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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

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Petitioners' BRIEF

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II. Whether Appellants can be collaterally estopped from litigating the issue of Respondent's status as the decedent's 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 Appellants 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 alleged bigamy and stipulated that 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 Appellants 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

The legendary music artist James Brown ("Brown" or "Husband 2") died on Christmas Day, December 25, 2006, in Atlanta, Georgia. His will devised his personal effects to six named children, including the Appellants, and the remainder of his considerable estate was left to an irrevocable trust, The James Brown "I Feel Good" Trust ("Trust"), to provide financial assistance for the education of disadvantaged youth.[1]

Following Brown's death, the respondent Tommie Rae Brown, a.k.a. Tommie Rae Hynie ("Respondent"), brought an action in probate court to set aside Brown's entire will, which named neither her nor her son as beneficiaries, alleging undue influence and fraud, and separately claimed an elective share or an omitted spouse's share of the Brown Estate. Respondent's claim that she was Brown's surviving spouse was contested by both the Estate and Appellants insofar as her 1997 marriage ("Marriage 1") rendered her attempted marriage to Brown in 2001 bigamous as a matter of law under S.C. Code Ann. § 20-1-80. The probate court transferred Respondent's claims to the circuit court.

Seven years of cluttered litigation ensued. The trial court thereafter approved a Compromise Settlement Agreement that provided Respondent a 23.75% share of Brown's entire estate, notwithstanding his testamentary wishes, but the settlement was sharply rejected by the South Carolina Supreme Court in *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013), as lacking evidence showing a fair and reasonable settlement of a good faith controversy, and the case was remanded to the trial court.

[1] *See Wilson v. Dallas*, 403 S.C. 411, 449, 743 S.E.2d 746, 767 (2013) (containing a detailed description of the factual and procedural history).

On October 1, 2013, the trial court appointed David C. Sojourner, Jr. to serve as Limited Special Trustee of the Trust specifically to defend the Estate and Trust against the will and trust challenges, and on October 10, 2013, the Probate Court appointed Mr. Sojourner as the Limited Special Administrator (hereinafter Mr. Sojourner is referred to in both capacities as the "LSA").[2]

The present motions for summary judgment and orders on appeal arose as a result of the LSA's motion to modify protective orders the trial court had issued in 2008 sealing Respondent's handwritten diaries ("Diaries"). During a hearing on the LSA's motion ("March 31, 2014 Hearing"), Respondent's attorneys argued against producing the Diaries and sought a stay of all discovery pending a summary judgment motion they intended to file on the issue of whether Respondent is Brown's "surviving spouse."[3] The trial court stayed *all* discovery and allowed Respondent to file her motion, but ruled that if her motion turned upon any contested facts "summary judgment goes out the window."[4]

On April 28, 2014, Respondent filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for partial summary judgment, which was joined in by the Appellants, contesting Respondent's spousal claim.

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

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[2] *See* R. p. 56, January 13, 2015 Order, at p. 4.

[3] 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").

[4] R. p. 637, *Id.* at 60:19-21.

The trial court held a hearing on the motions on November 24, 2014, and on January 13, 2015, entered a surprising order granting Respondent's motion for summary judgment ("MSJ Order"). The trial court ruled that Respondent's 2001 marriage to Husband 2 (Brown) was not bigamous because, in its view, Respondent's 1997 marriage to Husband 1 was bigamous, based solely on the unsupported findings in a 2004 order annulling Respondent's first marriage, obtained against Husband 1 by default.[5] The LSA and Appellants filed motions to reconsider on January 26, 2015.[6] At the June 30, 2015 hearing on these motions, the trial court requested supplemental briefing on the application of *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), which the parties thereafter filed.[7] On October 20, 2015, the court denied the motions to reconsider ("Order Denying Reconsideration").[8]

Appellants timely filed their Notice of Appeal of the above orders (collectively, the "Orders") on November 20, 2015.[9] Thereafter, before briefing ended, the LSA and Respondent filed what they purported to be their "settlement agreement" with the court, and the LSA was permitted to withdraw from this appeal. Subsequently, it appeared, however, that Respondent, the LSA, and the Estate's Personal Representative had withheld the full terms of their actual settlement, namely, a critical side-agreement which they have steadfastly refused to disclose to any court or Appellants.[10]

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[5] R. pp. 69, 71 and 97, MSJ Order, at 17, 19, and 45.

[6] R. pp. 825-883, LSA Motion to Reconsider; R. pp. 884-887, Brown Appellants' Motion to Reconsider.

[7] R. pp. 1049-1063, Memorandum of Limited Special Administrator on Issue of Application of *Lukich v. Lukich.*

[8] R. pp. 103-121, Order Denying Reconsideration.

[9] Brown Appellants' Notice of Appeal.

[10] In re: The Estate of James Brown, Appellate Case No. 2018-000104 (dismissed as

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.[11] The Opinion contained five rulings relevant to this Petition:

(i) The Opinion held that the factual finding in the 2004 Annulment Order that Marriage 1 was bigamous is binding on Appellants in this action, when they were not, and could not have been, parties to the Annulment Action.[12]

(ii) The Opinion held that Appellants are barred by the collateral estoppel doctrine from litigating whether Marriage 1 was bigamous even though (1) neither Appellants nor Brown were parties (or privies) to Respondent's Annulment Action; (2) Husband 1 never appeared, so the Annulment Order was not "actually litigated"; and (3) no evidence was presented in that proceeding other than Respondent's unopposed hearsay testimony that Husband 1 told her he had other wives.

(iii) The Opinion 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 Opinion held that Appellants 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 Appellants had only stipulated to narrow facts, including that the Annulment Order was entered in 2004, but not to any of its factual findings or

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interlocutory).

[11] Shearouse Adv. Sh. No. 30 at 19-30.

[12] Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 28.

conclusions of law.[13]

(v) The Opinion ruled, based solely on the 2004 Annulment Order, that after Respondent married Husband 1 in 1997, she was not required to take any action to annul her Marriage 1 (which she instead concealed) before attempting to marry Brown in 2001.

Appellants timely filed a petition for rehearing with suggestion for rehearing *en banc*, which was denied on October 10, 2018. Appellants' Petition for Writ of Certiorari to this Court followed and was granted on February 1, 2019.

STATEMENT OF THE FACTS

Respondent and Javed Ahmed ("Husband 1"), after applying for and securing a Texas marriage license, were legally married in Harris County, Texas on February 17, 1997 ("Marriage 1").[14]

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

On December 10, 2001 Brown and Respondent obtained a marriage license in Aiken County, South Carolina.[15] To obtain the license Respondent falsely swore under

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

[14] R. pp. 265-266, Marriage 1 License, Exhibit 1 to Joint Stipulation.

