in the form of her marriage license issued on February 12, 1997 signed by Clerk of Harris County Texas Court. See Joint Stipulation of Facts, at ¶ 1, Exhibit 1. (R., Vol. I, p. 255; 265). Further, Respondent's own Complaint for Annulment states that she married Ahmed. Id., at ¶ 7, Exhibit 5, ¶5. (R., Vol. I, p. 256; 271-273)

⁴ See Joint Stipulation of Facts, at ¶ 6 (R., Vol. I, p. 256)

⁵ Id. (R., Vol. I, pp. 271-296)

⁶ Id. at ¶¶ 4 and 5. (R., Vol. I, p. 256)

annulled for bigamy ab initio and there is nothing you can do about it. The CCFC Order is one based on a cornucopia of judicial errors involving such issues as service of process, default judgment, leading witnesses and uncorroborated self-serving hearsay.

What was also established, as additional factual basis upon which the Court of Common Pleas, acting as the Probate Court, and this Honorable Court has at its disposal to adjudicate and avoid legitimizing a proven bigamist marriage involving the subjects of this proceeding (i.e. James Brown and Respondent), were the additional facts enumerated below. ("[T]he courts must weigh the competing public policies."); *id.* (finding the public policy of not recognizing bigamous marriages outweighs the public policy favoring finality of judgments).⁷

1. The fact under consideration as to whether Ahmed was married to three women in Pakistan has never been proven;⁸
2. Respondent further stipulated that she cannot identify any documents or other evidence that proves, or a single person who can testify that Ahmed was married to another person when Respondent and Ahmed participated in the 1997 marriage ceremony;⁹
3. In the 21 years since her marriage to Ahmed, 16 years since her marriage to Mr. Brown, 14 years since filing her annulment action against Ahmed, and 11 years since filing the matter sub judice, Respondent has never provided proof of Ahmed's prior marriage(s) or death;¹⁰

⁷ Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37, *6-7 (Ct. App. 2018).

⁸ R., Vol. II, pp. 515-526. Ahmed can be located as evidenced by the Affidavit of David Bell. See Affidavit of David Bell 9/30/2014. (R., Vol. II, pp. 515-521)

⁹ R., Vol. I, p. 257. Even though Respondent testified to the CCFC as to an alleged Ahmed lawyer and guitar player who had information concerning bigamy, they cannot now be found. See (R. Vol. I, p. 304:10-20; 307:11-16)

¹⁰ Id. at Exhibits 1 through 19. (R., Vol. I, pp. 254-350). As pointed out by Appellant, she could have searched the Pakistan tribal marriage records a/k/a Nikah Namas to find Ahmed's wives. See Appellant's Brief, p. 34-35.

4. the Respondent-Ahmed Marriage license where Mr. Ahmed swore under oath he was not married that has not been refuted by any other evidence other than Respondent's inadmissible hearsay testimony;¹¹ and
5. Affidavit of Attorney David Bell wherein he spoke to Ahmed who said that he never had three wives and Respondent and Ahmed had lived together as husband and wife.¹²

Additionally, the Court of Common Pleas, acting as the Probate Court, and this Honorable Court also has at its disposal to adjudicate and avoid legitimizing a proven bigamist marriage involving the subjects of this proceeding (i.e. James Brown and Respondent), the below enumerated present sense impressions by both the decedent James Brown and the Respondent.

1. Respondent agreed in the Brown-Respondent Consent Order that she was not James Brown's spouse;¹³
2. James Brown amended his own annulment action after the Respondent-Ahmed annulment order was entered wherein Mr. Brown's attached the fact Respondent admitted the first marriage;¹⁴ and
3. The Respondent Diaries, which were conveniently gagged during the summary judgment proceedings from Appellants' use in glaring violation of their due process rights¹⁵, have not been given a full and fair opportunity to be presented because discovery on them was frozen by the lower court.

¹¹ See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Respondent Marriage License Application. (R., Vol. II, p. 526, line 8) Respondent continues to argue in page 35 of her Return that this is hearsay when SCRE 803(9) clearly proves otherwise.

¹² Affidavit of David Bell 9/30/2014. (R., Vol. II, pp. 515-521) Even though Ahmed was supposedly unfindable for service of process purposes resulting in the erroneous service by publication in the Respondent-Ahmed Annulment, Mr. Bell found him.

¹³ See Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350). This Court should strongly consider why an actual spouse would ever have to claim never to seek to be a declared a common law spouse. The answer is easy. The parties are not married.

¹⁴ See Joint Stipulation of Facts, Exhibit 16. (R., Vol. I, pp. 332-335) Why would Mr. Brown file his own annulment and amend his own annulment after the filing and order in the Respondent-Ahmed annulment if he supported Respondent's annulment for bigamy ab initio so he could remain married to Respondent?

¹⁵ Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 325,332 (parties must have "a full and fair opportunity for discovery.")

Somehow, even with the foregoing **facts**, this Court has overlooked the summary judgment standard. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976). Instead, applying a summary judgment standard that Appellant is unfamiliar with, the lower court and this Court have taken Respondent's **mere allegations**, that are not even facts or evidence, in a light most favorable to her as the **moving party**. The result of which is to incredulously uphold Respondent as the surviving spouse of James Brown by granting this unique summary judgment standard based on Respondent's bold assertions and plausibly maintained claim that Ahmed had three wives in Pakistan. This violates every principal of summary judgment argued in Appellant's initial Petition for Rehearing.¹⁶ Additionally, it violates the actual facts of the case which are that Respondent was married when she attempted to marry James Brown. More importantly, it violates to the public policy concerns expressed in Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992) and this Court's most recent ruling in Gary.

I. GARY V. LOWCOUNTRY MED. TRANSP., INC. CANNOT BE DISTINGUISHED FROM THIS MATTER THEREBY MAKING IT BINDING PRECEDENT ON THIS PANEL OF THE COURT.

Respondent attempts to distinguish the binding precedent issued by another panel of this Court when she argues that Gary v. Lowcountry Medical, Inc., No. 2016-000222, 2018 S.C. App. LEXIS 37, (Ct. App. 2018) "has no application to the facts sub judice."¹⁷

¹⁶ See Appellant's Pet. for Rehearing, pp. 2-3.

¹⁷ See Respondent's Return, p. 37.

Gary cannot be distinguished from this case. The bigamous marriage in question in this matter is the marriage between the Respondent and James Brown. The prima facie elements of bigamy were provided by the Brown-Respondent marriage certificate, Respondent-Ahmed marriage certificate, Respondent's stipulation that no court order concluded or terminated the Respondent-Ahmed marriage prior to the Brown-Respondent marriage, and Respondent's marriage to James Brown was less than 5 years after the marriage to Ahmed thereby demonstrating that Ahmed was not missing for more than 5 years. This Court is affirming a lower court's summary judgment order stating the CCFC Order is an acceptable response to the Respondent's bigamy and facts do not matter. Fortunately, as Gary provides, facts do matter.

Gary involved a Personal Representative of an estate filing pleadings in a wrongful death action stating that Charles Gary was the surviving spouse of Blondell Gary. Subsequent to the filing of the pleadings, settlement of the lawsuit for \$2,250,000 on September 14, 2015, and entry of a Consent Order of Dismissal with Prejudice of the wrongful death suit on November 13, 2015, the personal representative became aware of facts indicating the marriage between Charles and Blondell was void due to bigamy, and filed a petition to determine heirs on December 14, 2015. Charles Gary argued the personal representative was estopped from claiming that he was not the surviving spouse because the Consent Order was an adjudication of the merits and made the underlying facts and admissions binding.¹⁸ This Court rejected this argument, in Gary, which is Respondent's argument that has been affirmed in this matter. With Gary, this Court has stated that public policy against bigamous marriages is more important than estoppel or

¹⁸ See Final Appellant Brief Charles Gary, Purported Surviving Spouse, Appellate Case No. 2016-000222, pp. 10-11.

res judicata. Gary v. Lowcountry Medical, Inc., No. 2016-000222, 2018 S.C. App. LEXIS 37, *6-7 (Ct. App. 2018).

As in Gary, Respondent's marriage to James Brown is clearly bigamous **on the facts**. Charles Gary argued that entry by the lower court of a consent order wherein the pleadings admitted he was married to Blondell Gary precluded the Court from examining the actual underlying facts, which clearly were that he was already married, to prove his marriage with Blondell Gary was bigamous. The same rule applies to Respondent's actual facts in this matter. Respondent argues that the CCFC Order, wherein she presented mere baseless allegations of Ahmed's bigamy, precludes this Court from examining the actual underlying facts, which are that she has no factual evidence of Ahmed's bigamy making it clear the Respondent-Ahmed marriage was not bigamous, which proves Respondent's alleged marriage to James Brown was bigamous. Gary and this case are the application of the same rule. Charles Gary's case involves the situation where you are looking through the finality of a judgment to prove that he was already married when he attempted to bigamously marry Blondell Gary. Respondent's case, like Gary, involves looking through the finality of a judgment¹⁹ to determine that she was **already married (i.e. not bigamously married to Ahmed as the facts prove)**, and therefore factually married when she attempted to marry James Brown. The two cases are not distinguishable.

Just as facts mattered in Gary, Respondent fails to **prove with facts** that her marriage to Ahmed was bigamous. More importantly, Respondent fails to prove she was

¹⁹ Appellant still argues that the CCFC Order does not matter because collateral estoppel does not apply. See Appellant's Pet. for Rehearing, p. 16-23. However, assuming arguendo that it was a binding final judgment it would not matter under the Gary analysis.

not married to Ahmed when she attempted to marry James Brown, and based on her stipulations, she cannot identify any documents or other evidence that proves, or a single person who can testify that Ahmed was married to another person when Respondent and Ahmed participated in the 1997 marriage ceremony. Like Charles Gary argued, which was rejected by this Court, Respondent argues and this panel of this Court has ruled²⁰, in contradiction to Gary, that Appellants are estopped from challenging her marriage to Ahmed was bigamous because the mere allegations of bigamy contained in the CCFC Order were converted to actual retroactive facts to be used against James Brown when the CCFC Order was entered. Under the Gary analysis, this is incorrect.

As Gary denotes, the public policy against not recognizing bigamous marriages dictates that this Court look through the “finality” of the CCFC Order and analyze the actual underlying facts to determine whether or not a bigamous relationship exists. Just as in Gary, as it relates to determining Respondent’s marital status to James Brown, she has never provided, and cannot provide, any evidence that her relationship to Ahmed was factually bigamous or that she was not actually married to him when she attempted to marry James Brown. If it was, she should be able to come forward with those facts now. She allegedly presented them before the CCFC. It should be a simple matter of presenting them again, but it is indisputable, based on her stipulations, she had no evidence then, and she has no evidence now. Instead of doing this, Respondent argues, and this Court has ruled²¹, she does not need them because the CCFC Order allows her to

²⁰ Brown v. Sojourner (in re Estate of Brown), 2018 S.C. App. Lexis 53, *11-16 (Ct. App. 2018)

²¹ “Here, Respondent’s first marriage to Ahmed was invalid or void from the beginning because he was already married to someone else at the time of the marriage.” Brown v. Sojourner (In re Estate of Brown), 2018 S.C. App. LEXIS 53, *9 (Ct. App.

present a mere allegation of bigamy to create retroactive “facts.” Facts do not vanish or retroactively come into existence. The facts of bigamy should be just as easily presented in this matter as they were in the CCFC matter. Her facts of bigamy certainly existed when she attempted to marry James Brown. This should not be hard for Respondent because she is telling this Court she has already presented them once. She should be able to present them again to prove her marriage to Ahmed was bigamous. This is particularly true since the same attorney has represented her in both matters. Just open up the old file and present all the same evidence. The reason she does not, is because the file is empty. Just as Charles Gary could not, Respondent cannot provide facts proving she was not legitimately married to Ahmed prior to and continuing through her alleged marriage to James Brown. A bigamist marriage is void ab initio and the Respondent cannot undue her bigamist marriage to James Brown.

