

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED  
DEC 17 2018  
S.C. 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 (Court of Appeals)  
Appellate Case No. 2018-001990 (Supreme Court)

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.

**PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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

OF COUNSEL

*Pro Hac Vice*

Marc Toberoff

*mtoberoff@toberoffandassociates.com*

Toberoff & Associates, P.C.

23823 Malibu Rd., Suite 50-363

Malibu, CA 90265

Telephone: (310) 246-3333

Facsimile: (310) 246-3101

**TABLE OF CONTENTS**

**ARGUMENT** ..... 1

**I. CERTIORARI IS NECESSARY TO CORRECT THE GLARING WAYS  
IN WHICH THE OPINION CONFLICTS WITH SOUTH CAROLINA LAW** ..... 1

**II. THE 2004 ANNULMENT ORDER IS NOT DISPOSITIVE** ..... 3

    A. The Circuit Court Has Jurisdiction to Decide, and Petitioners Have Standing  
    to Challenge, Respondent’s Spousal Status Under the Probate Code ..... 3

    B. Petitioners Are Not Bound by Underlying Findings in an *In Rem* Order ..... 4

    C. The Opinion and Respondent Disregard the Elements of Collateral Estoppel ..... 6

**III. RESPONDENT MISAPPREHENDS THE SUMMARY-JUDGMENT  
STANDARD AND HER OWN BURDEN OF PROOF** ..... 9

**IV. LUKICH BARS THE 2004 ANNULMENT ORDER FROM RETROACTIVELY  
VALIDATING RESPONDENT’S MARRIAGE TO BROWN** ..... 11

**V. CONCLUSION** ..... 14

**RECEIVED**  
DEC 17 2018  
S.C. SUPREME COURT

## TABLE OF AUTHORITIES

### Cases

<i>Becher v. Contoure Labs.</i> , 279 U.S. 388, 49 S. Ct. 356, 73 L.Ed. 752 (1929) .....	5, 6
<i>Bell v. Progressive Direct Ins. Co.</i> , 407 S.C. 565, 757 S.E.2d 399, (2014) .....	3
<i>Byrd v. Byrd</i> , 279 S.C. 425, 308 S.E.2d. 788 (1983) .....	10
<i>Calhoun v. Calhoun</i> , 277 S.C. 527, 290 S.E.2d 415 (1982) .....	10
<i>Callen v. Callen</i> , 365 S.C. 618, 620 S.E.2d 59 (2005) .....	14
<i>Carnie v. Carnie</i> , 252 S.C. 471, 167 S.E.2d 297 (1969) .....	5
<i>Carolina Renewal, Inc. v. S.C. Dep't of Transp.</i> , 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009).....	7
<i>Day v. Day</i> , 216 S.C. 334, 58 S.E.2d 83 (1950) .....	13
<i>E.D.M. v. T.A.M.</i> , 307 S.C. 471, 415 S.E.2d 812 (1992) .....	10
<i>Ex parte GEICO</i> , 373 S.C. 132, 644 S.E.2d 699 (2007) .....	7
<i>Fairfield County Sch. Dist. Bd. of Trs. v. State</i> , 409 S.C. 119, 761 S.E.2d 241 (2014) .....	11
<i>Fogel v. McDonald</i> , 159 S.C. 506, 157 S.E. 803 (1931) .....	8
<i>Gary v. Lowcountry Med. Trans., Inc.</i> , 424 S.C. 18, 817 S.E.2d 291 (Ct. App. 2018).....	4
<i>Gratiot County State Bank v. Johnson</i> , 249 U.S. 246, 39 S. Ct. 263 (1919).....	5, 6
<i>Hallums v. Hallums</i> , 74 S.C. 407, 54 S.E.2d 613 (1906) .....	10
<i>Hancock v. Mid-S. Mgmt. Co.</i> , 381 S.C. 326, 673 S.E.2d 801 (2009) .....	11
<i>Johns v. Johns</i> , 309 S.C. 199, 420 S.E.2d 856 (1992) .....	4, 6, 13, 14
<i>Kunst v. Loree</i> , 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).....	5, 8
<i>Lewis v. Coleman</i> , 257 F. Supp. 38 (S.D. W. Va. 1966).....	9
<i>Lukich v. Lukich</i> , 379 S.C. 589, 666 S.E.2d 906 (2008) .....	<i>passim</i>
<i>Mizell v. Glover</i> , 351 S.C. 392, 570 S.E.2d 176 (2002) .....	11

