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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the petitioners, Deanna Brown-Thomas, Yamma Brown, and Venisha Brown[1] ("Petitioners"), hereby certify that a Petition for Rehearing and Suggestion for Rehearing *En Banc* was made to the Court of Appeals and was denied by Order dated October 10, 2018.

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioners can be bound to factual findings contained in an annulment order to which they were not and could not be parties when well-settled law provides that factual findings and conclusions of law contained in an *in rem* annulment order are not binding upon non-parties to the annulment proceeding.

II. Whether Petitioners can be collaterally estopped from litigating the issue of Respondent's status as surviving spouse when (a) they were not, and could not be, parties to Respondent's default annulment action, and (b) that issue was never actually litigated.

III. Whether it was error to grant Respondent summary judgment and deny Petitioners summary judgment when the record contains admissible evidence that Respondent's first marriage was valid at the time she attempted her second marriage, and Respondent, bearing the burden of proof as to the alleged invalidity of her first marriage, presented no admissible evidence of her first husband's bigamy and stipulated she had none.

IV. Whether summary judgment in favor of Respondent is appropriate when there are triable and genuine issues of material fact, and the trial court prohibited Petitioners from taking any discovery on those factual issues and sealed Respondent's diaries.

V. Whether Respondent's concealment of and failure to terminate her first marriage before her second marriage renders her second marriage bigamous as a matter of law under S.C. Code Ann. § 20-1-80 and the holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) that a *post-hoc* annulment, though declaring a first marriage void *ab initio*, does not relate back so as to retroactively validate a facially bigamous second marriage.

STATEMENT OF THE CASE

I. FACTS OF THE CASE

Respondent Tommie Rae Hynie ("Respondent") and Javed Ahmed ("Husband 1"), after jointly applying for and securing a marriage license, participated in a marriage ceremony and

[1] Petitioner Venisha Brown died intestate on September 23, 2018, and Petitioner Deanna Brown-Thomas has filed an application and petition to be formally appointed as Personal Representative for Venisha Brown. A hearing has not yet been scheduled. A Motion to Accept Petition for Writ of Certiorari or, in the alternative, to Extend Time for Filing Petition for Writ of Certiorari as to Venisha Brown has been filed for this Court's consideration. To fully protect Venisha Brown's rights, undersigned counsel submit this Petition on her behalf to the extent appropriate.

were legally married in Harris County, Texas, on February 17, 1997 ("Marriage 1").[2] To obtain the marriage license, both signed a sworn declaration that neither of them was currently married.[3]

Thereafter, on November 27, 2001, James Brown ("Brown") and Respondent executed a Prenuptial Agreement, which Respondent acknowledged she entered into voluntarily on the advice of her own counsel.[4] Therein, she "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."[5]

On December 10, 2001, Brown and Respondent obtained a marriage license in Aiken County, South Carolina.[6] Respondent concealed Marriage 1 from Brown, and falsely swore under oath to the Aiken County Probate Court that this was her first and only marriage.[7] On December 14, 2001, Brown and Respondent participated in a purported marriage ceremony in Aiken County, South Carolina ("Marriage 2").[8] Respondent admits that her Marriage 1 was never dissolved prior to her putative Marriage 2.[9]

On December 15, 2003, Respondent filed an action in the Charleston County Family Court (the "Family Court"), seeking to annul Marriage 1 on many alleged grounds (the "Annulment Action").[10] Husband 1 was never personally served, but was allegedly served by publication in the classifieds of The Houston Chronicle, and never appeared.[11] Thus, the only purported evidence presented in the action was Respondent's unopposed self-serving testimony, and, as to alleged bigamy, just her hearsay that Husband 1 supposedly told her that he had three

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[2] R. pp. 265-266, Hynie/Ahmed Marriage License, Exhibit 1 to Joint Stipulation.
[3] R. p. 526, Affidavit of Scott Kenily, Exhibit; 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.
[4] *Wilson v. Dallas*, 403 S.C. 411, 418, 743 S.E.2d 750, 762 (2013).
[5] *Id.*
[6] R. pp. 269-270, Joint Stipulation, Exhibit 4.
[7] *Id.*; *see also* S.C. Code Ann. § 20-1-230(A)(4).
[8] R. p. 256, Joint Stipulation, ¶5.
[9] R. p. 256, Joint Stipulation, ¶6.
[10] R. pp. 271-273, Joint Stipulation, Exhibit 5.
[11] R. pp. 274-291, Joint Stipulation, Exhibits 6-10.

or more wives.[12] On April 15, 2004, the Family Court entered the order submitted by Respondent's counsel, annulling Marriage 1 on all her grounds, including bigamy (the "Annulment Order").[13]

After discovering Marriage 1, but prior to the Annulment Order, Brown brought his own annulment action on January 29, 2004, in Aiken County, South Carolina against Respondent for bigamy.[14] Respondent counterclaimed for a divorce, the ostensible reason she rushed to annul Marriage 1.[15] The parties settled and dismissed their respective suits in an August 16, 2004 consent order (the "Consent Order"), wherein Respondent expressly agreed even to "forever waive any claim of a common law marriage to [Brown], both now and in the future."[16]

Brown died on December 25, 2006, in Atlanta, Georgia.[17] His will devised his personal effects to six named children, including Petitioners, and the remainder of his estate to an irrevocable charitable trust.[18] After 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, claiming fraud and undue influence. She separately claimed an omitted spouse's share of Brown's estate. The probate court transferred her claims to the circuit court. In 2009, the trial court approved a Settlement Agreement that provided Respondent 23.75% of Brown's entire estate, but the settlement was sharply rejected by this Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013), and the case was remanded to the trial court.[19]

In October, 2013, the probate court and trial court appointed David C. Sojourner, Jr. to serve as Limited Special Administrator ("LSA") and Limited Special Trustee to defend the