[15] R. pp. 269-270, Joint Stipulation, Exhibit 4.

oath to the Aiken County Probate Court that this was her first marriage, willfully concealing her Marriage 1 from both Brown and the Probate Court.[16]

On December 14, 2001, Brown and Respondent participated in a purported marriage ceremony in Aiken County, South Carolina ("Marriage 2").[17] Respondent admits and has stipulated that Marriage 1 was not dissolved prior to her attempted marriage to Brown in 2001.[18]

Years later, on December 15, 2003, Respondent filed an action in the Charleston County Family Court (the "Family Court") against Husband 1, alleging their marriage should be annulled on numerous grounds (the "Annulment Action").[19] Husband 1 was never personally served, but instead was purportedly served by publication.[20] Because Husband 1 never appeared in the Annulment Action, the only testimony presented to the Family Court was Respondent's. As to Respondent's claim that her Marriage 1 was bigamous, the only purported evidence presented to the Family Court was Respondent's self-serving testimony that Husband 1 had allegedly told her that he had three or more wives in Pakistan when they married.[21] On April 15, 2004, the Family Court entered an order annulling Marriage 1 on all of the grounds alleged by Respondent, based solely on her unopposed testimony and the proposed order submitted by her counsel (the "Annulment Order").[22]

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[16] *Id.*; *see also* S.C. Code Ann. § 20-1-230 (A)(4).

[17] R. p. 256, Joint Stipulation, ¶ 5.

[18] R. p. 256, *Id.*, ¶ 6.

[19] R. pp. 271-273, Joint Stipulation, Exhibit 5.

[20] R. pp. 274-291, Joint Stipulation, Exhibits 6–10.

[21] R. pp. 297-313, Joint Stipulation, Exhibit 13.

[22] R. pp. 293-296, *Id.*, Exhibit 12.

After discovering Marriage 1, but prior to the Annulment Order, Brown brought his own annulment proceedings on January 29, 2004, in Aiken County, South Carolina, against Respondent.[23] Respondent counterclaimed for a divorce from Brown. The parties settled and dismissed their respective suits in a consent order filed on August 16, 2004 (the "Consent Order"), wherein Respondent expressly agreed to even "forever waive any claim of a common law marriage to [Brown], both now and in the future."[24]

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009). Thus, if a genuine issue of material fact exists, summary judgment is improper and will be reversed on appeal. *Lanham v. Blue Cross & Blue Shield of SC., Inc.*, 349 S.C. 356, 366, 563 S.E.2d 331, 335–36 (2002). The appellate courts review a grant of summary judgment *de novo*. *Stoneledge at Lake Keowee Owner's Ass'n, Inc. v. Builders Firstsource-Southeast Group*, 413 S.C. 630, 634–45, 776 S.E.2d 434, 437 (Ct. App. 2015).

On summary judgment, the evidence must be viewed, and all reasonable inferences must be drawn, in the light most favorable to the non-moving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). However, where a party "makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the [moving party], he was entitled to judgment as a matter of law." *Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991).

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[23] R. p. 258, *Id.*, ¶ 19.

[24] R. pp. 349-350, *Id.*, Exhibit 19.

Although a denial of a motion for summary judgment ordinarily is not appealable, an appellate court "may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation." *Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002).

SUMMARY OF ARGUMENT

The Opinion erroneously condones Respondent's conduct aimed at anointing herself James Brown's spouse, even though their marriage was bigamous as a matter of law, and she comes to court with unclean hands. The parties' Joint Stipulation is clear that Respondent was still married to Husband 1 when she tried to marry Brown in 2001. Her uncorroborated self-serving hearsay that Marriage 1 was bigamous, in her unopposed 2004 Annulment Action to which Appellants and Brown were not and could not be parties, neither binds them nor trumps South Carolina's bigamy statute and strong public policies regarding marriage. The Opinion and the trial court's Orders directly conflict with bedrock South Carolina law on fundamental issues of due process and marital status and, as such, must be reversed.

First, the Opinion erroneously gave preclusive effect to the purported factual findings of the 2004 Annulment Order. Because the 2004 Annulment Order is undisputedly an *in rem* order, its underlying factual findings and conclusions of law are simply not binding on third-parties, including Brown and Appellants. While the Annulment Order binds all the world as to the dissolution of Marriage 1 as of the date of the order, its wholly unsupported factual assertion that Husband 1 was a bigamist is unquestionably not binding on Appellants. If the Opinion stands, third-parties who are barred from participating in a family court marital proceeding will be nevertheless

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 reversal.

Second, the Opinion also misapplied the black-letter requirements of the issue preclusion doctrine in erroneously holding that Appellants are collaterally estopped by the Annulment Order's purported findings. There is no question that the requisite elements of collateral estoppel are not met here both because (1) Appellants were neither parties to nor in privy with the Annulment Action, and (2) the issue of Husband 1's alleged bigamy was never actually litigated in that default setting, where Husband 1 (served by publication) never appeared, leaving Respondent's self-serving hearsay unopposed. Appellants were thereby wrongly deprived by the trial court's Orders and the panel's Opinion of a full and fair opportunity to litigate Respondent's circular bigamy allegation.

Third, the Opinion erroneously affirmed summary judgment for Respondent and the denial of Appellants' summary judgment motion. Respondent conceded at the November 2014 summary judgment hearing that the parties' cross-motions could be decided based entirely upon the undisputed facts in their Joint Stipulation.[25] Relevant to the questions before this Court, the parties stipulated to the following:

- On February 12, 1997, Respondent and Husband 1 obtained a marriage license in Texas;
- On February 17, 1997, Respondent and Husband 1 participated in a marriage ceremony in Texas;

[25] R. pp. 2467-2469, Nov. 24, 2014 hearing transcript, 4:13–6:5.

- On December 14, 2001, Respondent and Husband 2 participated in a marriage ceremony in South Carolina;

- From February 17, 1997 to December 14, 2001, no court order was entered that ended Marriage 1;

- On April 15, 2004, the Charleston County Family Court entered an order declaring Marriage 1 void based solely on Respondent's testimony, as Husband 1 did not appear in the action;

- Respondent can identify no evidence (other than her own assertion) that Husband 1 allegedly had other wives on February 17, 1997; and

- Husband 2 was not a named party in the Annulment Action nor was he able to intervene therein.[26]

The panel erroneously affirmed summary judgment for Respondent and denied summary judgment for Appellants even though Respondent has never presented any admissible evidence to support her self-serving assertion that her attempted second marriage was not bigamous because, supposedly, her first marriage (which she hid from Brown and this State) was bigamous. On summary judgment, the sole admissible evidence before the trial court as to Husband 1's true marital status was his own sworn statement that he was not married, in his and Respondent's application for a marriage license, mandating summary judgment for Appellants on this issue.

Fourth, it was clear error to grant Respondent summary judgment while barring Appellants from using her Diaries, conducting depositions, or taking any written discovery of Respondent or others. Although the trial court could and should have ruled as a matter of law that Marriage 2 was bigamous, the converse is not true. There were obvious triable issues of fact precluding summary judgment in Respondent's favor.

[26] R. pp. 255-258, Joint Stipulation, ¶¶ 2, 5, 6, 9 10, 12, and 18.

Fifth, and finally, the Opinion misconstrues this Court's fundamental holding in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), which can readily resolve this entire appeal and what remains of this action. In *Lukich*, this Court strictly construed the bigamy statute, Section 20-1-80 of the South Carolina Code, holding that a spouse's annulment of her first marriage as void *ab ignitio* after her attempted second marriage does not relate back so as to retroactively validate her facially bigamous second marriage. *Id.* at 379 S.C. at 592, 666 S.E.2d at 907. *Lukich's* pragmatic rule was held necessary to prevent the "uncertainty and chaos" that would result if a party could unilaterally alter the legal status of her bigamous second marriage at some future date by having her first marriage annulled, when and if convenient to do so. *Id.* at 593, 666 S.E.2d at 907.