<i>Nipper v. Snipes</i> , 7 F.3d 415 (4th Cir. 1993) .....	11
<i>Palm v. Gen. Painting Co.</i> , 203 S.C. 372, 396 S.E.2d 362 (1990) .....	1, 3, 9
<i>Rodman v. Rodman</i> , 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004).....	13
<i>Splawn v. Splawn</i> , 311 S.C. 423, 429 S.E.2d 805 (1993) .....	13
<i>State v. Bacote</i> , 331 S.C. 328, 330 S.E.2d 161 (1998) .....	8
<i>State v. Sellers</i> , 140 S.C. 66, 134 S.E. 873 (1926) .....	6, 13
<i>Tillman v. Tillman</i> , 93 S.C. 281, 76 S.E. 559 (1912) .....	8
<i>Virginia Hosp. Ass'n v. Baliles</i> , 830 F.2d 1308 (4th Cir. 1987) .....	8
<i>Wade v. Berkeley County</i> , 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).....	7
<i>Wilson v. Dallas</i> , 403 S.C. 411, 743 S.E.2d 746 (2013) .....	2, 8
<i>Yarbrough v. Yarbrough</i> , 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984).....	10

**Statutes**

S.C. Code Ann. § 20-1-80.....	1, 10, 12, 14
S.C. Code Ann. § 62-3-105.....	3

**Rules**

Rule 1.7, SCRPC.....	8
Rule 55, SCRP .....	8

**Other Authorities**

52 Am. Jur. 2d <i>Marriages</i> § 130 (1970) .....	10, 13
Restatement (First) of Judgments § 73 (1942).....	5, 6
Restatement (Second) of Judgments § 39 (1982) .....	7, 8

## ARGUMENT

Petitioners Deanna Brown-Thomas, Yamma Brown and Venisha Brown (collectively “Petitioners”) respectfully submit this Reply in Support of their Petition for Writ of Certiorari.

### **I. CERTIORARI IS NECESSARY TO CORRECT THE GLARING WAYS IN WHICH THE OPINION CONFLICTS WITH SOUTH CAROLINA LAW.**

Despite Respondent’s blank denials, the Court of Appeals opinion (the “Opinion”) directly conflicts with South Carolina law on fundamental issues of due process and marital status, providing especially compelling circumstances for this Court’s review and reversal.

*First*, Respondent has no answer to the controlling rule that underlying factual findings and conclusions of law in the 2004 *in rem* order belatedly annulling her Marriage 1 (the “Annulment Order”) are not binding on third-parties, including Brown and Petitioners. The Annulment Order binds the world only as to the dissolution of Marriage 1 on the date of the Order, such that Petitioners must be allowed to litigate the subsidiary question of whether Respondent’s Marriage 1 was in fact bigamous, if this remains relevant under *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). Unable to address the legal authority reflecting this long-established rule of *in rem* judgments, disregarded by the Opinion, Respondent vaguely attacks it as “absurd.”

*Second*, Respondents do not even begin to satisfy the basic elements of collateral estoppel misapplied in the Opinion because: (a) neither Petitioners nor Brown was a party or privy to the 2004 annulment proceeding (the “Annulment Action”); and (b) Husband 1’s alleged bigamy was never actually litigated, since he defaulted in that action, and the family court just adopted Respondent’s unopposed hearsay. Collateral estoppel does *not* apply to such a situation under clear South Carolina law. *See Palm v. Gen. Painting Co.*, 203 S.C. 372, 396 S.E.2d 362 (1990).

*Third*, under *Lukich*’s strict reading of the temporal requirement in the bigamy statute, S.C. Code Ann. § 20-1-80, Respondent lacked the legal capacity to marry Brown until Marriage 1 had

been “declared void by the sentence of a competent court,” regardless of the alleged grounds. *Id.* Respondent, like the Opinion, persistently misreads *Lukich* as offering a giant loophole for alleged “void” marriages, permitting opportunistic annulments of a first marriage years after a second marriage to retroactively validate the facially bigamous second marriage. This is precisely the chaotic marital see-saw that *Lukich*’s bright-line rule was meant to avoid.