The foregoing reasons are why this case is exactly like Gary. The public policy against bigamous marriages is too important to allow a party to argue a procedural technicality. This Court’s Gary ruling supports the common sense idea that when it comes to bigamy, we want to get it right. Facts matter. This Court’s panel deciding this matter should apply Gary and determine Respondent is not the wife of James Brown.

II. APPELLANTS’ HAVE MET THE BURDEN OF PROOF TO DETERMINE THAT JAMES BROWN’S MARRIAGE TO RESPONDENT WAS VOID.

As stated hereinabove, Appellants have met their legal burden of proof.

2018). This quote from this panel’s opinion in this matter is in direct contradiction to another part of this panel’s opinion in this matter which states: “However, Respondent is only asserting the family court’s order as to the status of her marriage to Ahmed.” Id. at 15. If the second quote were true, the Gary analysis would apply here and Respondent would be required to present facts of a bigamous relationship with Ahmed.

Respondent's own argument in her Return belies her attempts to distinguish Gary, when she denotes that the **facts** make it clear the parties were not married and "[b]ut for the public policy against bigamy to apply, bigamy must exist on the facts."²² Just as in Gary, **facts** make Respondent a bigamist and her alleged marriage to James Brown void ab initio. She has never proven Ahmed had three wives in Pakistan.²³ It is her burden of proof under the law. Respondent argues that all she needs to prove her alleged marriage to James Brown is her marriage license with him and the ceremony.²⁴ Respondent argues these facts close the case because she told the CCFC to assume Ahmed was a bigamist. She, however, glosses over the fact that she was married to Ahmed at the time she allegedly married James Brown and continued to be married to Ahmed from December 14, 2001 through April 14, 2004.²⁵

The fact that Respondent was married to Ahmed prior to allegedly marrying James Brown changes the landscape of what she is required to prove as it relates to the validity of her alleged marriage with James Brown. It is Respondent's burden to prove her alleged marriage to James Brown was valid. Respondent is required to provide **facts** that meet her burden of proof that her alleged marriage to James Brown (i.e. that she is his surviving spouse) was valid. Because she had a prior valid marriage with Ahmed, her only possible argument to even attempt to prove that her alleged marriage to James Brown was valid was to retroactively contrive that her marriage with Ahmed was

²² See Respondent's Return, p. 37.

²³ Respondent argues on page 5 of her Return that State v. Sellars, 140 S.C. 66, 134 S.E. 873 (1926) applies, but it does not. Unlike Sellars, Respondent has never proven that Ahmed was married when she allegedly married James Brown. Sellars does not apply to this matter.

²⁴ See Joint Stipulation of Facts, at ¶¶ 4 and 5. (R., Vol. I, p. 256); Respondent's Return, p. 33.

²⁵ Id. at ¶¶ 1 and 2, Exhibit 1. (R., Vol. I, pp. 254-256; 265-266; R. Vol. II, pp. 515-526)

bigamous. However, even this is not enough, because Respondent was married to Ahmed when she allegedly married James Brown. S.C. Code § 20-1-80 applies and her alleged marriage with James Brown is automatically void ab initio.

Respondent has completely failed in her burden. She presents no evidence. The CCFC Order did not litigate James Brown's marital status or determine her to be the spouse of James Brown. It had nothing to do with these issues. Respondent attempts to confuse this Court and muddle the actual issue to be determined with her argument otherwise.²⁶ In fact, she only has the retroactive factually deficient CCFC Order to argue. She has nothing else. Respondent continues to cling to this argument with the hope and prayer that this Court will not actually look at the **facts** as required.

III. THIS IS A PROBATE MATTER DETERMINING THE SPOUSAL STATUS OF RESPONDENT AS IT RELATES TO JAMES BROWN.

A. The Court of Common Pleas has jurisdiction, sitting in the shoes through removal from the probate court, to determine spousal status.

Respondent confused this Court with her smokescreen arguments of subject matter jurisdiction regarding annulment actions and the family court. However, Respondent finally admits in her Return that this is a probate matter.²⁷ This action is not Appellants re-litigating a Family Court Order. This action determines whether Respondent is the spouse of James Brown.²⁸ It was error for this Court to determine otherwise.²⁹ It was further error when this Court determined, in its Order, that Appellants' did not have standing to pursue this matter. The lower court had already

²⁶ See Respondent's Return, pp. 9-25.

²⁷ See Respondent's Return, p. 1.

²⁸ See Appellant's Pet. for Rehearing, p. 23-24.

²⁹ Brown v. Sojourner (In re Estate of Brown), 2018 S.C. App. LEXIS 53, *9-15 (Ct. App. 2018).

made this determination granting standing to the Appellants, and Respondent has admitted to not appealing this ruling.³⁰ The lower Court specifically noted:

A threshold determination that must be made in both the elective share and omitted spouse claims is whether Tommie Rae Brown is James Brown's surviving spouse. This determination could have a profound effect upon the Deviseses' property rights in or claims against both the Estate and Trust.

As a child of James Brown and a named Devisee of the Will, Terry Brown, has an interest in seeing that his father's estate plan is carried out.

As children and intestate heirs of James Brown, Terry Brown and the other Deviseses have potential property interests and/or claims against the Estate that "may be affected" by the Severed Actions.³¹

The fact that Appellants had standing is the law of the case, which was not appealed, and therefore not appealable. Further, Respondent in her settlement agreement with the Estate, which was filed with this Court, denotes that if the issue of spousal status is remanded she has agreed to try this issue in the Court of Common Pleas.³² This makes her attempt to further confuse this Court with her disingenuous question in footnote 7 of her Return wherein she ponders where an action for spousal determination would occur, even more suspect.³³ She has waived the right to ask this question with her own settlement. It also shows that Respondent believes that the Court of Common Pleas has jurisdiction, otherwise why submit to the same in a settlement agreement and run the risk of having to re-litigate such jurisdiction chosen. Appellants have standing, as already ruled by the lower court, and the Court of Common Pleas, sitting in the Probate Court's

³⁰ Order determining Parties to Severed Omitted Spouse Claim, Elective Share Claim, and Pretermitted Child Claim (February 7, 2014, Case No. 2008-CP-02-1647); Respondent's Return, fnt. 10

³¹ Order determining Parties to Severed Omitted Spouse Claim, Elective Share Claim, and Pretermitted Child Claim (February 7, 2014, Case No. 2008-CP-02-1647), p. 5

³² See Respondent's Joint Motion filed March 8, 2017, Exhibit A, p. 3, ¶4.

³³ See Respondent's Return, p. 3, fnt. 7

shoes through removal, has the right to hear this matter and determine Respondent is not the spouse of James Brown.

B. Respondent attempts to confuse this Court with how her spousal status should be determined with the application of S.C. Code §62-2-802.

This is not a posthumous annulment action as Respondent contends.³⁴ The facts necessary to determine the bigamy of Respondent voiding her alleged marriage to James Brown under S.C. Code § 20-1-80 existed long before his death. This is an action to present those facts to allow the Court of Common Pleas, acting as the Probate Court, to determine Respondent is not the spouse of James Brown. As previously argued, Appellant's believe that a determination of whether someone is the spouse of an estate, which Respondent admits is the purpose of this action³⁵ and the lower court has determined is a threshold issue³⁶, which Respondent did not appeal, is fully within the exclusive jurisdiction of the Probate Court in accordance with the probate of and estate or will in accordance with S.C. Code § 62-1-302(a)(which includes determining heirs). *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, ftnt 9 (2014); *Thomas v. McGriff*, 368 S.C. 485, 629 S.E.2d 359 (2006). Therefore, based on the foregoing, Respondent's argument that a determination of heirs is only related to intestate estates, and Appellants are incorrect in asserting it for probate court jurisdiction in this matter, is both factually, procedurally, and legally incorrect in this matter.³⁷ "If the ultimate issue is heirship, which is within the probate court's exclusive jurisdiction, then the probate court has jurisdiction to resolve the threshold issue whether the decedent was a party to a

³⁴ *Id.* at 4.

³⁵ *Id.* at 1.

³⁶ Order determining Parties to Severed Omitted Spouse Claim, Elective Share Claim, and Pretermitted Child Claim (February 7, 2014, Case No. 2008-CP-02-1647), p. 5

³⁷ Respondent's Return, p. 10

common-law marriage.” Thomas v. McGriff, 368 S.C. 485, 488, 629 S.E.2d 359, 360 (2006). Respondent argues that S.C. Code § 62-1-302(c), limits the above stated jurisdiction, as it relates to determining heirs (i.e. a marital relationship), only to the “interpretation of marital contract.”³⁸ This argument is contradictory to the language in Thomas. Thomas specifically says the probate court has jurisdiction to determine the marital status (i.e. party to a common-law marriage) if the ultimate issue is heirship. As James Brown is deceased, the ultimate issue is whether Respondent is an heir (i.e. spouse) for purposes of her claims. The Respondent was even intentionally omitted from James Brown’s will. Jurisdiction lies exclusively with the Court of Common Pleas, standing in the Probate Court’s shoes through removal in this matter, to determine this issue.

Appellant will also address Respondent’s argument that S.C. Code 62-2-802 is the sole provision that applies for determination of her spousal status. Respondent, again, glosses over a very important section of S.C. Code § 62-2-802 when she boldly states this section must apply to determine her spousal status.³⁹ Specifically, she neglects to analyze the very first sentence of S.C. Code § 62-2-802(a) which states:

(a) An individual who is divorced from the decedent **or whose marriage to the decedent has been annulled is not a surviving spouse** unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death.

S.C. Code Ann. § 62-2-802. (Emphasis added.)

As Appellants’ have already proven, James Brown’s marriage to Respondent is void.⁴⁰

S.C. Code § 20-1-80 is the ultimate annulment action. S.C. Code § 62-2-802(a) does not

³⁸ Id. at 3.

³⁹ Id. at 11.

⁴⁰ See Appellant’s Pet. for Rehearing, p. 3-16.

say that the annulment can only occur by court order, as this Court is aware, it can also occur by operation of statute (i.e. S.C. Code § 20-1-80 which states: “[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void.”) Therefore, S.C. Code § 62-2-802(a) determines that Respondent is not the spouse of James Brown because her marriage was automatically void (i.e. annulled) by operation of the statute. “There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy.” Splawn v. Splawn, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993). As such, S.C. Code 62-2-802(a), by and through the application of S.C. Code § 20-1-80, declares that Respondent is not the surviving spouse of James Brown as such relationship was void ab initio.

IV. RESPONDENT CONTINUES TO MISSTATE APPELLANT’S POSITION.

Respondent continues her efforts to obfuscate and confuse part of Appellant’s arguments with regard to S.C. Code § 20-1-80 before this Court.⁴¹ Specifically, she continues to state that Appellants’ argue that a bigamous marriage is valid until a court order is issued annulling the same.⁴² Interestingly, that is exactly the Respondent’s position, i.e. her marriage to James Brown may have been void, but the CCFC changed that. Appellant, this Court, and Respondent are unified and in agreement that a bigamous marriage is void ab initio under S.C. Code § 20-1-80. Appellant is not arguing that individuals in bigamous relationships must seek a court order. James Brown certainly was not required to do so because his relationship to Respondent has been factually proven as bigamous and therefore void under S.C. Code § 20-1-80.

What Respondent attempts to mischaracterize, and this Court misapprehend about

⁴¹ See Respondent’s Return, p. 4-5; 27-32.

⁴² Id.