Simply put, because Respondent's 1997 marriage to Husband 1 had not been dissolved, she lacked the legal capacity to marry Husband 2 in 2001. South Carolina law is clear that Respondent had a simple legal (as well as a moral) obligation, to resolve her first marriage before attempting to marry again. Respondent had actively entered into her first marriage and then knowingly concealed it. Respondent's *post-hoc* annulment ended her first marriage as of 2004, but it cannot serve as a time machine to resuscitate her illegal second marriage in 2001.

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 attaining due process to vindicate their unique rights. *Second*, a party is now precluded from litigating critical issues or taking any discovery, based on a prior action to which they were not and could not have been parties, even as to issues never "actually litigated." *Third*, the *post-hoc* annulment of a

prior marriage on an alleged ground that it was "void" is now an inexplicable loophole in *Lukich*'s prohibition against using the untimely annulment of a first marriage as void *ab initio*, to retroactively validate a facially bigamous second marriage. The Opinion sows considerable uncertainty where this Court has emphasized that certainty is of the utmost importance. This Court now has the welcomed opportunity to correct these serious legal errors and to reaffirm the vital public policies safeguarded by *Lukich*.

ARGUMENT

I. APPELLANTS ARE NOT BOUND BY THE PURPORTED FINDINGS CONTAINED IN THE *IN REM* ANNULMENT ORDER.

A. Appellants Have Standing To Challenge Respondent's Spousal Claim

As a threshold matter, in holding that Appellant's lack "standing" to challenge the Annulment Order,[27] the Opinion misconstrued Appellants' express intent. To be clear, Appellants have no interest in "undoing" Respondent's termination of her marriage to Husband 1 in 2004, nor do Appellants have any ability to do so. Furthermore, there is no outcome of the present litigation that would result in Respondent being married again to Husband 1. Instead, Appellants seek to enforce their own due process rights to litigate the validity of Respondent's claim that she is their father's surviving spouse and, in doing so, are not bound by the factual findings of her *in rem* Annulment Order.

Respondent and the panel's Opinion repeatedly conflate the binding effect of the annulment of Marriage 1 itself with the non-preclusive effect of the Annulment Order's underlying findings, including Husband 1's alleged, but wholly unproven, bigamy.

[27] "We find Appellants lacked standing to contest the annulment order, just as Brown did not have standing to intervene in the annulment action between Respondent and Ahmed." Panel Op. at 10; Shearouse Adv. Sh. No. 30 at 28.

Indeed, this persistent mischaracterization of Appellants' intent to "challenge the Annulment Order" is the cracked foundation upon which Respondent constructed her entire argument that Appellants lack standing to contest Respondent's unsupported claim that she is Brown's surviving spouse.

By contrast, it is law of the case that Appellants have standing to challenge Respondent's spousal claim. As the trial court found when naming Appellants as parties to this action over Respondent's objection, Appellants are "interested persons" under S.C. Code Ann. § 62-1-201(2) in multiple ways.[28] That unappealed ruling is the law of the case, so the only logical inference from the Opinion is that the panel also conflated the question of standing with that of preclusion – which, under settled law, must be resolved in Appellants' favor.

B. As Non-Parties to the 2004 Annulment Action, Appellants Cannot Be Bound By Factual Findings Or Conclusions of Law in the Resulting *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 conclusion: the *in rem* Annulment Order is only binding on non-parties (like Appellants) as to the disposition, *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 Appellants. This error alone compels reversal.

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[28] 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.

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); 4 S.C. Jur. *Action §* 5. The U.S. Supreme Court has made clear that while the 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 also Gratiot County State Bank v. Johnson*, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587 (1919) ("[J]udgments in rem [are] not res judicata as to the facts or [] the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto.").

The trial court, in declaring that that the Annulment Order is "binding on all the world,"[29] misconstrued this essential distinction and settled rule aptly summarized in the Restatement: "Although a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action . . . *except* as to persons who have appeared and actually litigated the question of [] th[at] fact." Restatement (First) of Judgments §73 (1942), note a, cmt. c (emphasis 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 factual issues decided therein); *State v. Phillips*, 400 A.2d 299, 307 (Ch. Ct. Del. 1979) (same). As discussed in Part II below,

[29] R. P. 97, MSJ Order, at 45.

Appellants 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 [to Marriage 1] are thereafter free to remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriages against third persons who were not and had no right to be heard thereon." *Rediker v. Rediker*, 221 P.2d 1, 4 (Cal. 1950) (*en banc*) (emphasis added); *see also In re Rowe's Estate*, 141 P.2d 832 (Ore. 1943) (*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."[30] Appellants 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 family court proceeding, such as Appellants and Brown.

The rule is logical 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

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

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 but 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 to the action).

Among the myriad undesirable consequences resulting from allowing the Opinion to stand is that family court matters would become a "race to the courthouse." That is, if Brown wanted to challenge Respondent's bare allegation that her first marriage was bigamous, he would have been required to beat her in a footrace to a hearing. Notably, the Opinion contemplates this without recognizing the inherent contradiction in its logic. It indicates that "during his life, Brown availed himself of the method available to him by bringing his own annulment action against Respondent to invalidate his marriage to her" based on her bigamy.[31] But under the Opinion's holding, Brown's pursuit of this action would have been futile, as Brown would have been retroactively bound by the unsupported factual finding in the Annulment Order, even though he was not and could not be a party to that family court proceeding.

Tellingly, the panel's Opinion included no analysis of the dispositive rule governing *in rem* orders. The trial court and panel committed clear reversible error in

[31] 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.

concluding that the underlying findings and conclusions in the *in rem* Annulment Order bind Brown and Appellants, despite being non-parties to the Annulment Action.[32]

II. APPELLANTS ARE NOT COLLATERALLY ESTOPPED FROM LITIGATING WHETHER RESPONDENT'S FIRST MARRIAGE WAS IN FACT BIGAMOUS

Beyond the plain error of ignoring the *in rem* nature of the Annulment Order and the attendant limitations on its preclusive effect, the Opinion further erred by abandoning the requisite elements of collateral estoppel, and affirming the trial court's holding that Brown and Appellants, as non-parties to the Annulment Action, were collaterally estopped from challenging the un-litigated findings of fact and conclusions of law in the Annulment Order.[33]

The Opinion thus neglected the first and most fundamental requirement of the collateral estoppel doctrine, *i.e.*, that one must be a party to a prior action (or their privy) to be precluded from litigating an issue decided therein. Restatement (Second) of Judgments § 27 (1982); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). In addition, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Id.* Thus only a party to an action who had a "full and fair opportunity to previously litigate the issue" therein may be collaterally estopped by the resulting order. *Id.* As these well-settled prerequisites are not met here, Appellants are squarely entitled to litigate the issue of whether Respondent's Marriage 1 was in fact bigamous.

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[32] R. pp. 80-86, MSJ Order, at 28–34; Panel Op. at 10, Shearouse Adv. Sh. No. 30 at 29.