Instead of forthrightly addressing these basic legal rules, Respondent mischaracterizes Petitioners’ arguments, erecting one straw man after another. Respondent also egregiously misrepresents her actual “settlement” with the Estate.<sup>1</sup> Although she curries favor by portraying it as a charitable gift (after years of financially motivated litigation against the Estate) the truth appears to be quite different. Respondent and the Estate entered into a back-room side-agreement, which they have steadfastly refused to produce to either the court or Petitioners, strongly indicating that Respondent is diverting proceeds to herself.<sup>2</sup> Significantly, these are the same parties who submitted their 2008 settlement agreement (transferring 1/3 of the Estate to Respondent) that this Court sharply rejected, noting, *inter alia*, (i) the “major impediment to [Respondent’s] spousal claim;” (ii) the lack of any “reasonable basis for” Respondent’s challenge to Brown’s will; and (iii) the fact that her *post-hoc* 2004 annulment was “hastily granted”. *Wilson*, 403 S.C. at 434 n.16, 439, 442, 743 S.E.2d at 759 n.16, 761, 763.

Respondent’s myriad legal and factual distortions in this high-profile case fail to deflect or overcome the Opinion’s fundamental errors of law that call for certiorari and correction.

---

<sup>1</sup> Outrageously, Respondent falsely asserts that Petitioners have refused to engage in settlement negotiations because “they wish to retain all these rights to themselves.” (Resp. Ret. p.3 n.6.) In reality, Petitioners were not even aware of settlement negotiations between Respondent and the Estate until their purported settlement was announced. Respondent’s transparent attempts to persuade this Court to deny certiorari just to end Respondent’s lengthy litigation must fail in favor of upholding South Carolina law and policy. Indeed, this Court has direct precedent for refusing to deny due process simply to promote settlement: *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). A more fitting resolution of this entire case as a matter of law is found in *Lukich* and § 20-1-80.

<sup>2</sup> R. pp. 57, 190-91, Petition for Rehearing at 5 and Reply in Support of Petition for Rehearing at 10-11.

## II. THE 2004 ANNULMENT ORDER IS NOT DISPOSITIVE.

### A. The Circuit Court Has Jurisdiction to Decide, and Petitioners Have Standing to Challenge, Respondent's Spousal Status Under the Probate Code.

Respondent disputes the circuit court's jurisdiction and Petitioner's standing by baldly mischaracterizing Petitioners' case as seeking to re-litigate the annulment of Marriage 1.<sup>3</sup> This is an obvious straw man. As Petitioners have clearly and repeatedly stated, they do not seek to undo this annulment, and no relief sought by them would do so. The Annulment Order is conclusive as to the dissolution of Marriage 1 on April 15, 2004. However, it is not dispositive of whether Respondent is Brown's lawful surviving spouse, at issue here, nor cannot it retroactively validate her Marriage 2 under *Lukich, supra*. For all of the reasons explained in the Petition, neither Brown nor his children are bound by the purported factual findings and conclusions of law in the *in rem* Annulment Order, as they were not parties or privies to that family court proceeding.

The circuit court is thus the proper forum to decide this dispute, which is not about whether Marriage 1 was dissolved in 2004, but whether Respondent is Brown's surviving spouse under the Probate Code. The circuit court has jurisdiction over this matter, like any other arising under the South Carolina Probate Code, to determine the heirs of an estate, including purported spouses. *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399, (2014); S.C. Code Ann. § 62-3-105. Respondent's resistance to this legal reality is impossible to reconcile with, *e.g.*, *Palm v. Gen. Painting Co.*, 203 S.C. 372, 374, 396 S.E.2d 362 (1990), where this Court ordered the circuit court to allow the plaintiff in a death-benefits case to litigate issues already covered by the findings of fact and conclusion of law in two *in rem* family-court orders.

Respondent's attempt to obfuscate Petitioners' standing is also without merit. Dispositive

---

<sup>3</sup> Resp. Ret. pp. 5, 7, 9, 10, 12, 15.

of this issue, the trial court conclusively determined that Petitioners are “interested persons” in multiple ways,<sup>4</sup> and Respondent chose not to appeal that ruling, making it law of the case. Nor can Respondent deprive Petitioners of their day in court merely because Brown dismissed his 2004 annulment action against Respondent. *First*, Brown only settled his annulment action based on Respondent’s agreement to never claim to even be his common law spouse.<sup>5</sup> It is disingenuous for Respondent to now argue that Brown, by accepting her covenant not to claim common-law spousal status, barred his own children’s right to challenge Marriage 2, when Respondent breached her promise immediately after Brown died. *Second*, even if Brown had believed Respondent to be his spouse (he clearly did not), South Carolina law firmly holds that subjective beliefs or even a court-approved consent order cannot validate a marriage that is otherwise bigamous by law. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 858-59 (1992). Thus, nothing Brown could have done would “change the rule that the bigamous [Marriage 2] was void.” *Id.* See also *Gary v. Lowcountry Med. Trans., Inc.*, 424 S.C. 18, 24, 817 S.E.2d 291, 294 (Ct. App. 2018).

