THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

In Re: The Estate of James Brown a/k/a James Joseph Brown,

Tommie Rae Brown ..... Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown ..... Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN IT IS UNDISPUTED THAT RESPONDENT FAILED TO TERMINATE HER FIRST MARRIAGE BEFORE ATTEMPTING HER SECOND MARRIAGE TO JAMES BROWN, RENDERING THE SECOND MARRIAGE BIGAMOUS AS A MATTER OF LAW UNDER SECTION 20-1-80 OF THE SOUTH CAROLINA CODE AND *LUKICH V. LUKICH*, 379 S.C. 589, 666 S.E.2D 906 (2008)?

II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN RESPONDENT'S ANNULMENT OF HER FIRST MARRIAGE DOES NOT RELATE BACK TO VALIDATE HER BIGAMOUS SECOND MARRIAGE UNDER SECTION 20-1-80 OF THE SOUTH CAROLINA CODE AND *LUKICH V. LUKICH*, 379 S.C. 589, 666 S.E.2D 906 (2008)?

III. DID THE TRIAL COURT FURTHER ERR IN GRANTING RESPONDENT SUMMARY JUDGMENT AND DENYING APPELLANTS SUMMARY JUDGMENT WHEN THE RECORD CONTAINED ADMISSIBLE EVIDENCE THAT RESPONDENT'S FIRST MARRIAGE WAS NOT INVALID, AND RESPONDENT, WHO HAS THE BURDEN OF PROOF AS TO THE ALLEGED INVALIDITY OF HER FIRST MARRIAGE, PRESENTED NO ADMISSIBLE EVIDENCE TO SUPPORT HER ASSERTIONS?

IV. DID THE TRIAL COURT FURTHER ERR IN BASING ITS RULING ON THE FINDINGS OF FACT IN A FAMILY COURT ORDER ANNULLING RESPONDENT'S FIRST MARRIAGE BY DEFAULT, WHICH FINDINGS WERE INADMISSIBLE HEARSAY, AND IN HOLDING THAT MR. BROWN AND APPELLANTS WERE COLLATERALLY ESTOPPED FROM CHALLENGING SUCH FINDINGS, WHEN THEY WERE NOT PARTIES TO RESPONDENT'S ANNULMENT ACTION NOR ALLOWED TO INTERVENE?

V. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT PRIOR TO ALLOWING THE PARTIES TO PARTICIPATE IN DISCOVERY, WHEN HER MOTION IMPLICATED TRIABLE ISSUES OF DISPUTED FACT AND THE COURT HAD IMPROPERLY PROHIBITED APPELLANTS FROM TAKING DISCOVERY OF RESPONDENT OR USING HER DIARIES?

STATEMENT OF THE CASE

The legendary music artist James Brown ("Decedent" or "Brown") 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 ("Trust"), from which the bulk of his fortune was devised to The James Brown "I Feel Good" 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" or "Hynie"), brought an action in probate court to set aside Decedent's entire will, which named neither her nor her son as beneficiaries. Her action to set aside the will was based upon alleged undue influence and fraud. She separately claimed an elective share or an omitted spouse's share of the Brown Estate. The probate court transferred Hynie's claims to the circuit court.

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

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

[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).

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 Hynie's handwritten diaries ("Diaries"). During a hearing on the LSA's motion ("March 31, 2014 Hearing"), Hynie'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 Hynie is Brown's "surviving spouse."[3] The trial court stayed *all* discovery and allowed Hynie to file her motion, but ruled if her motion turned upon any contested facts "the summary judgment goes out the window."[4]

On April 28, 2014, Hynie filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for summary judgment, which was joined in by the Appellants, and limited to the question of whether Hynie is Decedent's surviving spouse ("Appellants' motion").

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

The trial court held a hearing on the motions on November 24, 2014, and on January 13, 2015, entered an order granting Hynie's motion 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.

("MSJ Order"). The trial court ruled that Hynie's 2001 marriage to husband #2 (Brown) was not bigamous because, in its view, Hynie's 1997 marriage to husband #1 (Ahmed) was bigamous, based solely on the unsupported findings in a 2004 order annulling Hynie's first marriage, obtained against Ahmed 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 duly filed their Notice of Appeal of the above orders (collectively, the "Orders") on November 20, 2015.[9]

STATEMENT OF THE FACTS

Tommie Rae Hynie and Javed Ahmed ("Ahmed"), after applying for and securing a Texas marriage license, were legally married in Harris County, Texas on February 17, 1997 (the "Hynie/Ahmed Marriage").[10]

Thereafter, on November 27, 2001, James Brown and Hynie executed a Prenuptial Agreement wherein Hynie acknowledged she was entering the agreement knowingly and voluntarily on the advice of counsel of her own choosing. *See Wilson v.*

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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] R. pp. 265-266, Hynie/Ahmed Marriage License, Exhibit 1 to Joint Stipulation.