[33] R. pp. 86-97, MSJ Order, at 34–45; Panel Op. at pp. 9-11, Shearouse Adv. Sh. No. 30 at 28-30.

A. Appellants and Brown Were Not Parties to the Annulment Action or In Privity with a Party.

It is undisputed that none of the Appellants nor Brown was a party to the 2004 Annulment Action. 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 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 America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008).

Moreover, neither Appellants 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 [the 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 Appellants' 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 Renewal*, 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).[34]

Respondent's sole 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. Restatement (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").

Indeed, under Rule 1.7 of the South Carolina Rules of Professional Conduct the payment of a party's legal fees by a non-party cannot give the non-party control over the party's litigation, as would be required for a finding of privity.[35] Moreover, Brown was adverse to Respondent. After Respondent filed her Annulment 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.[36]

Put simply, collateral estoppel has no application here, because neither Appellants nor Brown were parties or privies to Respondent's Annulment Action.

B. The Bigamy Issue Was Never "Actually Litigated" in the Untimely Annulment Action

Even if Appellants or Brown had been parties or privies to Respondent's

[34] R. P. 97, MSJ Order, at 45.

[35] Rule 1.7 warns lawyers about the conflicts of interest that arise when a non-party pays the legal fees of the represented party. Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.7, comment 11 ("If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee . . . .").

[36] R. pp. 256-258, Joint Stipulation, ¶¶ 7 and 19.

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 nothing to indicate that he received actual notice.[38]

Thus, the sole "evidence" of bigamy presented at Respondent's 2004 annulment hearing was her own 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 her [self-serving] 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 she bears the burden of proof.

The Annulment Order was in every respect a default judgment. Under Rule 55,

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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 classifieds. (R. p. 256, Joint Stipulation ¶ 7; R. pp. 274-289, Exhibits 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").

SCRCP, a default occurs "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend," exactly as in the Annulment Action. *See also Black's Law Dictionary* 480 (9th ed. 2009) (defining "default judgment" as "entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim."). That Respondent did not formally move to place Husband 1 in default is of little consequence as the entry of default is just "official recognition" of a defendant's "failure to appear or otherwise defend." *Beckham v. Durant,* 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989). For purposes of collateral estoppel, the defendant is still "in default." *See RRR, Inc. v. Toggas,* 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).

It is well accepted that collateral estoppel does not apply to a default judgment, precisely 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 trial court and 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 self-serving hearsay.[40]

Appellants were strangers to Respondent's limited family court action and never had any opportunity to contest Respondent's unsupported claim that her Marriage 1 was supposedly bigamous. The erroneous application of the collateral estoppel doctrine below must be reversed as it deprived Appellants of their fundamental right to due process.

III. SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO APPELLANTS BECAUSE RESPONDENT FAILED TO PRESENT ANY ADMISSIBLE EVIDENCE THAT HER FIRST MARRIAGE WAS BIGAMOUS.

The panel erred in affirming summary judgment for Respondent on the purported ground that Marriage 1 was bigamous without any evidentiary support for that finding. In fact, the only admissible evidence before the court compelled a finding that Marriage 1 was not bigamous.

A. Respondent Bears the Burden of Proving She is Brown's Surviving Spouse.

It was Respondent's ultimate burden to prove that she qualified as Brown's surviving spouse. *See Byrd v. Byrd,* 279 S.C. 425, 308 S.E.2d. 788 (1983); *Calhoun v. Calhoun,* 277 S.C. 527, 290 S.E.2d 415 (1982). Although Appellants bore the burden of

[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, Exhibit 5 to Joint Stipulation at ¶ 10; R. pp. 295-96, Exhibit 12 to Joint Stipulation.

establishing that Respondent's purported Marriage 2 (to Brown) was invalid, *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992), that burden was discharged by the parties' Joint Stipulation, which admits: (1) that Respondent entered into Marriage 1 in 1997; and (2) that Marriage 1 did not end until the 2004 Annulment Order, years after Respondent attempted Marriage 2 in 2001.[41]

While it is true that when evidence of conflicting marriages are presented "a presumption arises that the former marriage was dissolved by death or divorce prior to the second marriage,"[42] that presumption was easily rebutted in this case. *First*, Respondent stipulated that no other occurrence ended the Marriage 1,[43] and in December 2003 she therefore filed her Annulment Action. The parties' Joint Stipulation further rebuts that Marriage 1 was dissolved by divorce.[44] *Second*, any notion that Husband 1 died prior to December 14, 2001, was also readily overcome. As the panel noted, the record contained an attorney's sworn 2014 affidavit attesting that he had located and spoke to Husband 1 in February 2008, and engaged an attorney in Pakistan who interviewed Husband 1 later that same month.[45]

Having overcome any presumption that Marriage 1 was dissolved prior to Marriage 2, a presumption arose in favor of Marriage 1's validity. *See Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906); *Yarbrough v. Yarbrough*, 280 S.C.

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

[42] *Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18.

[43] R. p. 256, Joint Stipulation, ¶ 6.

[44] R. p. 256, *Id.*, ¶ 6 states: "From the February 17, 1997 marriage ceremony between Petitioner and Javed Husband 1 through the December 14, 2001 marriage ceremony between Petitioner and Decedent, no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between Petitioner and Javed Husband 1."

[45] R. pp. 645-647, LSA's Memo in Support, Exhibit 2.

546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984).[46] As Respondent challenges the validity of Marriage 1 on grounds of alleged bigamy, she bears the burden of presenting admissible evidence that Husband 1 was already married on February 17, 1997—a burden she entirely failed to meet. *E.D.M.*, 307 S.C. at 475, 415 S.E.2d at 815; *Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18 (citing 52 Am. Jur. 2d *Marriages*, § 130 (1970)). Respondent even stipulated that she had no such admissible evidence.[47]

The trial court made a fundamental error of law in misapplying the burdens of proof.[48] The panel compounded the error by affirming summary judgment for Respondent without a shred of admissible evidence to support her twisty allegation that her facially bigamous Marriage 2 is not bigamous because supposedly her Marriage 1 was bigamous.

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

The trial court and panel erroneously based their conclusion that Marriage 1 was bigamous solely on the Annulment Order's purported finding. Nothing else supported Respondent's bare assertion, and she stipulated she had nothing else.[49] However, in South Carolina, such findings are inadmissible hearsay not subject to any exception. The definition of "hearsay" under the South Carolina Rules of Evidence is the same as in the Federal Rules of Evidence: an out-of-court statement offered to prove the truth of the

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[46] Panel Op. at 4 n.4; Shearouse Adv. Sh. No. 30 at 22.

[47] 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.").

[48] R. p. 96, MSJ Order, at p. 44.

[49] R. p. 257, Joint Stipulation ¶¶ 9-10 (*see* fn. 47 above).

matter asserted. *Compare* Rule 801(c), SCRE, *with* Rule 801(c), FRE. Accordingly, 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).

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.* Although the plaintiffs argued the order was properly admitted under the public record exception of Rule 803(8)(C), FRE, the Fourth Circuit disagreed, stating that "Rule 803(8)(C), on its face, does not apply to judicial findings of fact." *Id.* It further found that at common law, a judgment from another case could not be admitted as evidence of the facts set forth therein. *Id.* The Fourth Circuit vacated the judgment of the South Carolina district court, holding that it abused its discretion in allowing the findings of fact in the state court order to be admitted at trial. *Id.* at 418.