Appellant's argument is that it was necessary for **Respondent** to seek a court order to annul her marriage to Ahmed because her marriage was not factually bigamous. Respondent had no proof of the same before, during, or, even now, after appearing in the CCFC. As a result, the "automatic" voiding of a marriage under S.C. Code § 20-1-80 does not apply to Respondent, as it relates to James Brown, because she has no proof of the same. Therefore, on the date and time she married James Brown she was married to Ahmed. This is Lukich.⁴³ The CCFC Order did not convert her allegations of bigamy into retroactive facts as they relate to determining the status of her relationship with James Brown. When analyzing her alleged marriage to James Brown, the CCFC Order only stands for the "status"⁴⁴ that her marriage to Ahmed was annulled, not the alleged facts on which it was annulled, which Respondent contends, but has failed to prove, supported bigamy. This is black letter and South Carolina law on collateral estoppel that Appellant has already argued.⁴⁵ James Brown's estate and heirs have the absolute right in the threshold issue of spousal determination of Respondent as the alleged wife of James Brown to require her to prove her annulment to Ahmed was based on bigamy. These "facts" can still be challenged by James Brown, his Estate and heirs. As noted before, if the CCFC Order created binding "facts" on James Brown he could not have filled his own action for annulment. Fortunately, his own annulment action was ultimately unnecessary because Respondent admitted to the facts (which existed prior to, at her CCFC hearing, and now) in her own annulment proceeding proving her bigamous

⁴³ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008)

⁴⁴ Respondent continues to argue that she is only relying on the "status" determination of the CCFC order which is not true. See Respondent's Return, p. 10. She is also relying on the facts presented to the CCFC to "prove" bigamy.

⁴⁵ See Appellant's Brief, p. 20-30; Appellant's Pet. for Rehearing, p. 16-23.

marriage to James Brown and the application of S.C. Code § 20-1-80 voiding any alleged marital relationship with James Brown. James Brown could then dismiss his annulment action by entering a consent order with Respondent to secure any possible loose ends, wherein she also agreed she would not seek to be declared his common law wife.⁴⁶

Further, based on Respondent's argument, this Court must ask the question, why did she seek an annulment if her marriage to Ahmed was already annulled? By her argument, there was no need. Respondent's own actions betray her understanding of the situation. Respondent knew she was not in a bigamous relationship with Ahmed. That is why she included additional grounds for annulment to insure that some of her manufactured testimony (i.e. the marriage was never consummated) would be accepted to annul her marriage to Ahmed.⁴⁷ As such, **Respondent** (not individuals whose marriages have already been factually proven to be bigamous) was required to seek an annulment order that included several grounds for annulment. Actions speak louder than words. Respondent manufactured bigamy with mere allegations in her seventeen page transcript before the CCFC because this was her remote chance that she could later argue that her alleged marriage to James Brown was somehow valid.⁴⁸ This has resulted in the twelve years of chaos that Lukich⁴⁹ warned should be avoided and Gary⁵⁰ attempts to stop.

V. RESPONDENT'S CLAIM THAT AN ANNULMENT CANNOT BE ENTERED BY DEFAULT IS INCORRECT.

Respondent's claim that an annulment cannot be entered as a default judgment is

⁴⁶ See Joint Stipulation of Facts, Exhibits 5, 12, 15, 16, 18, 19.

⁴⁷ Id., at ¶ 7, Exhibit 5, ¶5. (R., Vol. I, p. 256; 271-273)

⁴⁸ Id., at ¶ 8, Exhibit 13, (R., Vol. I, p. 256; 297-313)

⁴⁹ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008)

⁵⁰ Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37

incorrect because the Ahmed-Respondent Annulment action is proof that it can happen.⁵¹

Respondent cites to the following language in her Return:

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.⁵²

The above language does not say that it cannot happen. It just says that it should not. It is up to the family court judge to insure that it does not happen by being exceptionally careful to avoid such a result. Based on the foregoing language, this Court must ask itself if the CCFC followed the above direction and mandate to prevent default "to the utmost exercise of judicial power" when it:

1. Allowed service by publication buried on page 2 in the Houston Chronicle classified section without any proof of actual due diligence, in violation of South Carolina law⁵³, on behalf of the process server as required to serve by publication.⁵⁴ Further, the CCFC ignored foreign service of process rules under Rule 4(h)(5) SCRCP when it was clear that Ahmed was from Pakistan.
2. Was not sure whether service by publication had occurred until the day of the hearing after all the testimony had been entered when Affidavit of Service by Publication was given to the CCFC Judge by Respondent.⁵⁵
3. Was declared by Respondent's counsel in open court that Ahmed was in "Default."⁵⁶
4. Allowed Respondent's counsel to lead the witness and proffer hearsay testimony throughout the hearing without reservation or question.⁵⁷
5. Failed to ask a single question with regard to any of the sketchy or preposterous allegations made by Respondent before the CCFC or ask any questions with regard to what was done by Respondent to actually serve Ahmed.⁵⁸

⁵¹ See Respondent's Return, p. 19.

⁵² See Respondent's Return, p. 20; Fogel v. McDonald, 170 S.C. 506, 157 S.E. 830, 833 (1931)

⁵³ See Ray v. Pilot Fire Ins. Co., 128 S.C. 323, 324 (1924)

⁵⁴ See Joint Stipulation of Facts at ¶7, Exhibit 6, 7, 8, and 9 (R., Vol. I, pp. 256; 274-289)

⁵⁵ Id. at ¶8, Exhibit 13 (R., Vol. I, pp. 256; 299: 3-25; 300:1-5; 312:4-13)

⁵⁶ Id. at 300:6-7.

⁵⁷ Id. at Exhibit 13.

6. Started a hearing at 9:00AM on April 15, 2004, completed the hearing with seventeen pages of transcript testimony laced with mere allegations and self-serving hearsay, signed and accepted the Respondent's pre-prepared order without making any changes to such order or attempting to insure that such order conformed to actual evidence that occurred during court rather than allowing the mere allegations to populate the pre-prepared order, and signed and entered the order by 9:34AM that same day.

Based on the foregoing, and all previous arguments made in prior filings by Appellant in this matter, the above is a default judgment in accordance with SCRCP 55.⁵⁹ The South Carolina Supreme Court suspected this failure in "utmost exercise of judicial power" by the CCFC to avoid default when it referred to the CCFC Order as "hastily granted."⁶⁰

The CCFC completely failed with its duty to insure proper entry of evidence and that the CCFC Order was not a default judgment. This is why Johns⁶¹, Gary⁶² and Lukich⁶³, and the litany of collateral estoppel cases exist so that when egregious errors such as this occur, this Court has the power to step in and correct such egregious errors. This, among many other reasons, is why the CCFC Order does not collaterally estop the Appellants' in this matter.

VI. THE DECISION BY THIS PANEL OF THE COURT AND RESPONDENT'S ARGUMENTS FUNDAMENTALLY CHANGE COLLATERAL ESTOPPEL IN SOUTH CAROLINA.

The panel decision by this Court turns collateral estoppel in South Carolina on its head. Everyone involved with this case agrees that James Brown, his Heirs and Estate were not a party the Ahmed-Respondent annulment action. Yet, this Court cites to

⁵⁸ Id.

⁵⁹ See Appellant's Initial Brief, pp 28-29; Appellant's Reply Brief, pp. 21-24; Appellant's Pet. for Rehearing, pp.19- 21.

⁶⁰ Wilson v. Dallas, 403 S.C. 411, 2013 S.C. Lexis 240 (S.C. 2013), footnote 16.

⁶¹ Johns v. Johns, 309 S.C. 199, 420 S.E.2d 856 (Ct. App. 1992).

⁶² Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37

⁶³ Lukich v. Lukich, 379 S.C. 589, 666 S.E.2d 906 (S.C. 2008)

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 support for why Appellants are collaterally estopped:

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. (Emphasis added.)⁶⁴

As noted above, James Brown, his Estate or Heirs were not a party to the Ahmed-Respondent Annulment action. They also were not in privity. Respondent makes the argument that because James Brown paid the legal fees for the annulment action he was somehow in privity.⁶⁵ He was not. One who is not a party to an action is not in privity. Further, this Court notes Appellants' argument in its opinion, but never addresses how the Appellants could possibly be in privity so that collateral estoppel can apply to preclude Appellants from challenging Respondent as the wife of James Brown.⁶⁶ Appellants have addressed this issue in detail in prior briefing.⁶⁷

By its ruling, this Court has precluded a non-party to an action from actually litigating an important issue in such party's own action that was never actually litigated in the initial action (i.e. the threshold issue of whether Respondent is James Brown's spouse). This Court is saying that the Ahmed-Respondent annulment action determined that Respondent was James Brown's wife. This is just not possible. This is why this opinion turns collateral estoppel on its head. This court is saying that an order determining third parties marital status has retroactively created facts that actually do not

⁶⁴ Brown v. Sojourner (In re Estate of Brown), 2018 S.C. App. LEXIS 53, *11-16 (2018)

⁶⁵ See Respondent's Return, p. 22-24.

⁶⁶ Brown v. Sojourner (In re Estate of Brown), 2018 S.C. App. LEXIS 53, *16 (Ct. App. 2018).

⁶⁷ See Appellant's Brief, p. 20-30, Reply Brief, p. 21, Appellant's Pet. for Rehearing, p. 16-23.

exist thereby changing James Brown's marital status from void ab initio to Respondent as his wife.

The effect of this Court's ruling is to protect a bigamist. From December 14, 2001 through April 14, 2004, Respondent was a bigamist. She has no evidence otherwise, and admits to the same.⁶⁸ Based on the facts before this Court and immediately on December 14, 2001, S.C. Code Section 20-1-80 applied as to James Brown's alleged marriage to Respondent by declaring it void. Her marriage to Ahmed was not void, at this time, and would not become so on suspect grounds until April 15, 2004. She admits to having no facts that would allow for anything else to be true. Respondent's marriage to James Brown was already void before she filed in the CCFC. The CCFC Order could not revive something that was already void. A voided marriage is void. Yet, that is exactly what this Court has done.

Further compounding the error, this Court's ruling determines that Appellants' are non-parties to the Ahmed-Respondent annulment action and are estopped from proving she is not the spouse of James Brown with facts that prove she was not married to James Brown, which has nothing to do with Respondent's annulment to Ahmed. Collateral Estoppel does not apply in this case. It never has. This only issue presently before the court is the threshold issue of whether Respondent is the wife of James Brown.

VII. THE SUPREME COURT RULING IN JOYE V. YON GOVERNS NOT THE OVERTURNED LAW TO WHICH RESPONDENT CITES.

Respondent attempts to support her position with law that was reversed by the South Carolina Supreme Court when she cites to Joye v. Yon, 345 S.C. 264, 547 S.E.2d

⁶⁸ See Joint Stipulation of Facts at ¶ 1 through 5, 9 and 10 (R., Vol. I, pp. 255-257)

888 (Ct. App. 2001).⁶⁹ Therefore, even though her quoted language in her Return does not support her position, it is unnecessary to really address it because this Court's decision was reversed by the Supreme Court on appeal. Joye v. Yon, 355 S.C. 452, 586 S.E. 2d 131 (2003).

In Joye, Husband and Wife were married in 1970. Id. at 454. After being married for 26 years, the couple divorced in 1996 and Husband was ordered to pay Wife monthly alimony. Id. In March 1999, Wife remarried Vance, but thereafter discovered Vance was not divorced from his former spouse. Id. Wife filed for an annulment. Id. In September 1999, the family court granted wife an annulment on grounds of bigamy, determining her March 1999 marriage to Vance was void *ab initio*. Id. Following the remarriage by wife, Husband ceased paying alimony. Id. Following the annulment, Wife filed for contempt against husband, because she argued, as Respondent does herein, that her marriage to Vance was void *ab initio* meaning that her alimony obligation never terminated. Id.

The lower court and this Court ruled, as they have done in this matter, that the annulment order applied retroactively against the husband because it was void *ab initio*. The Supreme Court rejected this ruling and overturned this position on appeal.