[12] R. pp. 297-313, Joint Stipulation, Exhibit 13.
[13] R. pp. 293-296, Joint Stipulation, Exhibit 12.
[14] R. p. 258, Joint Stipulation, ¶ 19.
[15] R. pp. 336-346, Joint Stipulation, Exhibit 17.
[16] R. pp. 349-350, Joint Stipulation, Exhibit 19.
[17] R. p. 258, Joint Stipulation ¶ 20.
[18] *See Wilson v. Dallas*, 403 S.C. 411, 449, 743 S.E.2d 746, 767 (2013) (detailed description of case history).
[19] *Id.*

Estate and Trust against the will and trust challenges.[20] 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 diaries (the "Diaries"). During a hearing on the motion, Respondent's attorneys sought a stay of all discovery pending a summary judgment motion ("MSJ") they intended to file on the issue of whether Respondent is Brown's "surviving spouse."[21] The trial court stayed all discovery and allowed Respondent to file her MSJ,[22] which she filed on April 28, 2014.[23] On June 2, 2014, the LSA filed an MSJ, joined by the Petitioners, also limited to the question of whether Respondent is Brown's surviving spouse.[24] On September 5, 2014, the parties filed a Joint Stipulation of Facts with exhibits ("Joint Stipulation") that sets forth undisputed facts applicable to the parties' cross-MSJs.[25]

After hearings held November 24, 2014, and January 13, 2015, the trial court granted Respondent summary judgment ("MSJ Order"). The trial court ruled that Respondent's 2001 Marriage 2 (to Brown) was not bigamous because the court believed her 1997 Marriage 1 was bigamous, based solely on the *post-hoc* 2004 Annulment Order, which itself was based solely on Respondent's unopposed hearsay testimony at a short hearing in a default setting.[26] The parties (including Petitioners) were precluded from taking any discovery and had no opportunity to litigate the question of whether Respondent's Marriage 1 was, in fact, bigamous. The LSA and Petitioners filed motions to reconsider on January 26, 2015.[27] At the trial court's request, the parties filed supplemental briefing on the application of *Lukich v. Lukich*, 379 S.C. 589, 666

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[20] R. p. 56, January 13, 2015 Order, p. 4.
[21] R. pp. 631-640, March 31, 2014 Hearing Transcript, 54:3-63:25, attached as Exhibit 1 to Memorandum of Law Supporting LSA's Motion for Summary Judgment and Opposing Tommie Rae Brown's Motion for Partial Summary Judgment on the Issue of Surviving Spouse, filed October 6, 2014 (the "LSA's Memo in Support").
[22] R. p. 637, *id.* at 60:19-21.
[23] R. pp. 231-249, Tommie Rae Brown's Notice of Motion and Motion for Summary Judgment.
[24] R. pp. 250-253, Limited Special Administrator's Motion for Summary Judgment.
[25] R. pp. 254-350, Joint Stipulation of Facts.
[26] R. pp. 69, 71, and 97, MSJ Order at pp. 17, 19, and 45.
[27] R. pp. 825-883, LSA Motion to Reconsider; R. pp. 884-887, Appellants' Motion to Reconsider.

S.E.2d 906 (2008).[28] On October 20, 2015, the court denied the motions to reconsider.[29]

Petitioners and the LSA filed Notices of Appeal of the above orders on November 20, 2015. Thereafter, before briefing ended, the LSA and Respondent filed a purported "settlement agreement" and the LSA was permitted to withdraw from this appeal. Subsequently, it appeared that Respondent, the LSA, and the Estate's Personal Representative had failed to disclose the full terms of their settlement, namely, a side-agreement which they have steadfastly refused to disclose to any court or Petitioners.[30]

II. THE COURT OF APPEALS OPINION

On July 25, 2018, a panel of the Court of Appeals published an opinion (the "Opinion") affirming the trial court's ruling that Respondent is Brown's surviving spouse. The Opinion is based solely on the 2004 Annulment Order declaring Marriage 1 void *ab initio*, years after Marriage 2 (to Brown) and Respondent's concealment of Marriage 1 from Brown and the State. *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 five erroneous rulings relevant to this Petition:

(i) The panel held that the factual finding in the 2004 Annulment Order that Marriage 1 was bigamous is binding on Petitioners in this action, when they were not, and could not have been, parties to the annulment action.[31] The Opinion thus misapplies or disregards well-settled law as to the limited preclusive effect of an *in rem* annulment order.

(ii) The panel held that Petitioners are barred by the collateral estoppel doctrine from litigating whether Marriage 1 was bigamous even though (1) neither Petitioners nor Brown were parties, or in privity with parties, to Respondent's annulment action; (2) Husband 1 never appeared (and apparently had no actual notice), so the Annulment Order was entered by default

[28] R. pp. 1049-1063, Memorandum of Limited Special Administrator on Issue of Application of *Lukich v. Lukich*.
[29] R. pp. 103-121, Order Denying Reconsideration.
[30] *In re: The Estate of James Brown*, Appellate Case No. 2018-000104 (dismissed as interlocutory).
[31] Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 28.

and not "actually litigated"; and (3) no evidence was presented other than Respondent's unopposed hearsay testimony that Husband 1 told her he had other wives.

(iii) The panel held that summary judgment was appropriate even though there was no admissible evidence of the disputed fact (Husband 1's alleged bigamy) upon which the trial court's decision turned, and all admissible evidence indicated that Marriage 1 was not bigamous.