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

As to the preclusive effect of the *in rem* Annulment Order, Respondent purposefully conflates the binding effect of the annulment itself (*i.e.*, that Marriage 1 was forever dissolved in 2004) with the non-preclusive effect of the Order’s findings of fact, including Husband 1’s wholly unproven bigamy, amongst a laundry-list of annulment grounds. Thus, if the trial court found on the merits that Marriage 1 was not bigamous (as it must because Respondent stipulated she has no admissible evidence of this<sup>6</sup>), the 2004 annulment of Marriage 1 would still stand. Again, Petitioners have no interest in reviving Marriage 1, and agree it was dissolved.

Respondent’s straw-man “re-litigation” argument keeps reappearing because her spousal

---

<sup>4</sup> Order Determining Parties to Severed Omitted Spouse Claim, etc., Case No. 2008-CP-02-1647 (Feb. 7, 2014).

<sup>5</sup> R. pp. 349-350, Joint Stipulation, Exhibit 19.

<sup>6</sup> R. p. 257, Joint Stipulation ¶¶ 9-10.

claim hinges on improperly binding Petitioners to the *in rem* Order's purported fact findings, even though Petitioners (like Brown) were not and could not have been parties to that Annulment Action.<sup>7</sup> Respondent's do-or-die position on the preclusive effect of the Order's "findings" is absolutely contrary to law. As a judgment *in rem*, the Annulment Order<sup>8</sup> 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 Judgments § 73 (1942), cmt. c. *See Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S. Ct. 356, 357, 73 L.Ed. 752 (1929) ("A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world"); *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 248, 39 S. Ct. 263, 263 (1919) (as to non-parties, "judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based"). This explicit, bright-line rule makes perfect sense given that family court proceedings often involve sensitive allegations by spouses in a proceeding where no one else may appear.<sup>9</sup>

Thus, the Opinion's conclusion that Petitioners are bound by the Annulment Order's sundry findings (a "kitchen sink" list drafted by Respondent's counsel in a default setting) directly contradicts the dispositive rule governing *in rem* judgments. Notably, Respondent barely addresses this rule and instead mocks it as "absurd".<sup>10</sup> She further pretends that the rule cannot apply if Petitioners' claims involve the "same issue" as an *in rem* Order's finding.<sup>11</sup> That notion is nowhere stated in case law or in the Restatement ("consistently followed" in South Carolina, *Kunst v. Loree*, 404 S.C. 649, 656, 746 S.E.2d 360, 363 (Ct. App. 2013)), and would vitiate the rule that non-

---

<sup>7</sup> Indeed, Respondent repeatedly admits that Brown "had no standing" to participate. Resp. Ret. p.5, 10-11.

<sup>8</sup> It is settled law that annulment orders are *in rem* orders. *Carnie v. Carnie*, 252 S.C. 471, 167 S.E.2d 297 (1969).

<sup>9</sup> As noted in the Petition, 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.

<sup>10</sup> Resp. Ret. p. 15.

<sup>11</sup> *Id.*

parties must be entitled to litigate such issues. Moreover, in the two U.S. Supreme Court cases cited by Petitioners which Respondent strains to distinguish on this fictional basis, the factual issue was the same between the *in rem* order and subsequent third-party claim.<sup>12</sup>

Finally, 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 Husband 1’s supposed bigamy.<sup>13</sup> This unprincipled word game must be rejected. Under South Carolina law, a “status” determination in an *in rem* divorce decree or annulment order includes only the determination of whether the marriage is dissolved as of the order’s date – not any other issue. *Johns*, 309 S.C. at 204, 420 S.E.2d at 860; *State v. Sellers*, 140 S.C. 66, 134 S.E. 873, 877 (1926). 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 (emph. added). Likewise, the U.S. Supreme Court holds that the status determination in an *in rem* order excludes any “subsidiary questions of law on which it is based[.]” *Gratiot*, 249 U.S. at 248. By conflating a “status” determination (*i.e.*, dissolution) with the “subsidiary questions” underlying the annulment (including Husband 1’s alleged bigamy), Respondent and the Opinion reverse settled law and undo the obvious distinction between an *in rem* status determination and a subsidiary finding of fact or law. *Id.* No authority supports this radical departure.