More importantly, the Supreme Court decision in Joye actually supports Appellants' arguments when it holds that a family court order annulling a wife's marriage as bigamous only applies **prospectively**, and **does not relate back to the date of the bigamous marriage**. Id. at 457. This directly supports Appellants' position in this matter. The following excerpt from the Supreme Court's holding rejects Respondent's

⁶⁹ See Respondent's Return, p. 15-18.

argument:

We also hold that regardless of whether the family court determines to reinstate periodic alimony payments or not, Husband has **no obligation to pay retroactive alimony to Wife for the time period that Wife was married to her bigamous husband.**

355 S.C. at 457, 586 S.E.2d at 134 (Emphasis added).

The Supreme Court's ruling in Joye establishes that a family court decree voiding ab initio a bigamous marriage **does not apply retroactively to a non-party to that family court action.** Just as important, the Supreme Court also rejected the void/voidable approach to determine the effect of a subsequent annulment on pre-existing periodic alimony payments:

Courts are split as to how to classify the effect a payee spouse's remarriage and subsequent annulment has on pre-existing periodic alimony payments. They have adopted one of the following rules: (1) the void/voidable approach, (2) the automatic termination approach, or (3) a case by case approach.

We hold that the case by case approach affords the Court the most appropriate method for resolving this novel issue. Just as the family court employs principles of equity in determining support and maintenance, equitable distribution, and child custody, so should it embrace these same principles in determining whether payor spouse's periodic alimony obligation is revived after payee spouse's subsequent marriage is annulled.

Joye v. Yon, 355 S.C. 452, 455-456, 586 S.E.2d 131, 133-134 (2003) (Emphasis added).

The above holding completely forecloses the Respondent's position in this appeal both as to the retroactive impact of an annulment order as well as her void versus voidable argument. When Joye (no retroactive application of annulment orders and case-by-case analysis) is coupled with this Court's ruling in Gary and South Carolina Supreme Court decisions in Lukich, there can be only one determination. Respondent was married to Ahmed when she married James Brown. As such, she is not the spouse of James Brown.

The point of law is for courts to get it right based on actual facts. This is the overriding principal contained in the three cases above, which should be the same in this case.

Respondent is not James Brown's wife because of the actual facts.

VIII. THIS CASE MEETS ALL THE REQUIREMENTS FOR A REHEARING EN BANC.

This case meets all the requirements for a Rehearing En Banc under SCACR Rule 219. While Appellant understands that a rehearing En Banc is not favored and ordinarily not ordered, this case is the quintessential case that should be heard in accordance with SCACR Rule 219. An En Banc hearing is necessary in this matter to secure and maintain the uniformity of this Court's decisions in numerous areas that are all questions of exceptional and far reaching importance in the state of South Carolina because: (1) this panel of the Court failed to apply the public policy of avoiding bigamous marriages as balanced against the finality of judgments in direct conflict with binding precedent issued by this Court in Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37 (Ct. App. 2018), which necessitates En Banc review under State v. Hoyle, 397 S.C. 622, 629, 725 S.E.2d 720, 724 (Ct. App. 2012), for this panel's current decision to even stand; (2) this panel of the Court misapprehended and misapplies the binding Supreme Court precedent of Lukich; (3) this panel of the Court has misapprehended the law as it relates to jurisdiction for determining heirs in South Carolina probate actions and overruled a lower court order that was not even appealed; (4) this panel of the Court misapplies and fundamentally changes the rule of law of collateral estoppel as it relates to non-parties to an action; (5) this panel of this Court misapplies and fundamentally alters the standard of summary judgment by allowing a moving party's mere allegations of retroactively created facts to be enough to grant summary judgment; and (6) this panel of this Court

misapprehended the fundamental principles of due process as they relate to discovery in the context of summary judgment against a non-moving party. Based on all the foregoing reasons, this Court should grant En Banc review to secure and maintain the uniformity of this Court's decisions.

CONCLUSION

After all these years, briefs, hearings, and arguments, Appellants' continue to get drowned out in the din of circular legal arguments, all the while the facts continue to scream. The Appellants' reasoned and factual voices continue to get lost in the noise. This needs to stop.

This case is quite simple when boiled down to the actual facts. Bigamous marriages are void ab initio and are not resuscitated back to life by later occurring events. The Respondent's marriage to James Brown was, at the precise moment they said "I do," bigamous and immediately void and legally incapable of resuscitation. Respondent was married to Ahmed, at the precise moment she married James Brown. At that precise moment, like now and at the CCFC hearing, she could not provide any evidence, testimony or fact corroborating Ahmed bigamy. The facts cannot change.

Because the facts cannot change, the Respondent, who at the time was an Aiken County resident, ran off to Charleston County to annul her Texas marriage in a default judgment hearing where she provided no evidence, testimony or fact corroborating Ahmed's bigamy, and dupes the CCFC into entering default on her unchanged pre-drafted CCFC Order. The South Carolina Supreme Court suspected as much when it referred to the CCFC Order as "hastily granted."⁷⁰

⁷⁰ Wilson v. Dallas, 403 S.C. 411, 2013 S.C. Lexis 240 (S.C. 2013), footnote 16.

James Brown was not interested in a Respondent-Ahmed annulment so he could remain married to the Respondent, as the Respondent claims. He certainly was not a party to the action by paying her legal bills. If any of this was true, why would James Brown file his own annulment against Respondent for bigamy? Why would James Brown amend his annulment for bigamy after the CCFC Order annulled the Respondent-Ahmed marriage for bigamy specifically noting she was bound by her declaration that she was married to Ahmed? Why would James Brown, and Respondent for that matter, enter into a consent order wherein Respondent agreed she would never claim to be James Brown's common law wife? James Brown did all of the above because the Respondent was married to Ahmed when she attempted to marry him.

Because facts cannot change, and the Respondent had no evidence, testimony or fact corroborating Ahmed bigamy, and she has stipulated to the same in this action, the Respondent was in a tough spot proving her marriage to Ahmed was bigamous in contravention to simultaneous actual and factual Respondent-Ahmed and Brown-Respondent marriage certificates. This tough spot forced Respondent to avoid pleading and arguing facts and instead to create twisting circular logic, contrary to law, that the CCFC Order resuscitated the void bigamous marriage to James Brown. Although, Johns, Lukich and Joye dispel the Respondents circular logic, Gary puts the nail in the coffin. **Facts do matter when it comes to bigamy.** ("[T]he courts must weigh the competing public policies."); *id.* (finding the public policy of not recognizing bigamous marriages outweighs the public policy favoring finality of judgments).⁷¹

This Court needs to ask who the wronged party is in this matter. Is it Respondent

⁷¹ Gary v. Lowcountry Med. Transp., Inc., 2018 S.C. App. LEXIS 37, *6-7 (Ct. App. 2018)

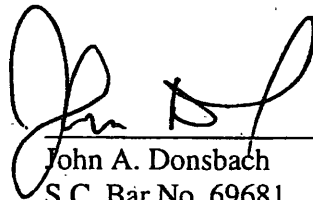
who: 1) signed pre-nuptials and other documents to never receive a share of James Brown's estate or claim to be his wife and was intentionally omitted from his will; 2) made allegations of bigamy but has actually never proven them, but by such allegations will be entitled to tens of millions in federal statutory copyright termination rights; or 3) in an effort to ensure receipt of these valuable copyright termination rights, negotiated a settlement with the Estate to keep it from pressing forward on the actual facts in this matter, wherein she and the Estate would agree to declare her the spouse in exchange for the Estate's right to share with her in tens of millions of dollars of copyright termination rights, rights that the Estate admits it would never actually be entitled to without the settlement⁷², thereby turning James Brown's estate plan on its head. Is it the Estate who: 1) has negotiated with a party, who provides mere allegations she is the wife, in order to gain significant financial advantage by and through tens of millions of dollars of federal copyright terminations, for the estate and remainder beneficiary trust, in direct contradiction to James Brown's actual estate plan, thereby directly harming the value of all of James Brown's children's federal statutory copyright termination rights by reducing them by half?; 2) has ignored its duty of impartiality required of a fiduciary and entered a settlement that benefits some of the heirs of the estate to the detriment of others?; or 3) clandestinely shrouded, and continues to shroud, portions of the settlement from the rightful biological heirs to the copyright terminations for purposes of its own financial gain while in league with the Respondent? Is it the Appellant, who for twelve years now, attempts to enforce his father's estate plan, as written, in the face of Respondent's factually devoid allegations that she is the wife and requests that his own federal

⁷² See Respondent's Joint Motion filed March 8, 2017, Exhibit A.

statutorily granted copyright termination rights be completely and fully upheld instead of reduced in half by such baseless allegations? This is what his Court has to decide. Who is the wronged party? It should be obvious.

Respondent is not the wife of James Brown, for all the foregoing reasons, the Appellant respectfully requests this Court hear this matter En Banc, vacate this panel's decision, and, at a minimum, reverse the lower court's grant of summary judgment to Respondent. However, based on S.C. Code § 20-1-80, Lukich, Gary, and all arguments placed before this Court, the grant of summary judgment should be reversed with a grant of summary judgment to Appellants declaring Respondent is not an heir of the Estate because she is not the surviving spouse of James J. Brown.

This 28th day of August, 2018.

A handwritten signature in black ink, appearing to read 'John A. Donsbach', written over a horizontal line.

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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

Appellate Case No. 2015-002417

RECEIVED

AUG 29 2018

SC Court of Appeals

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 28, 2018, he has caused a copy of the **REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO MOTIONS FOR REHEARING AND SUGGESTION OF REHEARING EN BANC OF APPELLANT TERRY BROWN** to be served on all counsel in this matter by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

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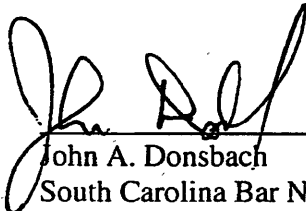
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August 28, 2018

VIA UPS OVERNIGHT DELIVERY

The Honorable Jenny Abbott Kitchings
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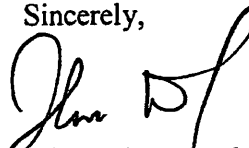
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AUG 29 2018
SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Reply to Respondent's Return in Opposition to Motions for Rehearing and Suggestion of Rehearing En Banc of Appellant Terry Brown and Proof of Service Thereof. Please file the original and six copies and return one copy to me in the enclosed self-addressed, stamped envelope. If you have any questions, please feel free to contact me. Thank you.

Sincerely,


John A. Donsbach

JAD/djg

Enclosures

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August 28, 2018

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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.

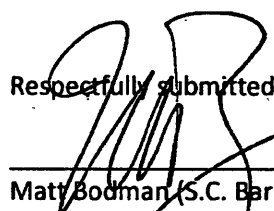
REPLY TO RESPONDENT'S RETURN TO APPELLANTS'
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Pursuant to Rule 240(f), Appellant Michael Deon Brown respectfully adopts in full the reply briefs and all arguments advanced by co-appellants Deanna Brown-Thomas, Yamma Brown, Venisha Brown, and Terry Brown in their replies to Respondent's Return to the Appellants Petitions for Rehearing and Suggestion for rehearing en banc.

Respectfully submitted,



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IN 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

Appellate Case No. 2015-002417

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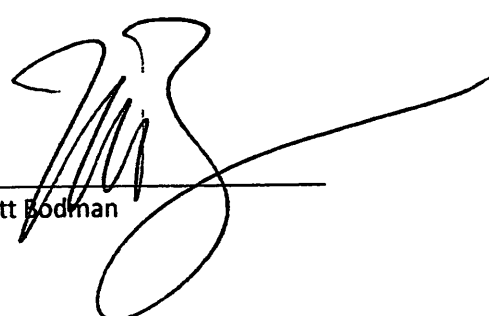
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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,
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ARGUMENT

Appellants Deanna Brown-Thomas, Yamma Brown and Venisha Brown (collectively “Appellants”) respectfully submit this Reply in Support of their Petition for Rehearing and Suggestion for Rehearing in *En Banc*.