(iv) The panel held that Petitioners are not entitled to take any discovery as to whether Marriage 1 was bigamous, as "the parties all agreed to the stipulation of facts," even though Petitioners had only stipulated to narrow facts, including that an annulment order was entered in 2004, but not to any of its factual findings or conclusions of law.[32]

(v) The panel ruled, based solely on the *post-hoc* 2004 Annulment Order, that after Respondent married Husband 1 in 1997, she was not required to take any action to annul her concealed Marriage 1 before attempting to marry Brown in 2001. The Opinion misapplied this Court's express holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906, 907 (2008), which held that an annulment order declaring a first marriage void *ab initio* after an attempted second marriage cannot retroactively validate the second (bigamous) marriage.

The Opinion contravenes settled law regarding the limited preclusive effect of *in rem* orders and the strict requirements for collateral estoppel. It likewise conflicts with both the letter and spirit of South Carolina's jurisprudence regarding bigamy. Petitioners filed a timely petition for rehearing with suggestion for rehearing en banc, which was denied on October 10, 2018.

ARGUMENTS IN SUPPORT OF THE PETITION

The Opinion erroneously condones Respondent's conduct aimed at anointing herself as Brown's spouse, even though her marriage to him was bigamous as a matter of law, and she comes to court with unclean hands. The Joint Stipulation is crystal clear that Respondent was

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

married to another when she tried to marry Brown. Her uncorroborated self-serving hearsay that Marriage 1 was bigamous, pasted into an unopposed *post-hoc* annulment order to which Petitioners and Brown were not parties, neither binds them nor trumps South Carolina's law and strong public policy against bigamy.

First, the panel committed clear legal error by giving preclusive effect to factual findings in the 2004 Annulment Order, and a writ of certiorari is necessary to prevent far-reaching harms that would flow from the panel's error. Because the Annulment Order undisputedly is an *in rem* order, its underlying factual findings (including that Husband 1 was supposedly a bigamist) cannot bind non-parties to the annulment action. If the Opinion stands, third-parties who, by law, cannot participate in a family court marital proceeding will be forever deprived of their ability to challenge any factual finding in the family court's order, despite over a century of consistent uninterrupted precedent to the contrary. This error alone compels review.

Second, the panel ignored or misapplied the basic requirements of collateral estoppel, under which Petitioners cannot be bound by the findings in the annulment action because (i) they were not parties (or in privity with parties) to that family court action, nor could they have been parties and (ii) bigamy was never "actually litigated" in the unopposed default proceeding. Petitioners thus had no full and fair opportunity to litigate Respondent's convenient bigamy allegation, and the panel precluded Petitioners from doing so.

Third, the panel erroneously affirmed summary judgment for Respondent (and denial of Petitioners' MSJ), even though there never has been any admissible evidence to support Respondent's self-serving claim that her attempted second marriage was not bigamous because her first marriage (which she concealed from Brown) was bigamous.

Fourth, it was clearly erroneous and a violation of due process to bar Petitioners from taking any discovery as to the critical question of whether Respondent's first marriage was in

fact bigamous, central to the Opinion and Respondent's spousal claim.

Fifth, the Opinion misconstrues this Court's fundamental holding in *Lukich*, which can readily resolve this entire action and appeal. *Lukich* strictly construed the bigamy statute to hold that a spouse's annulment of her first marriage as void *ab initio* after her attempted second marriage, does not relate back to retroactively validate her bigamous second marriage. 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008). This pragmatic bright-line rule was held necessary to prevent the "uncertainty and chaos" that would result if a party could alter the legal status of her facially bigamous second marriage at some indefinite future date by having her first marriage annulled when and if convenient to do so. *Id.* at 593, 666 S.E.2d at 907. Because Respondent failed to dissolve her first marriage, she lacked the legal capacity to marry Brown. Respondent actively entered into her first marriage and knowingly concealed it. She had a simple legal (and moral) obligation to resolve her prior marriage before she attempted to marry again. Respondent's belated self-serving annulment action ended her first marriage in 2004, but it did not and cannot serve as a time machine to resuscitate her bigamous second marriage in 2001.[33]

By breaking with South Carolina precedent, the Opinion results in erroneous and inequitable new rules: *First*, according to the Opinion, findings in an *in rem* order now preclude non-parties to the *in rem* action from obtaining due process to vindicate their unique rights. *Second*, a party is now precluded from taking any discovery or litigating critical issues, based on rulings in a prior action to which they were not and could not have been parties, and even as to issues never "actually litigated." *Third*, alleged bigamy of a prior marriage (or any ground rendering it "void") is now an inexplicable loophole in *Lukich*'s prohibition against using a belated annulment, declaring a first marriage void *ab initio*, to retroactively validate a bigamous second marriage. The Opinion sows uncertainty where this Court emphasized that certainty is of

[33] This Court in *Wilson v. Dallas*, 403 S.C. 411, 434 n.16, 743 S.E.2d 746, 759 n.16 (2013) "express[ed] no opinion [] on the circuit court's interpretation of" *Lukich* in this action, as that issue was not presented to the Court at that time. *Lukich*'s application to this case is now squarely before the Court, making certiorari especially appropriate.

the utmost importance. Certiorari gives this Court the opportunity to correct these serious legal errors and to reaffirm the vital public policies safeguarded by *Lukich*.

I. THE PANEL MISAPPLED SETTLED LAW WHICH HOLDS THAT FACTUAL FINDINGS IN AN *IN REM* ANNULMENT ORDER ARE NOT BINDING ON NON-PARTIES TO THE ANNULMENT PROCEEDING.

A. Petitioners Have Standing To Challenge Respondent's Surviving Spouse Claim.

As a threshold matter, in holding that Petitioners lack "standing" to challenge the Annulment Order, the panel misconstrued Petitioners' express intent. Petitioners do not seek to re-litigate the 2004 annulment of Marriage 1, and agree that it was terminated in 2004.