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), (citing *Nipper*, 7 F.3d 415 (4th Cir. 1993)); *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 a different case to prove the truth of its findings of fact).

The Annulment Order's purported findings are inadmissible hearsay in this action and cannot serve as proof that Marriage 1 was in fact 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 Only Admissible Evidence Established that Husband 1 Was Not Married When He Married Respondent in 1997.

The record contains the sworn testimony of Husband 1 that he was not married when he married Respondent: Husband 1's own sworn, notarized statement that "I am not presently married" on the couple's Texas Marriage License Application.[50] To obtain a marriage license in Texas both parties to a marriage must swear before the County Clerk of Harris County, Texas that they were not already married. Their marriage license application is then reported to the Bureau of Vital Statistics of the State Department of Health.[51] As the Marriage 1 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 self-serving hearsay in a default setting. Tellingly, in the 22 years since Respondent's Marriage 1, the 17 years since her Marriage 2, the 15 years since her Annulment Action, and the 12 years since filing her spousal claim in this case, 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 Appellants did here. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250,

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[50] R. p. 648, Application for Marriage License attached as Exhibit 3 to LSA Memorandum in Support.

[51] *See* http://www.dshs.state.tx.us/vs/default.shtm (last visited May 10, 2016).

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 Appellants' summary judgment motion, 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 Appellants.

IV. THE TRIAL COURT ERRED IN STAYING ALL DISCOVERY AND GRANTING RESPONDENT SUMMARY JUDGMENT DESPITE GENUINE ISSUES OF MATERIAL FACT.

Summary judgment is a drastic remedy that should not be entered before the parties have "had a full and fair opportunity for discovery." *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003). Yet the trial court completely barred Appellants from taking any discovery prior to granting Respondent summary judgment. The trial court compounded this error by thereafter allowing Respondent "to file two self-serving affidavits in support of her" summary judgment motion, while "seal[ing] her handwritten diaries," as noted by the panel.[52]

The Opinion overlooks these errors by misinterpreting the parties' Joint Stipulation, which simply acknowledged that the Annulment Order was entered in 2004,

[52] Panel Op. at 11; Shearouse Adv. Sh. No. 30 at 29.

but clearly did not agree to its factual findings or conclusions of law.[53] The Opinion similarly mischaracterized Appellants' right to discovery regarding Respondent's factual allegations as an attempt to "relitigate" the 2004 annulment, when Appellants expressly accepted that Marriage 1 was terminated in 2004. If Respondent's spousal claim survives this Court's review, Appellants merely seek a full and fair opportunity to take discovery relevant to Respondent's unsupported allegation that Marriage 1 was bigamous.

A. Appellants Were Erroneously Barred From Taking Any Discovery of Respondent.

On March 31, 2014, Respondent asked the trial court to stay discovery and protect her from being deposed, answering any written discovery, or producing her Diaries. Her counsel argued: "[She] is either married to James Brown or she isn't . . . Whether she's married or not really depends on the law and not the facts."[54] In response, the Court ruled that if Respondent asserted disputed facts, "summary judgment goes out the window."[55] "If it involves factual issues, obviously I would not rule on it; I will say you have to have an opportunity to complete discovery before I rule to determine whether or not there were genuine issues of material fact in dispute."[56]

Based upon Respondent's representations, the trial court barred the parties from conducting *any* discovery pending its ruling on her motion for summary judgment.[57] The

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[53] R. p. 257, Joint Stipulation ¶ 11

[54] R. pp. 631-633, March 31, 2014 Hearing Transcript, pp. 54-56, attached as Exhibit 1 to LSA's Memo in Support.

[55] *Id.*

[56] R. p. 638, *Id.*, at p. 61.

[57] R. p. 56, MSJ Order, at p. 4.

trial court also sealed Respondent's handwritten Diaries[58] and did not make the Diaries available until *after* it granted Respondent summary judgment. Six months later, Respondent filed two self-serving affidavits in support of her summary judgment motion, alleging a host of disputed facts[59] that the trial court appeared to rely upon in ruling in her favor.[60]

It is axiomatic that a trial court should not consider a motion for summary judgment before discovery has taken place, where the non-moving party could adduce contrary evidence through discovery. "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" *Schmidt,* 357 S.C. at 319, 592 S.E.2d at 331 (internal citation omitted). *See also Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Here, the error is compounded by the trial court's affirmatively staying all discovery prior to Respondent's summary judgment motion and preventing the use of potentially relevant evidence adverse to the moving party.

The Appellants had an absolute right to depose and cross-examine Respondent with her Diaries in hand, and to take written discovery of Respondent, prior to the court entertaining her motion for summary judgment. The trial court committed legal error and deprived Appellants of due process by granting Respondent summary judgment while prohibiting Appellants from taking relevant discovery.

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[58] R. pp. 638-639, *See* March 31, 2014 hearing transcript, pp. 61–62, attached as Exhibit 1 to LSA's Memo in Support.

[59] R. pp. 351-497, *See generally,* Respondent's Initial Memorandum

[60] R. pp. 62-69, MSJ Order, at 10–17.

B. At a Minimum, Disputed Issues of Material Fact Prevented Summary Judgment in Respondent's Favor.

The trial court and Respondent agreed that unless her motion for summary judgment could be determined solely upon the parties' Joint Stipulation, the motion must be denied.[61] The court relied, however, upon facts far outside the Joint Stipulation that were contested by Appellants.

The undisputed facts in the Joint Stipulation pertaining to the question of whether Respondent had the legal capacity to marry Brown on December 14, 2001, are limited to:

- On February 17, 1997, Respondent participated in a marriage ceremony with Husband 1;
- On December 14, 2001, Respondent participated in a marriage ceremony with Husband 2 (Brown);
- From February 17, 1997, to December 14, 2001, no court order had been entered to end Respondent's marriage to Husband 1;
- On April 15, 2004, Respondent obtained the Annulment Order as to Marriage 1 from the Charleston County Family Court; and
- Respondent has no evidence that Husband 1 had other wives when he married her on February 17, 1997 other than her own assertion that Husband 1 told her so.[62]

As discussed more fully in Part V below, these undisputed facts squarely demonstrate that Respondent's purported second marriage was bigamous under Section 20-1-80 and this Court's mandate in *Lukich* because Respondent's first marriage was not dissolved prior to her attempted second marriage. Accordingly, this Court can and should grant Appellants summary judgment on this issue as matter of law.

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[61] R. pp. 2467-2469, Nov. 24, 2014 hearing transcript, 4:13–6:5.

[62] R. pp. 255-258, Joint Stipulation, at pp. 2–5.

The converse, however, is not true—summary judgment could not be granted in Respondent's favor based on the parties' Joint Stipulation. In order for the trial court to have decided as a matter of law that Respondent is Brown's surviving spouse, it would have had to conclude that there is no triable issue of fact bearing on whether Respondent was married to Husband 1 when she tried to marry Brown on December 14, 2001. Without limitation, the following evidence before the trial court raised genuine issues of material fact precluding summary judgment for Respondent:

- Husband 1 swore under oath in his and Respondent's 1997 Marriage 1 License Application, that he was not married.[63]

- Respondent stipulated that she cannot identify any evidence (other than her own testimony) or identify any other person who can testify that Husband 1 was married to another when she and Husband 1 obtained their marriage license and participated in their 1997 marriage ceremony.[64]

- In the 22 years since her marriage to Husband 1, Respondent has not provided any admissible evidence whatsoever that Husband 1 was already married.