### **C. The Opinion and Respondent Disregard the Elements of Collateral Estoppel.**

Respondent next tries to short-circuit a genuine collateral estoppel analysis, loudly signaling that Petitioners are in no way precluded from litigating the issue of fact which Respondent claims is dispositive: whether Husband 1 was actually married to another when he

---

<sup>12</sup> *Gratiot*, 249 U.S. at 247-48, 39 S.Ct. at 263 (debtor’s insolvency was same issue in *in rem* action and civil action); *Becher*, 279 U.S. at 391, 49 S.Ct. at 357 (same issue of whether named inventor was inventor of patented device).

<sup>13</sup> Resp. Ret. p. 18.

married Respondent. To this day, that bare self-serving allegation by Respondent has remained untested, and Respondent has stipulated she has no evidence whatsoever to support it other than her own hearsay statements at the 2004 annulment hearing, with no party to object or oppose her.

The doctrine of collateral estoppel or issue preclusion prevents only a party to a prior action from re-litigating an issue 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). Here, Petitioners were not parties or in privity with any party to the 2004 Annulment Action, nor could they have intervened. *Ex parte GEICO*, 373 S.C. 132, 138–139, 644 S.E.2d 699, 702 (2007). As is undisputed, neither Petitioners' nor Brown's legal interests were determined in that 2004 family-court proceeding. *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 that Action.<sup>14</sup> Brown and Respondent’s interests were not even aligned, if not adverse, as Brown had separately sought to terminate their marriage, resulting in a settlement wherein Respondent agreed to never even claim to be Brown’s “common law” wife.<sup>15</sup>

To evade Petitioners’ non-party status, Respondent argues unpersuasively that Brown was somehow in privity with Respondent merely because he subsequently paid her legal fees after settling his action against her. South Carolina, however, strictly construes privity with respect to issue preclusion. *Wade*, 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. Restatement (Second) of Judgments § 39, cmt. c, at 384 (1982). For her tenuous argument, Respondent cites

---

<sup>14</sup> See R. pp. 293-313, Joint Stipulation, Exhibits 12, 13.

<sup>15</sup> R. pp. 349-350, Joint Stipulation, Exhibit 19.

one 1934 Kentucky case decided before publication of the Restatement (Second), but that fails to overcome strongly worded Fourth Circuit precedent and the Restatement on this exact point: “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.” *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).<sup>16</sup> Moreover, the idea that payment of some legal fees results in the level of involvement and control required for privity directly contradicts the admonishment in Rule 1.7, SCRPC, that mere payment of legal fees cannot confer any right of control over another’s legal proceedings.

Even setting aside that Petitioners were not parties or privies to the Annulment Action, the issue of whether Marriage 1 was bigamous was never “actually litigated” in that “hastily granted” annulment. *Wilson*, 403 S.C. at 434 n.16, 743 S.E.2d at 759 n.16. Respondent absurdly asserts that the Annulment Action was not a default proceeding, because the court was somehow a party, discharging the need for Husband 1 to appear and defend against Respondent’s claims against him, which were based entirely on Respondent’s unopposed hearsay. That argument would erase Rule 55, SCRCP, which conclusively provides that a default occurs “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend,” a definition that on its face only applies to Husband 1 (emph. added).<sup>17</sup> Husband 1’s non-participation in the Annulment Action constitutes the very essence of a default judgment to which the doctrine of collateral estoppel never applies, as a matter of law. *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.

---

<sup>16</sup> *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912) in no way supports Respondent’s theory that reimbursement of fees establishes privity. In *Tillman*, a father’s earlier affidavit in a custody case in which he disclaimed custody of his children was binding on him – a holding totally unrelated to privity or payment of legal fees. *Id.*

<sup>17</sup> *Fogel v. McDonald*, 159 S.C. 506, 157 S.E. 803 (1931), the only authority Respondent cites on this point, has no bearing. There, the family court entered judgment against a fully participating defendant whose pleading had a technical defect. *Id.* That is irrelevant to the situation here, governed by Rule 55, where a defendant fails to appear.

Tellingly, Respondent ignores *Palm*, where this Court *refused* to bind a daughter to a paternity finding contained in two family court orders (a divorce and a name-change order), because the paternity issue had been stipulated to in the divorce action (where the daughter was not a party), and “merely relied upon” in the name-change action (where she was a party). 302 S.C. at 374, 396 S.E.2d at 362. Under *Palm*, the issue was never “actually litigated,” a holding that applies even more forcefully here, where neither Husband 1, Brown, nor any Petitioner participated in the 2004 Annulment Action. Respondent’s silence regarding *Palm* says it all.