By contrast, it is law of the case that Petitioners have standing to challenge Respondent's claim that she is Brown's surviving spouse. As the trial court found when naming Petitioners as parties to this action over Respondent's objection, Petitioners are "interested persons" under S.C. Code Ann. § 62-1-201(2) in multiple ways.[34] That unappealed ruling is the law of the case, so the only logical inference from the Opinion is that the panel conflated the question of *standing* with that of *preclusion* – which, under settled law, must be resolved in favor of Petitioners.

B. As Non-Parties to the 2004 Annulment Action, Petitioners Cannot Be Bound By Factual Findings Or Conclusions of Law in the *In Rem* Annulment Order.

The Opinion directly conflicts with U.S. Supreme Court and South Carolina precedent regarding the preclusive effect of factual findings contained in an *in rem* order. Over a century of uninterrupted law leads to a clear-cut rule: the *in rem* Annulment Order is only binding on non-parties (like Petitioners) as to the legal status, *i.e.*, termination, of Marriage 1 as of 2004. None of the Annulment Order's findings of fact, including Respondent's self-serving assertion that her Marriage 1 was bigamous, can bind a non-party. Yet the panel ruled exactly the opposite. Indeed, the Opinion never addresses the law controlling *in rem* judgments, thoroughly briefed by

[34] 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.

Petitioners. This clear-cut error alone compels review and reversal of the Opinion.

There is no dispute that South Carolina recognizes annulment orders as *in rem* orders. *Carnie v. Carnie,* 252 S.C. 471, 475, 167 S.E.2d 297, 299 (1969). The U.S. Supreme Court has made clear that while ultimate disposition of the res subject to an *in rem* order is binding on all the world, the factual findings and legal conclusions contained in 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); *see 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 [] the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto."). The Restatement summarizes this settled rule: "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 . . . <u>except</u> as to persons who have appeared and actually litigated the question of [] th[at] fact." Restat. (First) of Judgments §73 (1942), note a, cmt. c (emph. added). *See, e.g., Fairfax Sav., F.S.B. v. Kris Jen Ltd. P'ship*, 338 Md. 1, 20, 655 A.2d 1265, 1274 (Ct. App. Md. 1995) (non-parties to *in rem* action are not barred from litigating fact issues decided therein); *State v. Phillips*, 400 A.2d 299, 307 (Ch. Ct. Del. 1979) (same). As discussed in Part II, Petitioners did not and could not appear in or litigate any issue in Respondent's annulment action.

Under these *in rem* rules, "the [Annulment Order] is res judicata only in that it conclusively determines that the parties are <u>thereafter</u> free to remarry so far as any relation to each other is concerned. It does not establish the <u>previous</u> 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*) (emph. added); *see also In re Rowe's Estate*, 141 P.2d 832 (Ore. 1943) (*in rem* order determining marital status is "not conclusive for or against any third person in reference to the facts which it necessarily affirms or denies"). The panel thus erred by holding that "the validity of [Marriage 1] was determined in the annulment action as it was the entire purpose of the action."[35] Petitioners are bound by the Annulment Order only insomuch as it terminated Marriage 1 as of April 15, 2004 (the date of the Order), and left Respondent 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 Petitioners and Brown.

This rule is necessary because 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 litigating their marital relationship might make allegations with momentous consequences for third-parties, such as claims of (i) paternity (directly affects the rights of children), (ii) a bigamous prior marriage (affects spousal and child support under that marriage); (iii) physical/sexual abuse (centrally relevant in third-party custody or criminal cases); or (iv) substance abuse (prejudices the accused for life), to name a few examples. Thus, even if the family court chooses to rely on such allegations, South Carolina law does not permit this to bind third-parties as a matter of law and public policy. *E.g.*, *Palm v. Gen. Painting 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).

Among the myriad undesirable consequences of the Opinion is that family court matters would become a "race to the courthouse." That is, Brown would be required to beat Respondent

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

to a hearing if he wanted to challenge her bare allegation that her first marriage was bigamous.[36]

A writ of certiorari is therefore necessary to faithfully apply South Carolina's uncontroverted rules as to the limited effect of *in rem* orders. Pursuant to those well-settled rules, the findings contained in the *in rem* Annulment Order are not binding on Petitioners.

II. PETITIONERS ARE NOT COLLATERALLY ESTOPPED FROM LITIGATING WHETHER THE FACIALLY BIGAMOUS SECOND MARRIAGE WAS VOID.

The Court of Appeals further erred in ruling that Petitioners are collaterally estopped by the Annulment Order from litigating the invalidity of Respondent's purported marriage to their father because the requisite elements of collateral estoppel are plainly absent. Glaringly, the panel neglected the first and most vital element: that one must have been be a party to the prior action (or their privy) for issue preclusion to apply. Restat. (Second) of Judgments § 27 (1982). Moreover, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Carolina Renewal, Inc. v. S.C. D.O.T*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). As these well-known prerequisites are not met here, Petitioners are squarely entitled to litigate the critical issue of whether Marriage 1 was in fact bigamous.

A. Petitioners and Brown Were Not (Nor Could They Have Been) Parties to the Annulment Action Nor in Privity with a Party.

It is undisputed that none of the Petitioners nor Brown was a party to the 2004 annulment proceeding. Nor could they have been because, as non-parties to Marriage 1, they lacked standing to intervene in that action. *Ex Parte GEICO*, 373 S.C. 132, 644 S.E.2d 699 (2007) (third party with indirect interest in validity of marriage does not have standing to intervene in family

[36] The Opinion is inconsistent on this point. The Opinion 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 Opinion's reasoning Brown would have been retroactively bound by the unsupported factual finding in the 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] action, and Brown did not bring another action prior to his death," the panel overlooked that the resolution of Brown's annulment action was the Consent Order wherein Respondent 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.

court action). *Accord Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994); *Powell ex rep Kelley v. Bank of Am.*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008).