I. REHEARING IS APPROPRIATE AND NECESSARY

Respondent’s brief studiously avoids the two key issues that require reversal of the trial court’s summary judgment order and the panels’ opinion. *First*, in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), our Supreme Court unambiguously ruled that a *post-hoc* annulment of a first marriage for any reason does not retroactively revive a bigamous second marriage, because any other holding would invite chaos and uncertainty on the fundamental question of a person’s marital status. *See Lukich v. Lukich*, 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008). *Lukich* explicitly provides that a person’s marital status and legal capacity to remarry is determined at the time that person attempts to remarry, yet Respondent ignores this rule and persistently argues that her subsequently obtained, wholly un-litigated 2004 Annulment Order retroactively validated her 2001 marriage to James Brown – three years prior. *Second*, while the Annulment Order terminated the Hynie/Ahmed marriage, and that termination is binding against the world as of 2004, it is black-letter law that the *in rem* Annulment Order’s purported underlying factual findings and conclusions of law are not binding on non-parties to that family court annulment proceeding – including James Brown and Appellants here. This conclusion is required by both the well-settled law governing the doctrine of collateral estoppel (or issue preclusion) and the limited preclusive effect of *in rem* orders.

Instead of forthrightly addressing these legal rules, Respondent presents a series of highly misleading straw-man arguments, each of which is irrelevant to the two key issues raised above that mandate reversal:

1. Contrary to Respondent's stance, determining Respondent's status as James Brown's surviving spouse in no way infringes the jurisdiction of the family court that issued the Annulment Order terminating the Hynie/Ahmed marriage. The trial court, sitting in probate, has exclusive jurisdiction to identify and determine the rights of the *heirs* to James Brown's estate. Such jurisdiction necessarily includes jurisdiction to adjudicate Respondent's claim to be Brown's *surviving spouse*. Moreover, the Annulment Order solely terminated the Hynie/Ahmed marriage as of April 15, 2004 – and Appellants do not seek to re-litigate or overrule this. Thus, no order of the trial court in this case can or would undo the termination of the Hynie/Ahmed marriage in 2004 or impinge upon the family court's jurisdiction. Respondent's repeated suggestion that Appellants somehow seek to reverse the family court's termination of the Hynie/Ahmed marriage is a fiction.

2. Respondent's position that James Brown would have been bound by the termination of the Hynie/Ahmed marriage in 2004 is also legally irrelevant, due to the bedrock rules governing *in rem* judgments and collateral estoppel. James Brown, as a non-party to the Annulment Action, would have been bound – like the rest of the world – only by the Annulment Order's termination of Hynie/Ahmed's *marital status* as of April 15, 2004, the date of the Order. That unremarkable fact in no way changes the law to mean that James Brown (or Appellants) would be bound by the Annulment Order's "findings," including the wholly unsupported allegation that Ahmed was a bigamist. To the contrary, under decades-long U.S. Supreme Court precedent, the Restatement (Second) of Judgments, and binding South Carolina precedent, the one and only aspect of the Annulment Order that bound James Brown or anyone else (besides

Respondent and Ahmed) is that the Hynie/Ahmed marriage terminated on April 14, 2004. That change of marital status in no way precludes Appellants right to litigate Respondent's unsupported claim that her marriage to Ahmed was supposedly bigamous, in the unlikely event that the Supreme Court's unequivocal holding in *Lukich* does not resolve this entire appeal.

3. Respondent's position that an annulment of a first marriage applies *retroactively* to resuscitate a bigamous second marriage, entered into before the first marriage was annulled, directly contradicts *Lukich*. Respondent cannot sweep aside *Lukich*'s admonition that the subsequent annulment of a first marriage – regardless of the grounds for annulment – does not serve to revive or validate a facially bigamous second bigamous marriage, as Respondent attempted to do here. Respondent is simply wrong to say that Appellants are applying *Lukich* inconsistently: under *Lukich*, the 1997 Hynie/Ahmed marriage barred Respondent from remarrying from 1997 to April 15, 2004, when the Annulment Order was entered. That is the reason her attempted 2001 marriage to Brown was ineffective. Respondent could have annulled her marriage to Ahmed before marrying Brown in 2001, or could have married Brown after April 15, 2004, but otherwise her marriage to Brown would be invalid in the eyes of the law. These results are wholly consistent with *Lukich*, and necessary to avoid the “chaos and uncertainty” that *Lukich*'s bright-line rule is intended to avoid. Nor can Respondent abrogate *Lukich* by citing earlier cases. Moreover, Respondent's citations only serve to undermine her unsupportable position. In *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), for example, the court rejected a putative wife's attempt to validate her second marriage by claiming that her first marriage was void for bigamy. That is precisely the erroneous position Respondent adopted in this case, contrary to the Supreme Court's mandate in *Lukich*, and prior precedent.

4. Respondent's final argument is an amalgam of non-sequitur statements, to the effect that the “finding” of Ahmed's bigamy in the Annulment Order can never be challenged by

a non-party to Annulment Action or reviewed by this or any court. Respondent cannot refute the well-settled law governing collateral estoppel and the limited preclusive effect of *in rem* judgments, so she dismisses them with a wave of the hand. Respondent's reason for avoiding a frank discussion of collateral estoppel is obvious, as the following dispositive elements are not remotely present in this case: (i) no Appellant was (or could have been) a party to the Annulment Action, nor in privity with a party to that action; (ii) as the trial court barred all discovery, Appellants have never been afforded a full and fair opportunity to take discovery and litigate the unsupported factual assertion that Ahmed was a bigamist, solely relied upon by Respondent to retroactively validate her facially bigamous marriage their father; and (iii) Ahmed's alleged bigamy was *never* "actually litigated" in the Annulment Action, as Ahmed did not appear, resulting in an effective default. Respondent deliberately muddled this clear-cut collateral estoppel analysis during oral argument before the panel, and tries to do so again in her brief.

When Respondent's extraneous arguments are properly stripped away, Respondent's case hinges on only one thing: her bare self-serving allegation that Ahmed was married to others when she married him in 1997. But remarkably, the undisputed facts expose that allegation of bigamy to be a total artifice. There is no evidence of Ahmed's alleged bigamy other than Respondent's unopposed self-serving hearsay at the 2004 annulment hearing that she was supposedly told that Ahmed had other wives in Pakistan. In fact, Respondent has admitted by stipulation that she has no other "evidence," and it is undisputed that no admissible evidence was presented to the family court in the Annulment Action. Indeed, in her brief Respondent does not even attempt to argue that Ahmed *was* in fact a bigamist – just that all courts, including this one, must accept the artifice of Ahmed's "bigamy" because it was included among multiple other purported grounds in the "hastily granted" Annulment Order which Respondent's counsel had drafted for the family court to sign. *Wilson v. Dallas*, 403 S.C. 411, 434, n. 16. Thus,

Respondent's stance that Appellants are bound by that single finding, in an *in rem* order in a case where they could not participate, is not merely wrong as a matter of law. Her position is wrong as a matter of basic fairness, an offense to the due process principles that animate the preclusion doctrines of South Carolina and every other State.

Finally, Respondent invokes her settlement with the Estate in an inappropriate attempt to curry favor and distract from the legal issues presented on appeal. That the Estate has abandoned its former staunch opposition to Respondent's spousal claim is not at all germane to the question of whether Respondent is James Brown's surviving spouse – and Respondent's suggestion that her undisclosed financial settlement with the Estate somehow ratifies her spousal claim is offensive. Contrary to Respondent's stance that the settlement reflects a generous gift from her to the Estate, the March 2017 settlement evinces just the opposite. The Estate's first attempted "Compromise Settlement Agreement" with Respondent (in 2009) would have gifted *her* 23.75% of Brown's entire estate, a clear unjust enrichment to Respondent; accordingly, the South Carolina Supreme Court rejected that attempted settlement in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013) and remanded the case back to the trial court. In response to the Supreme Court's rebuke, Respondent and the Estate worked in total secret to produce the March 2017 "settlement" – yet to this day Respondent and the Estate have concealed the full terms of their agreement from this Court and Appellants to whom the Estate owes a fiduciary duty.¹ Respondent's and the Estate's refusal to disclose their full settlement strongly evinces concealed terms that achieve the same unjust gift to Respondent that the Supreme Court invalidated in

¹ Appellants moved the circuit court to compel disclosure of all settlement terms to both the Court and Appellants themselves, but the circuit court denied the motion in a Form 4 order. Appellants appealed that decision, but the appeal was dismissed as interlocutory. Never once, in all of the briefing or argument devoted to the issue, has the Estate or Respondent claimed that the written document presented to this Court and Appellants as "the" settlement agreement is the full agreement between the parties, nor have they ever denied that there are secret, undisclosed settlement terms.

Wilson v. Dallas. Respondent cannot claim the virtue of her “settlement” while repeatedly refusing to disclose its full terms and her full benefits at the Estate’s and Appellants’ expense.

The Court should grant rehearing *en banc* to correct the manifest errors in the trial court’s summary judgment order and panel’s opinion, and put a long overdue end to Respondent’s gamesmanship.

II. THE FAMILY COURT ANNULMENT ORDER IS NOT DISPOSITIVE IN THIS CASE.

A. The Circuit Court has Subject Matter Jurisdiction to Decide and Appellants Have Standing to Participate in the Determination of Respondent’s Spousal Rights Under the Probate Code.

As the first of many straw-men, Respondent conflates the circuit court’s jurisdiction to hear this matter with the entirely separate issue of the *preclusive* effect of the findings of fact and conclusions of law in the 2004 Annulment Order, but ultimately all of her arguments are unavailing. The circuit court properly has subject matter jurisdiction over this matter and Appellants have standing because this matter arises under the South Carolina Probate Code, not in family court. The Probate Court has exclusive jurisdiction to determine the heirs of an estate, including purported spouses. *See* S.C. Code Ann. § 62-1-302 (a)(1); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, (2014); *see also* S.C. Code Ann. § 62-3-105. Respondent’s attempt to obfuscate Appellants’ standing on principles of intestacy (irrelevant to Brown’s estate) is without merit. Dispositive of this issue, the trial court in this case conclusively determined that Appellants are “interested persons” in multiple ways, and Respondent chose not to appeal that ruling, making that lower-court ruling the law of the case.

Moreover, Respondent’s overarching arguments regarding subject matter jurisdiction and standing are based upon another mischaracterization of Appellants’ arguments – namely, that Appellants seek to re-litigate the annulment of the Hynie/Ahmed marriage. As Appellants have clearly and repeatedly stated, they neither seek to undo, nor have any interest in undoing, the

Hynie/Ahmed annulment, and no relief sought here by Appellants would change that annulment. Contrary to Respondent's mischaracterization, Appellants do not dispute that the Family Court had jurisdiction to dissolve the Hynie/Ahmed marriage by way of annulment. The Annulment Order is conclusive as to the termination of the Hynie/Ahmed marriage as of April 15, 2004. It is not, however, dispositive on the ultimate issue in this probate dispute – whether Respondent is the surviving spouse of James Brown. For all of the reasons that follow and are contained in the briefing submitted in this matter, neither James Brown nor his children are bound by the purported factual findings and conclusions of law underlying the Annulment Order, as they were not parties or privies to that family court proceeding. The circuit court is the proper forum to decide the current dispute, which is not about whether the Hynie/Ahmed marriage was dissolved in 2004, but whether Respondent is James Brown's surviving spouse.²

B. Appellants Are Not Bound by Underlying Findings in an *In Rem* Order

As to the preclusive effect of the *in rem* Hynie/Ahmed Annulment Order, Respondent persistently conflates the binding effect of the annulment *itself* (i.e., that the marriage was forever terminated as of the date of the annulment) with the non-preclusive nature of the *findings of fact* and legal conclusions upon which it proceeds (including Ahmed's unproven bigamy). Respondent disingenuously continually accuses Appellants of attempting to "relitigate" the Hynie/Ahmed Annulment, when nothing could be further from the truth. Again, Appellants agree that the Hynie/Ahmed marriage was terminated on April 15, 2004, the date of the

² Relatedly, Respondent's frivolous assertion that Appellants effectively ask the circuit court sitting in probate jurisdiction to issue an annulment order is without merit. (Resp. Ret. p. 3 n. 7.) Nothing in this matter requires the circuit court to "overturn" the family court (particularly inasmuch as the family court listed several factual findings supporting the annulment that were wholly unrelated to bigamy in its Order). Nor do Appellants request that the circuit court issue a "posthumous annulment". Rather, Appellants simply seek for the circuit court to hold the exact same proceeding that took place in *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906) and determine whether Respondent is Brown's surviving spouse.