At a minimum, Petitioners are entitled to take discovery and present evidence to the court regarding the actual status of Respondent’s two purported marriages. It is Respondent who seeks to undermine due process with misleading mischaracterizations of her 2004 annulment proceeding and the requisite elements of collateral estoppel overlooked in the Opinion.

In short, the trial court and panel gravely erred (i) in concluding that all the findings and conclusions in the Annulment Order were preclusive and binding upon non-parties, like Petitioners, and (ii) in preventing Petitioners from taking any discovery as to Respondent’s uncorroborated claim that her belatedly annulled Marriage 1 was bigamous.

### **III. RESPONDENT MISAPPREHENDS THE SUMMARY-JUDGMENT STANDARD AND HER OWN BURDEN OF PROOF.**

Respondent battles against the summary-judgment standard by pretending that this case presents no issue of material fact.<sup>18</sup> That stance ignores the key factual issue – *i.e.*, whether Husband 1 was already married when he entered into Marriage 1 – underlying Respondent’s circular claim that Marriage 1, not Marriage 2, was supposedly bigamous. Unless *Lukich* disposes of this house of cards as a matter of law (*see* Part IV, *infra*), it presents an obvious issue of fact

---

<sup>18</sup> Resp. Ret. p.19. Contrary to Respondent’s citation to *Lewis v. Coleman*, 257 F. Supp. 38, 40 (S.D. W. Va. 1966) that case simply states the standard that summary judgment is appropriate absent a genuine issue of material fact.

precluding summary judgment, particularly as Petitioners were deprived of any discovery. Respondent's odd labeling of that critical factual issue as "immaterial" is based solely on her erroneous legal position regarding collateral estoppel and the preclusive effect of *in rem* orders.

Regarding her burden of proof, Respondent similarly attempts to evade the actual legal issues by conflating them. The trial court's and panel's disregard of established rules governing collateral estoppel and the limited preclusive effect of *in rem* orders do not relieve Respondent of her burden of proof. 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). Respondent's production of a marriage certificate, showing that she and Brown engaged in a 2001 ceremony is insufficient to carry that burden, because her own stipulations rebut the validity of Marriage 2, by acknowledging: (i) her 1997 license to marry Husband 1, (ii) her participation in a 1997 marriage ceremony with Husband 1, and (iii) that Marriage 1 had not been annulled when she procured the Marriage 2 certificate and engaged in the Marriage 2 ceremony in 2001.<sup>19</sup>

Thus, Respondent's factual stipulations (and the exhibits) overcome any presumption that Marriage 1 was dissolved prior to Marriage 2. *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). As Respondent wholly failed to meet her burden to present any *admissible* evidence that Marriage 1 was in fact bigamous, her attempted Marriage 2 was void as bigamous. S.C. Code Ann. § 20-1-80; *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992); *Yarbrough*, 280 S.C. at 550, 314 S.E.2d 16, 18, *citing* 52 Am. Jur. 2d *Marriages*, § 130 (1970)).

Finally, the Annulment Order itself cannot serve as *evidence* of Husband 1's unsupported

---

<sup>19</sup> R. p. 256, Joint Stipulation, ¶¶ 4-6.

bigamy because it is inadmissible hearsay. *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993) (“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). Respondent’s claim that Petitioners “stipulated to the admissibility” of the Annulment Order (Ret. at 14) is a rank misrepresentation – the joint stipulation states only that the copy of the Order is authentic, not admissible, as Respondent falsely asserts.<sup>20</sup>

The circuit court thus fundamentally erred in mis-assigning the burdens of proof.<sup>21</sup> The trial court should have granted summary judgment to Petitioners because Respondent could present no admissible evidence to support her self-serving claim. 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). This Court, however, need not even reach these multiple errors of law, due to *Lukich*’s overriding holding that the belated annulment of a first marriage after a facially bigamous second marriage cannot revive it as a matter of law.

#### **IV. LUKICH BARS THE 2004 ANNULMENT ORDER FROM RETROACTIVELY VALIDATING RESPONDENT’S MARRIAGE TO BROWN.**

Respondent continues to turn *Lukich* on its head by arguing that her facially bigamous 2001 Marriage 2 was validated by her supposedly bigamous 1997 Marriage 1, based solely on her 2004 annulment of Marriage 1. It is undisputed that at the time Respondent attempted Marriage 2 in 2001, she well knew that she had previously obtained a marriage license and participated in a marriage ceremony with Husband 1. It is also undisputed that before Respondent attempted Marriage 2, the critical moment in time under *Lukich*, she had not sought a divorce from Husband 1 or any annulment of Marriage 1, but instead she chose for years to conceal Marriage 1 from

---

<sup>20</sup> R. pp. 256, 293-96, Joint Stipulation, ¶ 7 & Exhibit 12.