Moreover, neither Petitioners nor Brown were in privity with Respondent or Husband 1. In South Carolina, "privity" is strictly construed. *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998). 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 [third-party's] liability . . . in a subsequent action." *Id*; *see also Morris v. Gressette*, 425 F. Supp. 331, 334, 335 (D.S.C. 1976) (privity requires "the right to participate in and control" the litigation; applying preclusion without "strict" privity is "contrary to fundamental concepts of due process"). Here, Respondent's annulment action did not purport to determine Petitioners' or Brown's interests. Even if it had, this could not establish privity.

Likewise, there is no allegation and no evidence that Brown ever participated in Respondent's annulment action. *Carolina Renwal*, 385 S.C. at 555. There is no allegation or evidence that Brown ever attended any hearing or exerted any control over any legal strategy or decision in that case, let alone "assumed control over the prior litigation," as required to find privity. *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987). In fact, after Respondent filed her action but before the Annulment Order was entered, Brown filed his action in January 2004 to annul Marriage 2, based on Respondent's previously concealed Marriage 1.

Respondent's reliance on Brown's subsequent payment of her legal bills is misguided, as the law is also crystal clear that payment of another's legal fees will not establish privity. Restat. (Second) of Judgments § 39, cmt. c, at 384 (1982); *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 [] collateral estoppel."); *see also Virginia Hosp.*, 830 F.2d at 1313 ("It is not sufficient [for privity] [] that the person merely contributed funds or advice in support of the party, [or]

supplied counsel to the party"). Put simply, collateral estoppel has no application here, because neither Petitioners nor Brown were parties or privies to Respondent's annulment action.

B. The Bigamy Issue Was Never "Actually Litigated."

Even if Petitioners or Brown had been parties or privies of parties to Respondent's annulment action, the issue of whether Marriage 1 was bigamous was never "actually litigated" in that annulment, which this Court described *sua sponte* as "hastily granted" *Wilson v. Dallas*, 403 S.C. 411, 434, n. 16. As Respondent stipulated, Husband 1 never appeared or participated in that action, so her self-serving assertions went totally unopposed.[37] Husband 1 was purportedly served by publication, but there is no evidence that he ever received actual notice.[38] Thus, the sole "evidence" presented at Respondent's annulment hearing was her own self-serving and unopposed hearsay that she was told Husband 1 "had three or more wives," and by that point Respondent was a defendant in Brown's own annulment action against her. Respondent even stipulated that (other than this limited testimony) she has no evidence whatsoever that Marriage 1 was bigamous.[39] Thus, this entire matter reduces to a false construct based on Respondent's single, unopposed hearsay statement in 2004, and the erroneous preclusion of any discovery regarding this naked allegation, for which Respondent bears the burden.

The Annulment Order was in every respect a default judgment. Under Rule 55, SCRCP, a default occurs "[w]hen a party against whom a judgment for affirmative relief is sought has

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[37] 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.").

[38] Husband 1 was not even properly served in the annulment action. The affidavit of Respondent's process server does not reflect any due diligence to locate him – merely that the 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 classifieds. (R. p. 256, Joint Stipulation ¶ 7; R. pp. 274-289, Exhs. 6, 7, 8, and 9.) Such a non-attempt does not satisfy the due diligence requirements for service by publication. *Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324 (1924). Further, Respondent knew Husband 1 was from Pakistan, but made no effort to locate and serve him there per Rule 4(h)(5) SCRCP, for foreign service.

[39] 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").

failed to plead or otherwise defend," exactly as in the annulment action. Collateral estoppel does *not* apply to a default judgment, because the issues were never "actually litigated". *State v. Bacote*, 331 S.C. 328, 503 S.E.2d 161 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply"); *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) (in a default, "essential element requiring that the claim" was "actually . . . litigated . . . is not met"). It was plain error for the panel to invoke collateral estoppel.

Courts must determine "with particular care" whether a matter has been "actually litigated". *In re Raynor*, 922 F.2d 1146, 1148 (4th Cir. 1991) (internal quotation marks omitted). In *Palm v. Gen. Painting Co.*, for example, the family court, presiding over a name-change action brought by a mother and daughter, relied on an earlier divorce decree to rule on the daughter's paternity. 302 S.C. at 373, 396 S.E.2d at 362. In the daughter's subsequent action for death benefits, she challenged the family court's paternity ruling. *Id.* This Court, on review, held that despite the daughter's participation in the prior action, she was not collaterally estopped from challenging its paternity ruling, as that issue "was not 'actually litigated'" in the prior action where the family court "merely relied upon the [parents'] earlier divorce decree in establishing" paternity. 302 S.C. at 374, 396 S.E.2d at 362. Here, it is even clearer that Respondent's spousal status was never "actually litigated." As Husband 1 did not appear in (and likely had no notice of) the action, there was no one to oppose Respondent's hearsay.[40]

By contrast, Petitioners were strangers to Respondent's limited family court action and never had any opportunity to contest Respondent's unsupported claim that her Marriage 1, which she intentionally entered into and knowingly concealed, was supposedly bigamous. Certiorari should be granted to correct the Opinion's erroneous application of the collateral estoppel doctrine and to protect third-party rights to due process.

[40] The panel's conclusion that the bigamy finding was necessary to support the annulment ignores that Respondent sought annulment on numerous grounds, all of which made their way into the Annulment Order. R. p. 272, Exh. 5 to Joint Stipulation at ¶ 10; R. pp. 295-96, Exh. 12 to Joint Stipulation.