- Respondent agreed she was not even Brown's common law spouse in the Consent Order which settled Brown's annulment action against her.[65]

In the event summary judgment is not granted to Appellants as a matter of law, the above evidence[66], especially when viewed, as it must, in the light most favorable to Appellants, was more than sufficient to raise a triable issue of fact as to whether Marriage 1 was bigamous, as shown below.

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[63] R. p. 648, *See* Application for Marriage License, attached as Exhibit 3 to LSA's Memo in Support.

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

[65] R. pp. 349-350, Joint Stipulation, Exhibit 19.

[66] Appellants, in fairness, should not even be confined to this evidence in assessing whether triable issues of fact precluded Respondent's motion because the trial court barred them from taking any discovery regarding Respondent's Marriage 1.

1. Negative Inferences Are Drawn From Respondent's Consistent Failure to Present Any Evidence That Husband 1 Was Already Married.

If, as Respondent asserted, Husband 1 had three or more wives in Pakistan[67] when he married Respondent, records of such marriages surely would exist. Pakistan is a modern nuclear country with a well-developed regulatory infrastructure and data collection systems. In Pakistan, as here, to be legally married one must obtain a marriage license, which is called a "Nikah Nama."[68] Pursuant to the Family Law Ordinance of 1961, the Nikah Nama must be registered with the Nikah Registrar at the local Union Council. *Id.* Such records can readily be obtained from NADRA[69] and/or the Karachi Union Councils via multiple internet services[70] or attorneys in Pakistan. If they existed, Respondent's qualified legal team would certainly have searched for, obtained, and presented such marriage records: (1) in support of Respondent's 2004 Annulment Action; (2) in opposition to Brown's 2004 annulment action, and (3) in support of Respondent's current summary judgment motion under review. Instead, at each juncture Respondent failed entirely to present any evidence supporting her self-serving hearsay assertion, and stipulated that she has none.

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[67] R. pp. 297-313, Joint Stipulation, Exhibit 13.

[68] *Pakistan: Information on Marriage Registrations, Including Mixed Marriages*, Immigration and Refugee Board of Canada—Responses to Information Requests, PAK104253E, 2, §3 (Jan. 14, 2013), available at https://www.justice.gov/sites/default/files/eoir/legacy/2014/03/04/PAK104253.E.pdf (last visited May 7, 2016).

[69] "NADRA" stands for the National Database and Registration Authority.

[70] *See* http://inp.org.pk/nikkah-nama-registration; http://mamooinpakistan.com/services/ marriage-certificate/.

2. The 1997 Marriage 1 License Application Evidences That Husband 1 Was Not Already Married.

As mentioned above, Husband 1's own sworn, notarized statement that "I am not presently married" on the Texas Marriage License Application underlying his 1997 marriage to Respondent is admissible evidence that Respondent's 1997 marriage to him was valid and that her 2001 marriage to Brown was bigamous. S.C. Code Ann. § 19-5-10; Rules 803(8), 902(4) and 1005, SCRE.

3. The Consent Order Further Evidences That Respondent Was Not Legally Married to Brown.

The Consent Order resulting from Brown's 2004 annulment action and Respondent's counterclaim therein for divorce, expressly provides: "Defendant [Respondent] agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff [Brown], both now and in the future."[71] There would logically and legally be no reason to include such language in the Consent Order if Brown and Respondent were married, or believed they were married, in the eyes of the law.

Brown filed his own annulment action against Respondent on January 29, 2004, shortly after Respondent filed for annulment of her marriage to Husband 1.[72] On May 4, 2004, soon after Respondent obtained her annulment of Marriage 1 by default, Brown amended his complaint re-asserting Respondent's bigamy.[73] On July 6,

[71] R. pp. 349-350, Joint Stipulation, Exhibit 19.

[72] R. p. 330, *Id.*, Exhibit 15, ¶3 ("Defendant was never legally divorced from her previous husband prior to entering into a marital contract with the Plaintiff. As such, this marriage is void *ab initio*.").

[73] R. p. 333, *Id.*, Exhibit 16, ¶5 ("At the time of the marriage ceremony on December 14, 2001 in Aiken County, South Carolina, Defendant was still legally married to Javed Ahmed and by way of such legal impediment was legally barred from entering into a marriage to Plaintiff . . .").

2004, Brown similarly replied to Respondent's counterclaim for divorce.[74] None of these documented actions by Brown comport with Respondent's unsupported assertions, accepted by the trial court that Brown controlled and supported the Annulment Action of Marriage 1. Instead, Brown continued to litigate with Respondent until resolving their relationship in the Consent Order, wherein Respondent expressly waived any claim to even a common law marriage with Brown.

V. RESPONDENT'S ATTEMPTED MARRIAGE TO BROWN WAS BIGAMOUS AS A MATTER OF LAW DUE TO HER FAILURE TO TERMINATE HER FIRST MARRIAGE PRIOR TO HER SECOND MARRIAGE.

Although the misapplication of settled law related to *in rem* orders and collateral estoppel is perhaps the most glaring error made by the trial court and panel and mandates reversal on its own, the simplest solution to this seemingly unending litigation is the forthright application of this Court's decision in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), to find that Respondent's willful concealment and failure to resolve Marriage 1 before attempting Marriage 2 to Brown, renders Marriage 2 bigamous under Section 20-1-80 as a matter of law. In misapplying *Lukich*, the Opinion 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.

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[74] R. p. 347, *Id.*, Exhibit 18, ¶4 ("Defendant remained married to this man at the time she entered into the marriage to Plaintiff.").

A. Under Section 20-1-80 and *Lukich*, the 2004 Annulment Order Did Not Retroactively Validate Respondent's Bigamous 2001 Marriage to Brown.

Lukich and its strict construction of Section 20-1-80 are entirely dispositive of this appeal as a matter of law, in light of the parties' Joint Stipulation,[75] such that the trial court's grant of summary judgment to Respondent must be reversed and summary judgment entered in favor of the Appellants.

Lukich unequivocally holds that the annulment of a first marriage after a second marriage, does not relate back so as to validate the bigamous second marriage. *Id.* at 592–93, 666 S.E.2d at 907. 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 at some indeterminate future date of the annulling spouse's choosing. 379 S.C. at 593, 666 S.E.2d at 907. The *Lukich* Court concluded that while a family court's annulment order renders the first marriage "void *ab initio*", this does not and cannot serve to retroactively resurrect the bigamous second marriage. *Id.* at 592, 666 S.E.2d at 907.

South Carolina's bigamy statute provides:

> All marriages contracted while either of the parties has a former wife or husband living shall be void. But this section shall not extend to a person whose husband or wife shall be absent for the space of five years, the one not knowing the other to be living during that time, not to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.