<sup>21</sup> R. p. 96, MSJ Order, at p. 44.

Brown and the State of South Carolina. Those facts alone compel one result under *Lukich*: Marriage 2 was void under the bigamy statute, because Marriage 1 had not been “declared void by the sentence of a competent court.” S.C. Code Ann. § 20-1-80.

Respondent’s theory that she did not need have Marriage 1 “declared void” prior to marrying again directly contradicts the statute. By circularly arguing that the 1997 Marriage 1 need not be annulled before her 2001 Marriage 2 due to her 2004 Annulment Order, Respondent and the Opinion openly contradict *Lukich*’s central holding. Under *Lukich*, the subsequent annulment of a first marriage cannot be used to retroactively validate a second marriage, as the 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 (emph. added)). The *Lukich* Court rightly concluded that “[a]ny other construction of [] § 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. It could not be any clearer.

It is willful distortion for Respondent to say that, under Petitioners’ reading of *Lukich*, bigamous marriages would be “valid” until voided by a court.<sup>22</sup> Instead, under *Lukich*, a party to a marriage simply cannot remarry until that marriage is first “declared void by the sentence of a competent court.” *Id.*, 379 S.C. at 592, 666 S.E.2d at 907, *quoting* S.C. Code Ann. § 20-1-80. Nor are Petitioners applying *Lukich* any differently to Marriage 2 than to Marriage 1, as the issue here is not whether Brown could remarry, but whether Marriage 2 is bigamous due to Respondent’s concerted failure to first terminate Marriage 1 by the sentence of a court. The policy behind the statute and *Lukich*’s timing requirement is obvious: once a person like Respondent actively obtains a marriage license and participates in a marriage ceremony, her marital status in the eyes of the

---

<sup>22</sup> Resp. Ret. at 21.

law is too important to be left to her “subjective[]” belief or self-serving allegations that such marriage was void. *Johns*, 309 S.C. at 203, 420 S.E.2d at 858.

Once again, Respondent side-steps the wealth of legal authority that reaffirms this strict timing requirement. *See* Pet. at 20-24. For example, she has no response to 52 Am. Jur. 2d *Marriage* § 57, which provides that an annulment for any reason “does not relate back so as to validate a second marriage. In order for the subsequent marriage to be valid . . . there must be a new ceremony following the termination of the earlier marriage.”

Respondent continues to argue that this unequivocal rule, set forth in *Lukich* without any exceptions, applies only to “voidable” marriages, when *Lukich* and the statute say no such thing.<sup>23</sup> Respondent’s mantra that bigamous marriages are void *ab initio* is legally unpersuasive, as all annulled marriages are declared “void ab initio.” *Splawn v. Splawn*, 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*.”). It is thus no surprise that *Lukich* does *not* distinguish between void and voidable marriages, declining to adopt the footnote which invited that distinction in the Court of Appeals’ *Lukich* decision. 368 S.C. at 55 n.2, 627 S.E.2d at 758 n.2. Instead, this Court reaffirmed that such a void/voidable distinction would foster a “legal fiction” and lead to “inconsistent” results. *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)).

Respondent’s disingenuous plea that she should not be asked to prove her self-serving assertions regarding Marriage 1 describes a mess of her own making and does not trump settled South Carolina law. Respondent is not specially exempted from the bigamy statute. Respondent

---

<sup>23</sup> *Sellars*, 140 S.C. 66, 134 S.E. 87, does not aid Respondent. There, Marriage 1 was not void, and if voidable, was never annulled, so Wife 1’s attempted marriage to Husband 2 was invalid, leaving Husband 2 not criminally liable for bigamy. Thus, any discussion in *Sellars* as to a void/voidable distinction cited by Respondent is pure *dicta*. Nor does *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950), which merely denied a putative spouse death-benefits due to bigamy. *Day* has nothing to say about when and how someone in a bigamous marriage can lawfully marry again.

actively obtained a marriage license and engaged in Marriage 1 in 1997,<sup>24</sup> and in the five years between Marriage 1 and Marriage 2, Respondent could have readily annulled Marriage 1. But instead, *she* opted to conceal Marriage 1 from both Brown and the State of South Carolina.<sup>25</sup>