III. NO ADMISSIBLE EVIDENCE SUPPORTED RESPONDENT'S MSJ; THE ONLY ADMISSIBLE EVIDENCE SUPPORTS PETITIONERS' MSJ.

The panel further erred in affirming summary judgment for Respondent because there was no admissible evidence that her Marriage 1 was bigamous. In fact, Respondent's burden on this issue, combined with her stipulation that she had no other evidence and Petitioner's contrary admissible evidence, compelled a finding that Marriage 1 was not bigamous.

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

It was Respondent's ultimate burden to prove her "surviving spouse" status 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 Petitioners bore the burden of establishing that Respondent's purported Marriage 2 (to Brown) was invalid, that burden was discharged by the parties' Joint Stipulation, which admits: (1) that Respondent entered into Marriage 1 on February 17, 1997; and (2) that Marriage 1 did not end until the 2004 Annulment Order, years after Respondent attempted Marriage 2 in 2001.[41]

The Joint Stipulation thus overcame any presumption that Marriage 1 was dissolved prior to Marriage 2, creating a presumption that Marriage 1 was valid. *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).[42] Because Respondent here challenges the validity of Marriage 1 as bigamous, she bears the burden to present *admissible* evidence to support her claim – a burden she failed to meet. Respondent even stipulated that she had no such admissible evidence.[43] Thus, the panel erred by affirming summary judgment to Respondent based on her self-serving claim that

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

[42] Moreover, as the panel noted, the record contained an attorney's sworn declaration attesting that he located Husband 1 in 2014, and that Husband 1 affirmed that he was not married when he married Respondent and that the two co-habited as husband and wife. Panel Op. at 4 n.4; Shearouse Adv. Sh. No. 30 at 22.

[43] 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.").

Marriage 1 was bigamous, without a shred of admissible evidence to support it.

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

It was clear error for the panel to rely on the Annulment Order for the "truth" of the findings asserted in it –in particular, that Marriage 1 was bigamous. Under the South Carolina Rules of Evidence (as under the Federal Rules), "hearsay" is an out-of-court statement offered to prove the truth of the matter asserted. Rule 801(c), SCRE; Rule 801(c), FRE.[44] Here, the panel based its conclusion that Marriage 1 was bigamous solely on the Annulment Order's findings. Nothing else supported Respondent's bare assertion, and she stipulated she had nothing else.[45]

The Annulment Order's 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 by allowing into evidence a state court order from an earlier case (indeed, involving the same parties). *Id.* at 417. Under *Nipper*, a state court order is inadmissible hearsay that does not fall within any exception. *Id. Nipper* further found that at common law, a judgment from another case could not be admitted as evidence of the factual findings therein. *Id.*

This Court follows the same rule: "[J]udicial 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). *See also Hill v. USA Truck, Inc.*, 2007 WL 1574545, at *4, *6 (D.S.C. May 30, 2007) (error to admit probate court order from different case to prove truth of its findings of fact). The Annulment Order cannot serve as proof that that Marriage 1 was bigamous. With no evidence to support an independent finding of bigamy, the trial court had no basis to grant Respondent summary judgment, and the panel had no basis to affirm.

C. The Admissible Evidence Established That Marriage 1 Was Not Bigamous.

The panel further erred in affirming the trial court's denial of Petitioners' MSJ, because

[44] 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).
[45] R. p. 257, Joint Stipulation ¶¶ 9-10.

whereas Respondent provided zero admissible evidence to support her self-serving assertion, the trial court record contains Husband 1's sworn, notarized statement on his and Respondent's Marriage License Application that he was not married.[46]

As their 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. That evidence cannot be contradicted by the Annulment Order's inadmissible finding, which itself was based solely on Respondent's hearsay. Tellingly, in the 21 years since Respondent's Marriage 1, the 16 years since her Marriage 2, the 14 years since her annulment action, and the 11 years since filing her spousal claim here, Respondent has not provided any admissible evidence to support the *post-hoc* fiction that her Marriage 1 was bigamous.

On summary judgment, as to any issue on which the non-movant bears the burden, the moving party need only point to the lack of evidence supporting the non-movant's position, as Petitioners did here. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). 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) ("non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence [] in support of its proposition."). Thus, in opposition to Petitioners' MSJ, Respondent had to present admissible evidence supporting her assertion that Marriage 1 was bigamous. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Because Respondent utterly failed to do so, the Court of Appeals erred in affirming the trial court's denial of summary judgment to Petitioners.

IV. PETITIONERS WERE BARRED FROM TAKING ANY DISCOVERY AS TO RESPONDENT'S MARITAL STATUS IN VIOLATION OF DUE PROCESS.

It is axiomatic that summary judgment is a drastic remedy and should not be entered

[46] R. p. 648, Application for Marriage License attached as Exh. 3 to Memo. of Law Supporting LSA's' MSJ.

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). Yet the trial court completely barred Petitioners from taking any discovery prior to granting Respondent summary judgment. The trial court compounded the error by allowing Respondent "to file two self-serving affidavits in support of her" MSJ, while "seal[ing] her handwritten diaries," as noted by the panel.[47]

The Opinion overlooks these errors by misinterpreting the parties' Joint Stipulation, which simply acknowledged that the Annulment Order was entered in 2004, but clearly did not agree to any of its factual findings and/or conclusions of law.[48] The Opinion similarly mischaracterized Petitioners' right to discovery regarding Respondent's unsupported factual allegations as an attempt to "relitigate" the 2004 annulment, when Petitioners expressly accepted that Marriage 1 was terminated in 2004. Petitioners merely seek a full and fair opportunity to discover evidence relevant to Respondent's claim that she is their father's surviving spouse, notwithstanding her prior concealed marriage. Certiorari is necessary to correct this serious deprivation of due process.

V. THE PANEL MISAPPLIED THIS COURT'S HOLDING IN *LUKICH* THAT THE *POST-HOC* ANNULMENT OF A FIRST MARRIAGE AS VOID *AB INITIO* CANNOT RETROACTIVELY REVIVE A BIGAMOUS SECOND MARRIAGE.