Annulment Order. Appellants have no interest in reviving the Hynie/Ahmed marriage. If this trial court found on the merits that the Hynie/Ahmed marriage was not bigamous (as it must because there is *no admissible evidence* whatsoever to support this conclusion), the *in rem* 2004 Annulment Order would stand unaffected.³

Respondent's straw-man "relitigation" argument keep cropping up because her success in this action solely hinges upon binding Appellants to the factual findings from an *in rem* proceeding to which they were never joined as parties, and in which they could not have intervened. This is, however, absolutely and fundamentally contrary to well-established law. The Annulment Order, as a judgment *in rem*, binds the entire world only as to its dissolution of the Hynie/Ahmed marriage on the date of the order. See *Carnie v. Carnie*, 262 S.C. 471, 167 S.E.2d 297, (1969). However, a judgment *in rem* 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." Restatement (First) of Judgment § 73 (1942) (1942), cmt. c. The trial court's decision and the panel's opinion that Appellants are bound by the factual findings in the 2004 Annulment Order is directly contrary to black-letter law.

As held by the United States Supreme Court: "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

³ Moreover, alleged bigamy is but one of many grounds for the 2004 Annulment. Thus, even in Respondent's imaginary universe where Appellants desire to "undo" the Hynie/Ahmed Annulment, such annulment would be wholly unaffected by a ruling on the merits in this case that Ahmed was not married when he and Hynie wed.

omitted); *see also Gratiot County State Bank v. Johnson*, 249 U.S. 246, 248, 39 S. Ct. 263, 263 (1919) (“judgments 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 explicit, bright-line rule makes perfect sense given that family court proceedings often involve sensitive factual allegations in the context of a proceeding where no one else has any ability whatsoever to appear.⁴

Because Appellants were not parties to the annulment action, the factual findings contained in the Annulment Order are not binding on Appellants, plain and simple. Yes, the Annulment Order conclusively established that Respondent and Ahmed were no longer married as of April 15, 2004. It does not, however, establish, nor even tend to establish, any of the so-called “facts” on which the Annulment Order was based, including its wholly unsupported “finding” of fact (drafted by Respondent’s counsel) that Ahmed was already married – the sole fictitious basis for Respondent’s unsupportable spousal claim in this case.

Respondent weakly tries to erase the distinction between an *in rem* change in marital status (which is binding on the world), and a finding of fact or law in an *in rem* order (which is not), by redefining “status” to *include* the unproven finding of Ahmed’s purported bigamy in the 2004 Annulment Order.⁵ This unprincipled word game reflects a disregard for established law and must be rejected. According to the Restatement, “the existence of a *status*” determined by an *in rem* judgment excludes any “fact upon which the judgment is based.” Restatement (First) of Judgments §73 (1942), note a, cmt. c (emphasis added). And according to the U.S. Supreme Court, the status determination in an *in rem* order excludes any “subsidiary questions of law on

⁴ Respondent’s desire to make the factual findings contained in an *in rem* order binding is not only wholly unprecedented but dangerous, particularly where the reputations and interests of third-parties who are unable to intervene to protect themselves are involved.

⁵ Resp. Ret. p. 18.

which it is based[.]” *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919). By conflating a “status” determination (*i.e.*, termination of marriage) with the “subsidiary questions” on which that determination was partly based (*i.e.*, Ahmed’s alleged bigamy), Respondent seeks to reverse bedrock law and undo the obvious distinction between an *in rem* status determination and a subsidiary finding of fact or law. Moreover, under South Carolina law, a “status” determination in an *in rem* divorce decree or annulment order includes only the determination of whether the parties’ marriage is valid, dissolved or terminated as of the date of the decree or order. *Johns v. Johns*, 309 S.C. 199, 204, 420 S.E.2d 856, 860 (Ct. App. 1992); *State v. Sellers*, 140 S.C. 66, 134 S.E. 873, 877 (1926). Nothing else about such an *in rem* order is binding upon anyone not a party to the proceeding.⁶ No authority suggests that the concept of “marital status” can be expanded to include factual or legal questions that underlie whether a marriage is extant or not extant, and Respondent presents no reason to enact such a disruptive change in the law now.

Notably, Prof. Homer H. Clark’s commentary quoted and highlighted in Respondent’s own brief strongly confirms that only the *change in status* of the Hynie/Ahmed marriage (*i.e.*, its termination), not any underlying findings in the Annulment Order, can bind third-parties. Prof. Clark cites the “well-established rule that” a divorce decree or annulment “is conclusive on third parties *with respect to the termination of the marriage*”; thus, Prof. Clark accurately states the

⁶ Likewise, Respondent’s continued emphasis on the “unappealed” nature of the annulment order is nonsensical. Respondent repeatedly points out that James Brown had no standing to participate in the Hynie/Ahmed Annulment Action, a proposition the panel’s opinion appears to accept, and Ahmed (the only party with any ability to appeal) knew nothing of it.

case law by specifically qualifying that only the marital status change of “*termination*” binds non-parties, not any subsidiary factual findings in the divorce decree or annulment order.⁷

Applying the “well established rule” of *in rem* judgments here, Respondent’s marriage to Ahmed is annulled as of April 15, 2004. But Appellants are not bound by any of the Annulment Order’s underlying findings. Thus, to the extent that the factual issue of whether Ahmed was married to an unidentified other person when Respondent chose to marry him is even relevant under the *Lukich* analysis (it is not), Appellants are guaranteed constitutional due process to litigate that factual question – not to “undo” the annulment, but to determine Appellants’ legal rights, which the lower court and the panel have effectively denied.

C. Appellants Are Not Collaterally Estopped From Litigating Whether Respondent is the Surviving Spouse of James Brown.

Respondent’s brief makes only the most conclusory statement that the “elements of collateral estoppel are [] met” to bind Appellants to the findings in the Annulment Order.⁸ But Respondent’s effort to skip over a genuine analysis of collateral estoppel loudly signals that Appellants are in no way precluded from litigating the issue of fact which Respondent claims is dispositive of this case: whether Ahmed was purported already married when he married Respondent. To this day, that bare allegation has remained untested in a court of law, and Respondent has stipulated that she has no evidence whatsoever to support the allegation other than her own (self-serving hearsay) testimony at the 2004 annulment proceeding.

It is axiomatic that the doctrine of collateral estoppel or issue preclusion prevents a party to a prior action from re-litigating an issue that was decided in that action. *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554 684 S.E.2d 779, 782 (Ct. App. 2009). For

⁷ Resp. Ret. p. 15 (quoting 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added)).

⁸ Resp. Ret. P. 23.

collateral estoppel to apply to a party, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Id.* Thus only a party to an action who had a “full and fair opportunity to previously litigate the issue” therein may be collaterally estopped by such action. *Id.* In cursory fashion, the panel mistakenly concluded that Appellants are collaterally estopped from challenging the findings of the Annulment Order, even though they clearly were not parties or in privity with any party to that family court proceeding, nor could they have intervened. *See Ex parte GEICO*, 373 S.C. 132, 138–139, 644 S.E.2d 699, 702 (2007) (holding that a third party does not have standing to intervene in a family court action despite an interest in the validity of the marriage).

It is undisputed that neither Appellants’ nor Brown’s legal interests were determined in the Hynie/Ahmed Annulment proceedings. *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.”) Nor was any finding regarding Brown’s marriage to Respondent included in the Annulment Order. Brown did not attend any hearings, nor is there any assertion that he exerted any control over the legal strategies or theories advanced in the Hynie/Ahmed proceeding. Brown and Respondent’s interests were not even aligned, as Brown had separately sought to terminate his own marriage to Respondent, a proceeding which culminated in a settlement wherein Respondent agreed that she would never even claim to be Brown’s “common law” wife.

In an unpersuasive attempt to evade Appellants’ non-party status, Respondent argues that Brown was somehow in privity with Respondent merely because he paid her legal fees. However, due to the severe legal consequences that flow from collateral estoppel, privity is very strictly construed with respect to issue preclusion. *Wade v. Berkeley County*, 330 S.C. at 317, 498 S.E.2d at 687. The law is crystal clear that the payment of another party’s legal fees does

not render one in privity with that party. See Restatement (Second) of Judgments § 39, cmt. c, at 384 (1982). Respondent cites one 1934 Kentucky case in support of her tenuous argument, decided prior to publication of the second series of Restatements, but this case will not overcome strongly worded Fourth Circuit precedent, which, in turn, cites the Restatement (Second) of Judgments on this exact point: “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....” *Virginia Hosp. Ass’n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) (citing Restatement (Second) of Judgments § 39 comment c, at 384 (1982)); see also *Kunst v. Loree*, 404 S.C. 649, 656, 746 S.E.2d 360, 363 (“South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel.”). Moreover, the idea that payment of some legal fees automatically results in the level of involvement and control required for privity directly contradicts the admonishment in South Carolina Rule of Professional Conduct 1.7, which expressly provides that the mere payment of legal fees cannot confer any right of control over the legal proceedings in question.

Even setting aside that Appellants were not parties or privies to the Hynie/Ahmed Annulment, the issue of whether Ahmed was actually married to another was never “actually litigated” in the Charleston County family court annulment. Even the Supreme Court recognized, *sua sponte*, that the Hynie/Ahmed annulment was “hastily granted.” *Wilson v. Dallas*, 403 S.C. 411, 434 n.16, 743 S.E.2d 746, 759 n.16 (2013) (“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.”). It is undisputed that Respondent and her counsel ran to the Charleston County family court on December 15, 2003 to obtain a

quickie annulment of the Hynie/Ahmed marriage⁹ upon news that Brown would shortly file for annulment (on January 29, 2004) after he learned that Respondent was already married to Ahmed (a fact she concealed from him).¹⁰ In the Hynie/Ahmed annulment proceeding, service of Ahmed was by publication and, unsurprisingly, he did not appear as presumably he had no actual notice of the action. Respondent's uncontested and one-sided annulment hearing was held on April 15, 2004, and the Annulment Order her counsel submitted was signed the very same day.¹¹ Respondent had asserted several alleged grounds for annulment, supported solely by her unopposed, self-serving hearsay testimony; yet the Annulment Order (prepared by Respondent's counsel) listed and adopted each of these purported grounds by rote.

Despite Respondent's attempt to characterize the annulment as a decision on the merits, the facts remain that Ahmed never appeared, never answered the complaint or otherwise pled, and never participated in any hearing or otherwise defended himself against Respondent's sudden and convenient accusations.¹² There was zero evidence presented at the perfunctory annulment hearing other than Respondent's own self-serving and completely uncorroborated testimony, replete with inadmissible hearsay and double hearsay. These circumstances constitute the very essence of a default judgment to which the doctrine of collateral estoppel also never applies. *State v. Bacote*, 331 S.C. 328, 330 S.E.2d 161, 163 (1998); *Kunst*, 404 S.C. at 649, 746 S.E.2d at 360.¹³

⁹ R. pp. 271–273, Joint Stipulation, Exhibit 5.

¹⁰ R. pp. 349–350, *Id.*, Exhibit 19.

¹¹ R. pp. 293–313, *Id.*, Exhibits 12, 13.

¹² R. p. 257, *Id.*, ¶ 17.