Moreover, under South Carolina law, “after the impediment [of Marriage 1] is removed . . . there must be a new mutual agreement” to enter into Marriage 2, such as “by way of civil ceremony.” *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005); *see cases*, Pet. at 23. It is undisputed that Brown and Respondent did not marry after the 2004 Annulment Order and instead, Respondent covenanted never to claim to be even Brown’s “common law” wife.<sup>26</sup>

South Carolina law does not condone or reward Respondent’s conduct. A person desiring the benefits of legal marriage has both a legal and moral obligation to resolve any prior marriage before undertaking to re-marry. *See Johns*, 309 S.C. at 202-03, 420 S.E.2d at 858-59 (noting that even “good faith” will not change this basic requirement). 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. § 20-1-80. A long line of cases forbids exactly what Respondent attempted here, and *Lukich* reaffirms that annulment orders can never be used, as in the panel’s Opinion, to retroactively validate a facially bigamous second marriage.

### CONCLUSION

Respondent’s hall of mirrors cannot deflect from the bedrock legal principles that dispose of her spousal claim. *First*, the 2004 Annulment Order’s finding that Marriage 1 was supposedly bigamous is not binding on non-parties to that action, including James Brown and Petitioners, under our longstanding rules governing collateral estoppel and the limited preclusive effect of *in rem* judgments. *Second*, Respondent’s attempted 2001 marriage to Brown was bigamous on its

---

<sup>24</sup> R. p. 256, Joint Stipulation, ¶ 6.

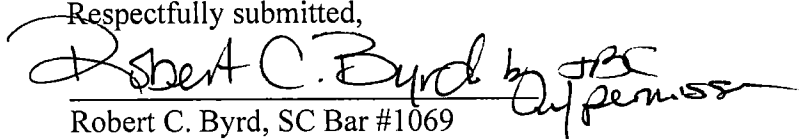
<sup>25</sup> R. pp. 329-335, Joint Stipulation, Exhibits 15-16.

<sup>26</sup> R. pp. 258, 349, Joint Stipulation, ¶¶ 19-20 & Exhibit 19 at 1.

face due to her 1997 marriage and cannot be retroactively revived by her 2004 annulment of that marriage. Under the bright-line rule emphasized by *Lukich* and inherent in the bigamy statute, Respondent's after-the-fact 2004 annulment of her first marriage (on multiple alleged grounds) does not retroactively resuscitate her facially bigamous second marriage as a matter of law.

In the unlikely event that *Lukich* does not resolve this entire case, Petitioners, who were not and could not have been parties to the 2004 Annulment Action, are fully entitled to litigate whether Marriage 1 was in fact bigamous, an issue that was never actually litigated and for which to this day Respondent has no admissible evidence whatsoever. Fundamental due process requirements cannot abide Respondent's extreme position that no party or court can ever challenge her self-invented claim even though she willfully concealed her first marriage and attempted to marry Brown, in clear violation of South Carolina's bigamy law and public policy.

Respectfully submitted,

 Robert C. Byrd by JBC  
on permission

Robert C. Byrd, SC Bar #1069

*bobbybyrd@parkerpoe.com*

A. Smith Podris, SC Bar #78051

*smithpodris@parkerpoe.com*

Parker Poe Adams & Bernstein LLP

200 Meeting Street, Suite 301 (29401)

Post Office Box 160

Charleston, SC 29402

Telephone: (843) 727-2650

Facsimile: (843) 727-2680

Of Counsel (*Pro Hac Vice*):

Marc Toberoff

*mtoberoff@toberoffandassociates.com*

Toberoff & Associates, P.C.

23823 Malibu Rd., Suite 50-363

Malibu, CA 90265

Telephone: (310) 246-3333

Facsimile: (310) 246-3101

December 17, 2018

Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED  
DEC 17 2018

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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 (Court of Appeals)  
Appellate Case No. 2018-001990 (Supreme Court)

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 December 17, 2018, s/he has caused a copy of the **PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** to be served upon all parties of record by mailing a copy of the same addressed as follows:

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

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

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

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

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

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

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

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

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

David L. Michel, Esq.  
Michel Law Firm, LLC  
751 Johnnie Dodds Blvd., Suite 200  
Mt. Pleasant, SC 29464

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

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

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

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

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

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

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

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


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

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

Steven M. Slotchiver, Esq.  
Slotchiver & Slotchiver, LLP  
751 Johnnie Dodds, Suite 100  
Mount Pleasant, SC 29464

Daryl Brown  
2223 Birnam Place  
Augusta, GA 30904

Terry Brown  
3929 Liberty Hill Rd.  
Eastanollee, GA 30538

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

*with permission*

Charleston, South Carolina