Independent of the other serious legal errors that require review and correction, this Court's holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) should entirely dispose of this long-running case. *Lukich* unequivocally holds that the annulment of a first marriage after a purported second marriage will not retroactively revive the bigamous second marriage. As this Court pragmatically reasoned, this is the only way to avoid the "uncertainty and chaos" that would result from retroactive application of a *post-hoc* annulment. 379 S.C. at 593, 666 S.E.2d at 907. Thus, Respondent's attempted Marriage 2 was void for bigamy, because she did not bother

[47] Panel Op. at 11; Shearouse Adv. Sh. No. 30 at 29.
[48] R. p. 257, Joint Stipulation ¶ 11

to first annul Marriage 1 and chose instead to conceal it. By ruling otherwise, the panel unnecessarily opened a Pandora's Box, creating a dangerous precedent for parties to retroactively transform their marital status, when and if it serves their current interests.

A. Under *Lukich*, the 2004 Annulment Order Cannot Be Given Retroactive Effect To Validate Respondent's 2001 Bigamous Marriage.

The bigamy statute provides: "All marriages contracted while either of the parties has a former wife or husband living shall be void," except as to "any person . . . whose marriage shall be declared void by the sentence of a competent court," among other exceptions not relevant here. S.C. Code Ann. § 20-1-80 (emph. added). The statute clearly says "shall be declared void," not "is void," reflecting that one who obtains a marriage license and engages in a marriage ceremony cannot unilaterally deem that marriage "void" on any ground without a judgment to that effect. *Lukich* strictly construed the statute, holding that a first marriage must be "declared void" before entering into a second marriage. 379 S.C. at 592, 666 S.E.2d at 907. This is a bright-line timing requirement: "The statute speaks to the status quo at the time the [second] marriage was contracted and does not contemplate either a prospective or retroactive perspective. Any other construction of § 20-1-80 would lead to uncertainty and chaos." *Id.* at 593, 666 S.E.2d at 907 (emph. added). *Lukich's* holding not only adheres faithfully to § 20-1-80, it also reflects the rule in 52 Am. Jur. 2d *Marriage* § 57 that a *post-hoc* annulment of a first marriage for any reason "does not relate 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."

Indeed, Respondent, in the 2004 Consent Order (following her Annulment Order) tacitly acknowledged her awareness of this legal rule, by agreeing to "forever waive any claim of a common law marriage to [Brown], both now and in the future." The Consent Order thus accurately reflected the rule that her Annulment Order "did not relate back so as to validate [her]

second marriage," and she and Brown intentionally did not engage in "a new ceremony following the [2004] termination of [her] earlier marriage." *Id.*

The reason for the rule, reaffirmed in *Lukich*, is as simple as it is logical: marital status is too important, and its legal implication too far-reaching, for it to see-saw back and forth at a spouse's discretion. It is incumbent on a married person to annul her marriage before attempting a second marriage. In contrast, Respondent applied for a Marriage 1 license, participated in a legal ceremony establishing Marriage 1, and then tried to marry Brown, while concealing Marriage 1 from both Brown and the State of South Carolina. The Opinion not only rewards such conduct, but does so notwithstanding *Lukich's* admonitions and the consequences of such negative precedent. Respondent's 2001 Marriage 2 is bigamous because her 2004 annulment of Marriage 1 has no retroactive application, as a matter of law. *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

The Opinion's contrary reasoning is circular: Its conclusion that Respondent was free to remarry in 2001 (because Marriage 1 was supposedly bigamous) is solely based on the retroactive application of her 2004 Annulment Order, openly contradicting *Lukich*'s prohibition.[49]

Removing any doubt that the Opinion misapplies § 20-1-80, this Court has held that not even annulment orders finding (actually litigated) bigamy can have retroactive effect. In *Joye v. Yon*, 355 S.C. 452, 457, 586 S.E.2d 131, 134 (2003), Husband 1's alimony obligations were discharged when Wife 1 remarried. Subsequently, Wife 1's remarriage was annulled due to Husband 2's bigamy and Wife 1 asked that her alimony be reinstated and back-paid for the duration of her bigamous marriage. While this Court reinstated her alimony, it refused any back-payments for the months Wife 1 and bigamous Husband 2 were purportedly married, thereby

[49] Indeed, Westlaw flags the Court of Appeals' Opinion as the "Most Negative" treatment of *Lukich*, reflecting objective legal analysis that the Opinion sharply breaks with this Court's holding.

refusing to give "retroactive" effect to the annulment order even though it found bigamy. *Id.*

Contrary to the plain wording of the bigamy statute and *Lukich*, and the general rule in this country, the panel adopted Respondent's unsupported circular argument that Marriage 2 was not bigamous because Marriage 1 was bigamous, based solely on her hasty *post-hoc* annulment. This exemplifies the very "chaos" *Lukich* sought to foreclose.

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

Although the Court of Appeals in *Lukich* made a distinction between "void" and "voidable" marriages in a footnote, this Court did not adopt that distinction. Instead, it established a clear, easy-to-apply rule that the belated annulment of a first marriage does not have retroactive effect so as to validate a bigamous second marriage. *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

All annulments declare a marriage void *ab initio*, regardless of the basis for annulment. *Splawn v. Spawn*, 311 S.C. 423, 425, 429 S.E.2d 805, 806 (1993). This is, of course, the primary difference between an annulment (which declares the marriage to never have existed) and a divorce (which declares it to have ended). While the "void"/"voidable" distinction affects what a party must show for the requested remedy of annulment, it does not alter the annulment's legal effect. Indeed, *Lukich* indicated that its holding applies equally to the present scenario, reasoning "it would be inconsistent at best to hold that a [first] marriage declared void *ab initio* never existed for bigamy purposes", *i.e.*, for deciding whether a second marriage was bigamous. 379 S.C. at 593, 666 S.E.2d at 907 (citing *Rodman v. Rodman*, 361 S.C. 291, 296, 604 S.E.2d 399, 402 (2004) ("[t]here is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy"). This Court's refusal to award "retroactive alimony" in *Joye* further affirms this fundamental point. 355 S.C. at 457, 586 S.E.2d at 134.