¹³ Respondent fails to support the nonsensical argument that simply because the annulment of a marriage is important, the uncontested annulment proceedings where Ahmed never appeared did not effectively result in a default judgment. Resp. Br. p. 48. Nor can Respondent seriously claim that the annulment order was not a default judgment merely because Respondent did not formally *move* for a default judgment: at the annulment hearing, Respondent's counsel urged the

Nor have Appellants ever been afforded the full and fair opportunity to litigate whether Respondent is the surviving spouse of James Brown. The stakes are far too high for the truth to be hidden behind the “hastily granted” Annulment Order based on nothing more than Respondent’s self-serving hearsay. *Wilson v. Dallas*, 403 S.C. at 434. Thus, even notwithstanding the simple truth that the fundamental requisites for collateral estoppel are not present as to the Appellants in this case, because the doctrine of collateral estoppel is “grounded upon concepts of fairness,” courts always retain discretion to decline to apply it where, as here, it would be highly inequitable and/or thwart the truth-seeking mission of every court. *Bacote*, 331 S.C. at 331, 503 S.E.2d at 163.

Indeed, this Court recently reaffirmed that the public policy against bigamy must outweigh the possible application of collateral estoppel to situations where bigamy is potentially at issue, just as in this case. Respondent misses the irony in her interpretation of *Gary v. Gary*, Op. No. 5563 (S.C. Ct. App. filed May 23, 2018) (Shearouse Adv. Sh. No. 21 at 113), when she accuses Appellants of “bootstrapping” a “bare claim of bigamy” to this case.¹⁴ Thus, Respondent gets the holding of *Gary* entirely backwards. This case presents a straightforward issue of bigamy because Respondent was indisputably married to Ahmed *at the time* she tried to marry Brown in 2001. By contrast, in support of Respondent’s claim of *Ahmed’s* purported bigamy, there is no evidence, no proven facts, and there has been no discovery. There is only a “bare” annulment order containing numerous purported grounds for the annulment. *Gary*

family court to enter judgment against Ahmed, arguing, “[t]he Defendant, I guess, arguably is in default”. Having obtained the uncontested annulment order she asked for, Respondent cannot now claim that the one-sided findings in that order (which her counsel drafted) were “actually litigated.”

¹⁴ Resp. Ret. p. 37-38.

forcefully instructs that South Carolina's imperative against bigamy requires, at a minimum, actual litigation of Ahmed's alleged bigamy.

Appellants are merely seeking the opportunity to take discovery and present admissible evidence and facts to the court regarding the nature of Respondent's two purported marriages. It is Respondent who seeks to undermine the due process based upon misleading mischaracterizations of her 2004 Annulment proceeding and casting a blind eye to the doctrine of estoppel. What is binding is the "annulled" status of the Hynie/Ahmed marriage as of the date of the family court order, not its purported bigamy finding. The doctrine of collateral estoppel does not and cannot be applied here, where the "truth-seeking mission" of this Court is needed to continue to protect the public policy against bigamy. *Bacote*, 331 S.C. at 331, 503 S.E.2d at 163.

The 2004 Annulment Order is solely binding as to the terminated status of the Hynie/Ahmed marriage as of April 15, 2004, the date of the order. The trial court and panel gravely erred in concluding that all the findings and conclusions in the Annulment Order were preclusive and binding upon non-parties, like Appellants, and in preventing Appellants from taking *any discovery* as to Respondent's uncorroborated claim that her belatedly annulled marriage to Ahmed was bigamous. This Court, however, need not even reach that error, due to the Supreme Court's overriding holding in *Lukich* that the annulment of a first marriage, *for any reason*, after a second marriage cannot revive the bigamous second marriage as a matter of law and public policy.

III. LUKICH BARS THE ANNULMENT ORDER FROM HAVING RETROACTIVE EFFECT

Respondent continues to argue that her second bigamous marriage was not really bigamous because her first bigamous marriage was supposedly bigamous. It is undisputed that at the time Respondent attempted to marry James Brown in 2001, she well knew that she had

previously obtained a marriage license with Javed Ahmed and participated in a marriage ceremony with Javed Ahmed in 1997. When Respondent attempted a second marriage, the critical moment in time under *Lukich*, she had not sought any annulment or divorce of her marriage to Ahmed (but instead, she intentionally concealed her first marriage from Brown and the State of South Carolina). Those facts alone compel one result under *Lukich*: the attempted Hynie/Brown marriage was void under the bigamy statute, because the Hynie/Ahmed marriage had not been “declared void by the sentence of a competent court.” S.C. Code Ann. § 20-1-80.

Respondent’s claim that the Hynie/Brown marriage was valid hinges on one argument: that the bigamy statute does not require a married person to annul her prior marriage *before* marrying again.¹⁵ By taking that counterintuitive stance, Respondent openly contradicts *Lukich*’s central holding, and essentially tries to re-argue the *Lukich* case. However, *Lukich* foreclosed Respondent’s argument. Under *Lukich*’s common-sense, bright-line rule, a first marriage cannot be retroactively annulled, after a bigamous second marriage, in order to revive that second marriage.

Thus, *Lukich* makes clear that Respondent’s attempted marriage to James Brown was void for bigamy and was not resuscitated by Respondent’s *post-hoc* annulment of her first marriage on any ground. According to *Lukich*, South Carolina’s bigamy statute “speaks to the status quo at the time the marriage was contracted, and *does not contemplate either a prospective or a retroactive perspective.*” *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 (emphasis added)). The Supreme Court rightly concluded that “[a]ny other construction of S.C. Code Ann. § 20-1-80 would lead to uncertainty and chaos”, exemplified here by Respondent’s tortured arguments to arrive at a polar-opposite result. *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

¹⁵ Resp. Ret. p. 14.

In attempting to evade *Lukich* and its practical, common-sense upholding of South Carolina's strong public policy against bigamy, Respondent continues to argue that the unequivocal rule set forth in *Lukich* without any exceptions, applies only to "voidable" marriages, not "void" marriages. *Lukich* says no such thing, and Respondent's mantra that bigamous marriages are void *ab initio* amounts to a distinction without a difference here. All annulled marriages are declared void *ab initio*. *Splawn v. Splawn*, 311 S.C. at 425, 429 S.E.2d at 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*."). Reflecting this rule, *Lukich* does not distinguish between void and voidable marriages.¹⁶ The Supreme Court refrained from making any distinction between annulments of "void" and "voidable" marriages because the statute contains no such distinction in determining whether a second marriage is bigamous and because the same "uncertainty and chaos" would result from *post-hoc* annulments of a prior marriage, regardless of the alleged grounds for annulment. Instead, the Supreme Court reaffirmed that such a void/voidable distinction would be a "legal fiction": "[i]t would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes yet can serve as the foundation for a family court's division of property, alimony, and/or child support." *Lukich*, 379 S.C. at 592-93, 666 S.E.2d at 907 (citing *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004)). The undisputed fact that bigamous marriages are void *ab initio* does nothing to alter or alleviate *Lukich*'s concern over the chaotic inability to ascertain a marriage's validity *at the time of marriage* if that were later subject to the parties' choices and legal maneuvering at an indeterminate time, years after that marriage.

¹⁶ Respondent also argues that the Supreme Court has expressed no view as to whether her marriage to James Brown was void under *Lukich*. While it is true that the *Wilson v. Dallas* opinion contains no indication of a majority opinion on that subject because it was not properly before the Supreme Court at that time, at least one former Justice repeatedly suggested during oral argument that *Lukich* barred Respondent's claim to be the surviving spouse.

subject to the parties' choices and legal maneuvering at an indeterminate time, years after that marriage.

Respondent's disingenuous plea that she should not be asked to re-litigate the circumstances surrounding her first marriage to Ahmed, simply describe a mess of her own making and does not trump well-settled South Carolina law. If Respondent had properly addressed her prior marriage to Ahmed before attempting to marry James Brown, we would not be here. But, having chosen not to do so, Respondent does not get a special exemption from the established South Carolina rule that an annulment order does not have retroactive effect so as to validate a facially bigamous second marriage. If Respondent wanted to rely upon an *in rem* annulment order, then she should have obtained one prior to marrying Brown, instead of concealing her first marriage. Respondent inadvertently concedes this point by asserting that, under South Carolina law, "a bigamous marriage is never valid".¹⁷ Appellants agree, and that is why, under *Lukich*, Respondent was required to annul her marriage to Ahmed *before* attempting to marry Brown: her facially bigamous marriage to Brown could not be retroactively validated years later because "a bigamous marriage is never valid".

Thus, under South Carolina law, the legal capacity to contract a new marriage is not cleared until *after* an annulment order is issued by a competent court. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907; S.C. Code Ann. § 20-1-80. Here, Respondent actively obtained a marriage license and engaged in a marriage ceremony with Ahmed in 1997.¹⁸ In the five years between her marriage to Ahmed and her attempted marriage to James Brown, Respondent could have

¹⁷ Resp. Ret. p. 4.

¹⁸ R. p. 256, Joint Stipulation, ¶ 6.

readily obtained an annulment of her first marriage. Instead, she chose to hide her marriage to Ahmed from both Brown and the State of South Carolina.¹⁹

South Carolina law should not and does not condone or reward such conduct. A person desiring legal marriage has both a legal and moral obligation to ensure that he or she is legally eligible to re-marry *before* attempting to re-marry. This includes, of course, the resolution of any prior marriage *before* undertaking to marry once again. See *Johns v. Johns*, 309 S.C. 199, 202-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992) (noting that even “good faith” will not change this bright-line rule). In the eyes of the law, what matters is that Respondent’s “first marriage shall have been declared void by the sentence of a competent court” *before* she attempted to remarry in 2001. S.C. Code Ann. § 20-1-80.

Respondent badly misstates the holding in *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003), which does not involve the retroactive use of an annulment order to validate a subsequent marriage. At issue in *Joye* was the payment of alimony by a first husband to his ex-wife, who subsequently remarried but then obtained an annulment of that second marriage due to her new husband’s bigamy. The sole issue in *Joye* was “[w]hether [the] annulment *reinstates*” the first husband’s alimony obligations from the date of the annulment going forward. *Id.* at 454, 586 S.E.2d at 133. Thus, nothing in the *Joye* decision stands for the proposition that a post-hoc annulment of a first marriage can be used to retroactively validate a bigamous second marriage, the very argument *Lukich* rejected.

To the contrary, *Joye* firmly contradicts Respondent’s position. First, the Court held that, “regardless of whether” the first husband’s alimony obligation *restarts* from the time of the annulment of the second marriage, there is “no obligation to pay *retroactive* alimony [] for the time period” of the second marriage – strongly confirming the South Carolina rule that an

¹⁹ R. pp. 329-335, Joint Stipulation, Exhibits 15-16.

annulment of a bigamous marriage does not apply retroactively. *Id.* at 457, 586 S.E.2d at 134. Second, the Court expressly rejected “the void/voidable approach” that Respondents urge here, refusing to adjudicate the case based on “whether the subsequent marriage was [] void *ab initio* or voidable.” *Id.* at 455, 586 S.E.2d at 133.²⁰ Accordingly, *Joye* held that the first husband was retroactively not bound by the bigamy finding in the order annulling his ex-wife’s remarriage, and was entitled to litigate whether the ex-wife’s second marriage was in fact bigamous. Thus, contrary to Respondent’s distortions, the Supreme Court expressly recognizes well-established law that a third-party may challenge the contents of a prior annulment order to which he or she was not a party. *Id.* at 457, 586 S.E.2d at 134.²¹

Importantly, the case law cited by Respondent only undermines Respondent’s claims. Respondent cites *State v. Sellers*, 140 S.C. 66, 134 S.E. 873 (1926), and *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), for the proposition that courts are capable of reviewing the validity of multiple marriages at once. That is, of course, exactly what Appellants are seeking and entitled to in this proceeding. It is Respondent who attempts to hijack these proceedings by improperly interposing the Hynie/Ahmed Annulment Order as preclusive and dispositive on all questions, which is flatly contrary to law.