S.C. Code Ann. § 20-1-80 (emphasis added). The 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. The first sentence states the general rule that "[a]ll marriages"

[75] R. pp. 254-258, Joint Stipulation, at pp. 1–5.

contracted while one has a living spouse are void. *Id.* The phrase "marriages contracted while" further indicates that the statute looks to the parties' marital status at the time a marriage is attempted, not in hindsight years later. The second sentence provides just three exceptions to the general rule. If a person's spouse is living when he contracts marriage to another, the second marriage is only valid if by that time: (1) the first spouse has been absent for five years and it is unknown if he/she is alive; (2) the first marriage was dissolved by divorce; or (3) the first marriage has been declared void by a court order. *Id.* These exceptions listed in the bigamy statute naturally pertain to the period between the first and attempted second marriage, and would be nonsensical if they applied to an uncertain future point in time after the second marriage.

In *Lukich*, the putative wife relied on a *post-hoc* annulment and Section 20-1-80's third exception ("shall be declared void by the sentence of a competent court") placing the time of the statute's "declared void" exception at issue. 379 S.C. at 592, 666 S.E.2d at 907. *Lukich* strictly construed the statute, holding that a first marriage must naturally be "declared void" before attempting a second marriage. *Id.* ("In construing a statute, we need not resort to rules of construction where the statute's language is plain."). *Lukich* thus expressed this as a bright-line timing requirement and did not equivocate depending on the grounds for an untimely annulment. Instead, as mandated by the statute's plain language, the *Lukich* Court focused on that point in time when the second marriage is "contracted":

> "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 (emphasis added).

In the instant case, none of the exceptions in Section 20-1-80 are met. It was undisputed that Respondent and Husband 1 obtained a marriage license and were thereafter married on February 17, 1997, and that at the time of her second, attempted marriage to Brown on December 14, 2001, in South Carolina, five years had not elapsed, Respondent had not obtained a divorce, and her first marriage had not been "declared void" by a court.[76] In short, Respondent lacked the legal capacity to contract marriage to Brown as a matter of South Carolina law.

Lukich's holding not only adheres faithfully to Section 20-1-80, it also comports with the general rule in this country as set forth in 52 Am. Jur. 2d *Marriage* § 57:

> [A]part from statute, bigamous marriage does not acquire validity . . . where the prior subsisting marriage is annulled after the second marriage is contracted, even though the purpose of an annulment proceeding is to declare that no valid marriage ever took place between the parties or that no valid marriage relation ever existed between the parties. Even where the annulment decree expressly declares the first marriage null and void ab initio, it does not relate back so as to validate the second marriage. In order for the subsequent marriage to be valid, it has been held that there must be a new ceremony following the termination of the earlier marriage.

(Emphasis added.)[77] Like *Lukich*, this language explicitly rejects Respondent's void *ab initio* rationale adopted by the trial court and panel (based on the untimely Annulment Order). Even though that order may have "declare[d] that no valid [first] marriage ever took place," it "d[id] not relate back so as to validate [Respondent's] second marriage." *Id.*

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

[76] R. p. 256, Joint Stipulation, ¶ 6.

[77] Notably, 52 Am. Jur. 2d *Marriage* §57 is quoted by the Court of Appeals in *Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006).

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 bigamous marriage to Brown in 2001, and she and Brown deliberately did not engage in "a new ceremony following the [2004] termination of [her] earlier marriage." *Id.*

The reason for this well-settled rule, reaffirmed in *Lukich*, is as simple as it is logical: marital status is too important, and its legal implications are 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 his/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 this State. 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.[78]

Removing any question that the Opinion misapplies Section 20-1-80, this Court has held that not even annulment orders finding (actually litigated) bigamy can have

[78] Panel Op. at p. 8, Shearouse Adv. Sh. No. 30 at 26. 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.

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 2. While this Court reinstated her alimony, it refused any back-payments for the months Wife 1 and bigamous Husband 2 were purportedly married, thereby refusing to give "retroactive" effect to the annulment order even though it found bigamy. *Id.*

Contrary to the plain wording of the bigamy statute, this Court's holding in *Lukich*, and the general rule throughout this country, the trial court and panel adopted Respondent's unsupported circular argument that her subsisting 1997 marriage was no impediment to her contracting marriage in 2001 because her first marriage was supposedly bigamous as well, based solely on the retroactive application of her *post-hoc* annulment.[79] This was erroneous as a matter of law.

B. Under Section 20-1-80 and *Lukich*, It Does Not Matter Whether the Subsequently Annulled Marriage Was "Void" or "Voidable."

Both the Opinion and the trial court's ruling are based on a misguided parsing distinction between subsequently annulled marriages that were "void" and those that were "voidable"[80] – a distinction found nowhere in the *Lukich* Court's controlling decision or in Section 20-1-80. In place of the Supreme Court's express holding, the trial

[79] R. pp. 72 and 97, MSJ Order, at pp. 20 and 45; R. p. 115, Order Denying Reconsideration at p. 13; Panel Op. at 8, Shearouse Adv. Sh. No. 30 at 26.

[80] R. p. 110, Order Denying Reconsideration, at p. 8; Panel Op. at 6-8, Shearouse Adv. Sh. No. 30 at 24-26.

court relied on a passing footnote in the Court of Appeals' *Lukich* decision, 368 S.C. 47, 55 n.2, 627 S.E.2d 754, 758 n.2 (Ct. App. 2006) ("Footnote 2").[81]

After citing *Scarboro v. Morgan*, 233 N.C. 449, 452 64 S.E.2d 422, 424 (1951), Footnote 2 opined that its decision may 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.* (emphasis added).

As courts have long recognized, and as reflected in Section 20-1-80, it is axiomatic that 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) (emphasis added). This lays bare the erroneous void/voidable distinction and attendant circularity pervading Respondent's arguments and the panel's Opinion. "[T]he state's concern in . . . marriage 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.

This Court thus chose not to adopt Footnote 2 and refrained from making any distinction between untimely annulments of "void" vs. "voidable" marriages, and Section 20-1-80 contains no such distinction in determining whether a second marriage

[81] R. p. 110, Order Denying Reconsideration, at p. 8

is bigamous. *Lukich*, 379 S.C. at 592–93, 666 S.E.2d at 907. Instead, this Court established a clear, easy-to-apply rule that a belated annulment of a first marriage does not have retroactive effect so as to validate a facially bigamous second marriage. *Id.*

Lest there be any remaining doubt, *Lukich* indicated that its holding applies equally to the case at hand—a first marriage, untimely annulled for bigamy, and concluded: "It would be inconsistent at best to hold that a marriage declared void *ab initio* never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support." 379 S.C. at 593, 666 S.E.2d at 907 (emphasis added) (citing *Rodman v. Rodman*, 361 S.C. 291, 296, 604 S.E.2d 399, 401 (Ct. App. 2004)).

Rodman, cited in *Lukich*, expressly followed *White v. White,* 283 S.C. 348, 323 S.E.2d 521 (1984), and *Splawn v. Splawn,* 311 S.C. 423, 429 S.E.2d 805 (1993), both of which hold that the family court has subject matter jurisdiction to distribute the marital property of a couple even though it had declared their marriage void *ab initio* as bigamous. If, as held by the trial court and panel, an annulment for bigamy related back such that the marriage had no legal significance, the family court would lack such jurisdiction.[82] *Lukich, Rodman, White,* and *Splawn* all reject this circular notion.