Moreover, the Court of Appeals' promotion of the void/voidable distinction in *Lukich*

misconstrued the law. After citing *Scarboro v. Morgan*, 233 N.C. 449, 452 64 S.E.2d 422, 424 (1951), it opined that its decision does not apply where the prior marriage was one of three "void" (as opposed to "voidable") marriages, including "marriages of minors." 368 S.C. at 55 n.2, 627 S.E.2d at 758 n.2. But in *Scarboro,* 233 N.C. at 452 64 S.E.2d at 424 (1951), where a "void" marriage to a minor was annulled after a bigamous second marriage, the North Carolina Supreme Court held, as this Court did in *Lukich*, that the subsequent annulment order "would be effective only from [its] date [] and would not . . . give retroactive validity to a bigamous marriage." *Id.* (emph. added). As courts have long recognized, and as reflected in § 20-1-80, even a "void" bigamous marriage "persists unless and until it is overthrown by [] an appropriate judicial proceeding. No mere claim of bigamy [] would establish that [the] marriage was bigamous." *MacPherson v. MacPherson*, 496 F.2d 258, 263 (6th Cir. 1974) (emph. added). Thus, "the state's concern in . . . marrriage status . . . demands that the invalidity of the purported marriage be judicially determined before that invalidity be accepted." *Id., citing Williams v. N.C.*, 317 U.S. 298 (1942); 4 Am. Jur. 2d, Annulment of Marriage § 2.

Finally, the void/voidable distinction is irrelevant given this Court's expressed need for certainty. A bigamous relationship may be void *ab initio*, but the legal capacity to contract a new marriage is not cleared until "the first marriage shall be declared void by the sentence of a competent court." § 20-1-80; *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907, *citing Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947) ("'[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage'"). Parties cannot legally marry when "there is an impediment to marriage, such as one party's existing marriage". *Callen*, 365 S.C. at 624, 620 S.E.2d at 62; *accord Prevatte v. Prevatte*, 297 S.C. 345, 349, 377 S.E.2d 114, 117 (Ct. App. 1989) (same); *Yarbrough*, 280 S.C. at 551, 314 S.E.2d at 16 (same). Even "after the impediment is removed . . . there must be a new mutual agreement" such as "by way of civil ceremony." *Id.*

Here, it is clear that a void/voidable distinction is unworkable and even encourages abuse. Respondent included numerous grounds (void and voidable) in her annulment complaint and proposed order, which, unopposed, was adopted by the family court, without a difference in legal effect. Respondent then entered into the 2004 Consent Order with Brown, promising to never even claim to be his common-law wife. Yet, immediately after Brown dies, Respondent contests his will by plucking the single "void" ground from her Annulment Order, unsupported by any admissible evidence, to claim she is Brown's surviving spouse.

Lukich simply requires parties to resolve their own marriage records before attempting to remarry – an essential prerequisite given the important role marriage plays in 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 the government when requesting the civic benefits associated with marriage. Rather than engage in a loop-de-loop of unweaving prior relationships *post-hoc*, the law must require spouses who have previously obtained a marriage license and participated in a marriage ceremony to annul such a marriage before attempting to marry again.

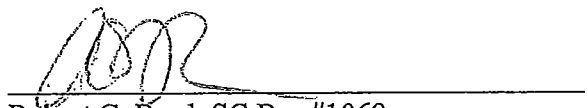
The importance of the issues presented in this high-profile case merits certiorari to correct the serious issues misapprehended or overlooked by the panel's Opinion, to adhere to this Court's precedent, and to avoid confusion in the law that affects all married persons in the state.

CONCLUSION

Certiorari is needed to correct the Court of Appeals' grave misapplication of preclusion law, which, if left uncorrected, would prevent total strangers to an *in rem* action from ever challenging its findings. The law is crystal clear that because Petitioners and Brown were not and could not have been parties to Respondent's annulment action, they are not bound by the factual findings in the resulting *in rem* Annulment Order. Nor are the essential requirements of collateral estoppel met by Respondent. Petitioners must be permitted as a matter of due process to take

discovery and try the factual issue of whether Marriage 1 was bigamous, if that issue is held to survive § 20-1-80 and *Lukich*. Certiorari would enable the Court to alternatively resolve this long-running case by simply reaffirming that under *Lukich*, the belated annulment of Respondent's first marriage could not retroactively revive her facially bigamous second marriage as a matter of law and public policy. The panel's contrary Opinion should be corrected because it invites the "chaos and uncertainty" *Lukich* warned against. Certiorari is necessary to restore order to this fundamental area of law, maintain consistency in the decisions of this Court and the Court of Appeals, and afford basic due process to Petitioners regarding their father's estate.

Respectfully submitted,



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November 9, 2018

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.

PROOF OF SERVICE

The undersigned hereby certifies that on November 9, 2018, s/he has caused a copy of the **PETITION FOR WRIT OF CERTIORARI** to be served upon all parties of record by mailing a copy of the same addressed as follows:

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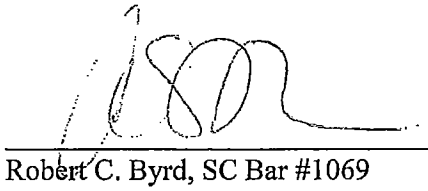

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