Moreover, Respondent misstates the issues presented in *Sellers* and *Hallums*. First, and importantly here, the *Sellers* Court was concerned about the binding nature of marriage being undercut when court orders are not obtained prior to attempting a subsequent marriage. The concern was rooted in situations similar to the one presented here – groundless annulments based

²⁰ Rather, as to the issue of reinstatement of alimony payments, *Joye* instates a “case by case approach,” where the court considers factors including “whether the [wife’s] subsequent marriage was properly annulled.” *Joye*, 355 S.C. at 456, 586 S.E.2d at 134 (citing *In re Marriage of Cargill*, 843 P.2d 1336 (Colo. 1993)).

²¹ Respondent admits in her Return that her surviving spouse claim detrimentally impacts Appellants’ unique personal interests.

upon nothing more than the self-serving testimony of people who simply changed their minds. In *Sellers*, the pivotal fact was the putative wife's age, which was easily provable and not disputed. Of course, this case presents the opposite scenario, where the pivotal fact of Ahmed's alleged bigamy is disputed, is not readily provable, and was never demonstrated or even supported by any admissible evidence.

It is also of no small importance that *Sellers* is a criminal case, where the stakes and burden of proof of bigamy are higher. This case is not a criminal case. There is no discussion of punishment, but instead whether Respondent should be rewarded for her concealment and failure to resolve her first marriage before attempting her second marriage.

Second, *Hallums* confirms that there is *no presumption of validity of Respondent's attempted marriage to Brown*. As is the case here, the putative wife in *Hallums* attempted to prove the validity of her second marriage by claiming her first marriage was void *ab initio* due to the alleged bigamy of her first husband. The *Hallums* Court refused to reward her with the status of surviving spouse, noting that, as here, the first husband was not available to defend himself, and refused to declare him to be a bigamist in the absence of any evidence other than the wife's self-serving testimony. The family court that entered the Hynie/Ahmed Annulment Order did what our Supreme Court in *Hallums* refused to do: It declared a man unavailable to defend himself to be a bigamist based upon nothing more than the self-serving testimony of his wife. Yet Respondent takes this unfair factual scenario miles further and now seeks to bind Appellants – strangers to that annulment action – to all the purported findings in the “hastily granted” 2004 Annulment Order without recourse or any semblance of due process.

Hallums stands in a long line of cases that forbid what Respondent attempted here, and *Lukich* reaffirms that prohibition by unequivocally holding that annulment orders can never be used retroactively to validate a subsequent marriage.

IV. RESPONDENT BEARS THE ULTIMATE BURDEN OF PROOF AS THE INDIVIDUAL CLAIMING SPOUSAL PRIVILEGES.

Respondent's arguments regarding the burden of proof at issue in this matter again attempts to evade the issues by conflating them. The trial court and panel's disregard of established rules governing collateral estoppel and the limited preclusive effect of in rem orders, like the Annulment Order, in no way changes Respondent's burden to prove her central claim in this case: that her 1997 marriage to Ahmed was bigamous.

It is clear that Respondent has the burden of proving she is the decedent's "surviving spouse" in each of her will and trust challenges. See *Byrd v. Byrd*, 279 S.C. 425, 426–27 308 S.E.2d 788, 789 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982). In this case, however, Respondent's production of a marriage certificate, showing that she and Brown engaged in a marriage ceremony on December 14, 2001, is insufficient to carry that burden of proof. As Respondent still cannot deny, despite her protestations, she *stipulated* that (i) she procured a 1997 marriage license to marry Ahmed, (ii) she participated in a 1997 marriage ceremony with Ahmed, and (iii) her marriage to Ahmed had not been annulled at the time she improperly procured the Hynie/Brown marriage certificate.²² By asserting that *Appellants* have the burden of proving the validity of the prior *Hynie/Ahmed marriage*, Respondent asks to be relieved from the legal effect of her stipulated facts from the summary judgment record. But Respondent cites no authority, and Appellants are aware of none, to justify ignoring on appeal her stipulated facts that establish a *prima facie* case that Hynie and Ahmed married in 1997.

Ironically, Respondent ignores the Supreme Court's pointed admonition in *Lukich* regarding the "chaos" that would result if subsequent annulment orders were retroactively

²² R. p. 256, Joint Stipulation, ¶ 6.

applied to revivify bigamous second marriages, but tries to sway this Court with vague policy arguments about “chaos in the law of marriage”. She erroneously charges Appellants with shifting the burden of proving a marriage’s validity onto those who are married, to distract the Court from the uncontroverted fact that Respondent was secretly already married at the time she tried to marry Brown anyway. As with all her other assertions here, this argument is a straw man. Appellants do not suggest that the burden is on every remarried person to prove the validity of their second marriages to third parties.²³ But in *this* case, the law demands that a party seeking spousal benefits in a probate proceeding be prepared to prove that her admitted first marriage was legally terminated prior to her a purported second marriage with the decedent.

Because the factual stipulations, exhibits and affidavits of record overcome the presumption that the Hynie/Ahmed marriage was dissolved by death or divorce, there is a legal presumption that the Hynie/Ahmed marriage was *valid*. See *Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906), relied upon in *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). As Respondent challenges her marriage to Ahmed on grounds of his alleged bigamy, and has wholly failed to meet her burden of presenting any *admissible* evidence that Ahmed was married to another at the time Respondent married him, her marriage to Brown was void as bigamous. S.C. Code Ann. § 20-1-80; *E.D.M.*, 307 S.C. at 475, 415 S.E.2d at 815; *Yarbrough*, 280 S.C. at 550, 314 S.E.2d 16, 18 (citing 52 Am. Jur. 2d *Marriages*, § 130 (1970)).

The Annulment Order itself cannot serve as evidence of Ahmed’s bigamy because the South Carolina Supreme Court has adopted the holding of *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993), 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.

²³ Resp. Br. p. 71.

392, 402, 570 S.E.2d 176, 181 (2002).²⁴ Indeed, Respondent tacitly concedes that her sole basis for trying to admit the Annulment Order's findings as evidence in this case is her erroneous assertion that the Order's findings are "legally binding" on Appellants.²⁵ But because that assertion is based on multiple reversible errors, as discussed above at Parts II.B-C. Respondent has no grounds for citing the Annulment Order as evidence to contradict her conclusive stipulations admitting to her 1997 marriage to Ahmed.

The lower court therefore made a fundamental error of law in mis-assigning the burdens of proof.²⁶ Notwithstanding that *Lukich* is already dispositive of this issue, because Respondent had the burden of proof, and the Annulment Order is incompetent as evidence of Ahmed's bigamy, the trial court should have granted summary judgment to Appellants because the Annulment Order was the *only* purported "evidence" presented by Respondent to support her bigamy allegations. See *Fairfield County Sch. Dist. Bd. of Trs. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014); *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

CONCLUSION

Despite the serial digressions and distortions in Respondent's brief, Respondent cannot avoid the bedrock legal principles that dispose of her spousal claim. *First*, Respondent's attempted 2001 marriage to Brown was bigamous on its face due to her 1997 marriage to Ahmed and cannot be retroactively revived by her 2004 annulment of her prior marriage. Under the bright-line rule emphasized by the Supreme Court in *Lukich*, Respondent's after-the-fact 2004 annulment of her first marriage has no retroactive application or effect, so as to resuscitate her

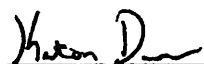
²⁴ Respondent's disingenuous argument that Appellants refute the collateral estoppel effect of the Annulment Order based on *Nipper* is yet another strawman mischaracterization with no basis.

²⁵ Resp. Ret. p. 10.

²⁶ R. p. 96, MSJ Order, at p. 44.

facially bigamous second marriage. *Second*, even apart from *Lukich*, the 2004 Annulment Order's finding of Ahmed's supposed bigamy is not binding on non-parties to the 2004 Annulment Action, including James Brown and Appellants, under our longstanding rules governing collateral estoppel and the limited preclusive effect of *in rem* judgments. Thus, in the unlikely event that *Lukich* does not resolve this entire case, Appellants, who were not and could not have been parties to the 2004 Annulment Action, are fully entitled to litigate the question of Ahmed's alleged bigamy, which has never been actually litigated and for which to this day Respondent has presented and has no admissible evidence. The fundamental requirements of due process cannot abide Respondent's extreme position that no court or party can ever challenge her self-invented claim to be Brown's surviving spouse, even though she had concealed her marriage to Ahmed and her attempted marriage to Brown was clearly bigamous - all in violation of strong South Carolina public policy.

Respectfully submitted,

 on behalf of Robert C. Byrd

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August 29, 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

RECEIVED
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SC Court of Appeals

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 29, 2018, s/he has caused a copy of the
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APPEAL FROM AIKEN COUNTY
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Doyet A. Early, III, Circuit Court Judge

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**MOTION TO SUBSTITUTE TABLE OF CONTENTS AND TABLE OF AUTHORITIES
IN APPELLANTS' REPLY IN SUPPORT OF PETITION FOR
REHEARING AND SUGGESTION FOR REHEARING EN BANC**

The Appellants, Deanna Brown-Thomas, Dr. Yamma Brown, and Venisha Brown, through their counsel, hereby move the Court for leave to substitute the Table of Contents and Table of Authorities in the Appellants' Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc with the Table of Contents attached hereto as Exhibit A and the Table of Authorities attached hereto as Exhibit B. Unintentional clerical errors exist in both the Table of Contents and Table of Authorities contained in the Reply filed by Appellants yesterday, and these errors are believed to have occurred due to a software issue. Specifically,

the pagination included in the Table of Contents and Table of Authorities did not update correctly, and several cases were deleted from the Table of Authorities. The Table of Contents and Table of Authorities attached as exhibits to this motion have been corrected to reflect the actual contents of Appellants' Reply. No changes were made to the substantive portions of the brief, only the Table of Contents and Table of Authorities.

Respectfully submitted,

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August 30, 2018

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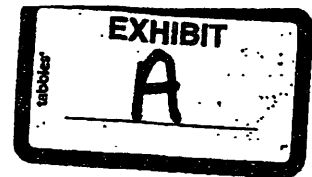


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RECEIVED
AUG 30 2018
SC Court of Appeals

**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 *MOTION TO SUBSTITUTE TABLE OF CONTENTS AND TABLE OF AUTHORITIES IN APPELLANTS' REPLY IN SUPPORT OF 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 motion.

By copy of this letter, we are serving all parties of record with a copy of the motion. 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:kxl
Enclosures

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

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The South Carolina Court of Appeals

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 Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

Appellate Case No. 2015-002417

The Honorable Doyet A. Early, III
Aiken County

Trial Court Case No. 2013CP0202849, 2013CP0202850

ORDER

The motion to substitute the Table of Contents and Table of Authorities in the appellants' reply filed on behalf of Appellants Deanna Brown-Thomas, Dr. Yamma Brown and Venisha Brown is Granted.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

FILED

August 31, 2018

Columbia, South Carolina

cc:

Robert N. Rosen, Esquire
S. Alan Medlin, Esquire
Thomas Heyward Carter, Jr., Esquire
Andrew W. Chandler, Esquire
M. Jean Lee, Esquire
David Lawrence Michel, Esquire
Arnold S. Goodstein, Esquire
Robert C. Byrd, Esquire
John Andrew Donsbach, Sr., Esquire
Matthew Day Bodman, Esquire
David B. Bell, Esquire
Marc Toberoff, Esquire
Alyson Smith Podris, Esquire
Katon Edwards Dawson, Jr., Esquire
The Honorable Doyet A. Early, III



The South Carolina Court of Appeals

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CLERK

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October 10, 2018

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Re: In Re: The Estate of James Brown
Appellate Case No. 2015-002417

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable Doyet A. Early, III

The South Carolina Court of Appeals

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 Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

Appellate Case No. 2015-002417

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.


Paul E. Short, Jr. J.
Paul E. Thomas J.
D. Martin J.

Columbia, South Carolina

FILED

October 10, 2018

cc:

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