This is not a new interpretation of the bigamy statute. This Court, in 1993, expressly stated 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*." *Splawn*, 311 S.C. at 425, 429 S.E.2d at 806. In fact, all annulments declare a marriage void *ab initio*, regardless of the ground for annulment. *Id.*; *see also Rodman*, 361 S.C. at 296, 604

[82] R. p. 118, Order Denying Reconsideration, at p.16; Panel Op. at p. 8, Shearouse Adv. Sh. No. 30 at p. 26.

S.E.2d at 401 ("There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy, as they are both void *ab initio*, or 'from the inception.'"). This is, of course, the primary difference between an annulment (which declares the marriage to never have existed) and a divorce (which declares it to have ended). While the "void"/"voidable" distinction may affect what a party must show for the requested remedy of annulment, it does not alter the annulment's legal effect. Simply put, it matters when walking into family court, but is largely irrelevant when walking out.

Finally, the void/voidable distinction is unpersuasive 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." S.C. Code Ann. § 20-1-80, quoted in *Lukich*, 379 S.C. at 592-593, 666 S.E.2d at 907 (citing and quoting *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 a "civil ceremony." *Callen*, 365 S.C. at 624-25, 620 S.E.2d at 62.

Here, it is clear that a void/voidable distinction is unworkable and even encourages abuse. In her Annulment Action, Respondent included numerous grounds (void and voidable) in her complaint and proposed order, which, unopposed, was adopted

by the Family Court, without a difference in legal effect.[83] Respondent and Brown were free to marry after her 2004 Annulment Order, but they decidedly chose not to do so and instead entered into the 2004 Consent Order wherein Respondent agreed to even "forever waive any claim of a common law marriage to [Brown], both now and in the future."[84] Yet, immediately after Brown died, Respondent contested his will by plucking the single "void" ground from her untimely Annulment Order, unsupported by any admissible evidence, to proclaim that she is, retroactively, Brown's surviving spouse.

C. Vital Public Policy Concerns Underlie *Lukich* and Section 20-1-80.

The institution of marriage holds a critical place in our society with wide-ranging legal and financial implications throughout our family, trust and estate, and tax laws. *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.

The question of whether someone may legally contract a second marriage, is too critical a legal question to be left to subsequent whims and circumstances, uncertain and unknown at the time of the second marriage. Rather than engage in a loop-de-loop of unweaving prior relationships *post-hoc*, the law simply requires spouses who have previously obtained a marriage license and participated in a marriage ceremony to annul that marriage before attempting to marry again.

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[83] R. pp. 272-273, 293-307, Joint Stipulation, Exhibits 5, 12.

[84] R. pp. 349-350, *Id.*, Exhibit 19.

Any other application of the law would be dysfunctional, and permit a person's marital status to see-saw back and forth with the retroactive application of each subsequent annulment order. At one moment in time, a particular marriage is void for bigamy, but, years later, the void marriage springs to life due to a *post-hoc* annulment of the prior marriage for alleged (and here, unproven) bigamy. It cannot be. The variations are unlimited, and embody the uncertainty and "chaos" the Supreme Court sought to preempt in *Lukich.*

Lukich's analysis is thus of a practical necessity and assures an equitable result. Respondent, at the time she purported to marry Brown, was the only one of the two who knew of her marriage to Husband 1. Before applying for a second marriage license and entering into a bigamous marriage with Brown, Respondent had both the legal and moral responsibility to disclose and seek an annulment of her first marriage. It does not matter in the eyes of the law whether her 1997 marriage to Husband 1 was "void" or "voidable." What matters is that Respondent's "first marriage shall be declared void by the sentence of a competent court" before she attempts to remarry. S.C. Code Ann. § 20-1-80.

It is undisputed that Respondent did not bother to annul her first marriage before attempting to marry Brown, choosing instead to conceal it from Brown and the State of South Carolina. As Respondent did not divorce Husband 1 nor annul their marriage until 2004, she lacked the legal capacity to contract marriage to Brown in 2001. *Id.*

Accordingly, Appellants are entitled to summary judgment that: (1) Respondent lacked the legal capacity to marry Brown on December 14, 2001; (2) their purported marriage was void as bigamous under Section 20-1-80; (3) the April 15, 2004 Annulment Order did not retroactively validate her bigamous 2001 marriage; (4) Brown and

Respondent did not marry after the 2004 Annulment Order; and accordingly, (5) Respondent is not Brown's surviving spouse as a matter of law.[85]

CONCLUSION

The trial court Orders and panel's Opinion upends and contravenes controlling South Carolina precedent regarding bigamy, the limited preclusive effect of *in rem* orders, the collateral estoppel doctrine, and the well-worn civil procedures that safeguard due process on summary judgement. If left uncorrected, the Opinion would pave the way for retroactive circumvention of South Carolina's bigamy statute and strong public policies regarding marriage, and prevent total strangers to an *in rem* action from ever challenging its findings. The law is crystal clear that because Appellants and Brown were not and could not have been parties to Respondent's 2004 Annulment Action, they are not bound by the factual findings in the resulting *in rem* Annulment Order.

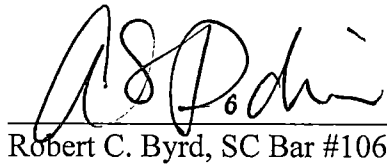
Nor are the essential requirements of collateral estoppel met, as neither Appellants, nor Brown were parties or privies to the Annulment Action, and the bigamy issue was never "actually litigated" in that default setting. Compounding these legal errors, the panel and trial court relied upon inadmissible hearsay to support its award of summary judgment to Respondent, while disregarding admissible evidence that mandated summary judgment in favor of Appellants. At a minimum, Appellants must be permitted, as a matter of basic due process, to take discovery and try the factual issue of whether Marriage 1 was in fact bigamous, if that issue even survives this Court's scrutiny under Section 20-1-80 and *Lukich*.

[85] R. pp. 255-258, Joint Stipulation, ¶¶ 1, 2, 5, 6, 9, 10, 18.

Alternatively, this Court can and should resolve this long-running case by reaffirming that under the bigamy statute and *Lukich*, Respondent's untimely annulment of her first marriage could not retroactively revive her facially bigamous second marriage as a matter of law and public policy. In sum, the panel's contrary Opinion invites the very "chaos and uncertainty" which *Lukich* warned against and this case, if left unaddressed, personifies. This Court's badly needed reaffirmation of *Lukich's* sound reasoning will restore order to this fundamental area of law, maintain consistency in the decisions of this Court and the Court of Appeals, and equitably resolve this matter, once and for all.

Appellants therefore respectfully request that this Court (i) find that summary judgment was entered erroneously in favor of Respondent, and (ii) grant summary judgment to Appellants because under Section 20-1-80 and *Lukich*, Respondent lacked the legal capacity on December 14, 2001 to contract marriage with Brown, as a matter of law.

Respectfully submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

PROOF OF SERVICE

The undersigned hereby certifies that on March 1, 2019, s/he has caused a copy of the **APPELLANTS' BRIEF** to be served upon all parties of record by mailing a copy of the same addressed as follows:

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