Dallas, 403 S.C. 411, 418, 743 S.E.2d 750, 762 (2013). Therein, Hynie "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 Hynie obtained a marriage license in Aiken County, South Carolina.[11] To obtain the license Hynie falsely swore under oath to the Aiken County Probate Court that this was her first marriage, concealing the Hynie/Ahmed Marriage from both Brown and the Probate Court.[12]

On December 14, 2001, Brown and Hynie participated in a marriage ceremony in Aiken County, South Carolina (the "Hynie/Brown Marriage").[13] Hynie now admits that her 1997 marriage to Ahmed was never dissolved prior to her attempted marriage to Brown in 2001.[14]

Two years later, on December 15, 2003, Hynie filed an action in the Charleston County Family Court (the "Family Court") against Ahmed, alleging their marriage should be annulled (the "Hynie/Ahmed Annulment Action").[15] Ahmed was never personally served, but instead was purportedly served by publication.[16] Because he never made an appearance in the Annulment Action, the only testimony presented to the Family Court was Respondent's own self-serving testimony that Ahmed allegedly told her that he had three or more wives in Pakistan when they married.[17] On April 15, 2004, the Family

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

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

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

[14] . p. 256, *Id.*, ¶ 6.

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

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

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

Court entered an order annulling the Hynie/Ahmed Marriage based solely on Hynie's testimony (the "Annulment Order").[18]

After discovering the 1997 Hynie/Ahmed Marriage, but prior to the Annulment Order, Brown brought his own annulment proceedings on January 29, 2004, in Aiken County, South Carolina, against Hynie for bigamy (the "Brown/Hynie Annulment Action").[19] Hynie counterclaimed for a divorce from Brown. The parties settled and dismissed their respective suits in a consent order filed August 16, 2004 (the "Hynie/Brown Consent Order"), wherein Hynie expressly agreed even to "forever waive any claim of a common law marriage to [Brown], both now and in the future.[20]

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 inappropriate 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*

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

[19] R. p. 258, *Id.*, ¶ 19.

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

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).

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 trial court's Orders erroneously and inequitably permit Tommie Rae Hynie to loot the Estate of James Brown and to defy his charitable testamentary intent based upon an attempted marriage that was bigamous as a matter of law.

Hynie's counsel conceded at the November 2014 summary judgment hearing that the parties' cross-motions for summary judgment can be decided based entirely upon the undisputed facts in the parties' Joint Stipulation of Facts.[21] Relevant to the questions before this Court, the parties stipulated to the following:

- On February 12, 1997, Hynie and Ahmed obtained a marriage license in Texas;
- On February 17, 1997, Hynie and Ahmed participated in a marriage ceremony in Texas;
- On December 14, 2001, Hynie and Decedent participated in a marriage ceremony in South Carolina;

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

- From February 17, 1997, to December 14, 2001, no court order was entered that ended the Hynie/Ahmed Marriage;
- On April 15, 2004, the Charleston County Family Court entered an order declaring the Hynie/Ahmed Marriage void based solely on Hynie's testimony, as Ahmed did not appear in the action;
- Hynie can identify no evidence (other than her own assertions) that Ahmed allegedly had other wives on February 17, 1997; and
- Decedent was not a named party in the Annulment Action nor was he able to intervene therein.[22]

Family matters are often messy and rarely easy, but, thankfully, the South Carolina Supreme Court clarified in *Lukich v. Lukich* that under the bigamy statute, section 20-1-80 of the South Carolina Code, a spouse's annulment of her first marriage *after* her attempted second marriage does *not* relate back to validate retroactively the bigamous second marriage. 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008). Simply stated, because Hynie's 1997 marriage to Ahmed had not been dissolved, she lacked the legal capacity to marry Brown in 2001. South Carolina law is clear that Hynie had a legal obligation, as well as a moral one, to resolve her prior marriage *before* she married again, and her annulment of this marriage years later cannot serve as a time machine to go back and resuscitate her illegal second marriage.

Even if the purported reason for Hynie's untimely annulment was somehow relevant (it is not), Hynie has consistently failed to present any admissible evidence whatsoever that her first marriage was bigamous (like her second marriage)—a burden of proof she alone must carry. Indeed, the only admissible evidence before the trial court was Ahmed's own sworn statement that he was <u>*not*</u> married to another. The trial court nonetheless held, contrary to well-settled law, that Appellants are precluded by the

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

findings of fact in the hasty Annulment Order, even though neither Decedent nor Appellants were parties to that action, nor could they have intervened.

Finally, the trial court erred in granting Hynie summary judgment while barring Appellants from using her Diaries, holding depositions, or taking written discovery of Hynie. Whereas, the court could and should have ruled as a matter of law that the Hynie/Brown Marriage was bigamous, the converse is not true. There were obvious triable issues of fact precluding summary judgment in Hynie's favor.

ARGUMENT

I. HYNIES'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.

A. The 2004 Annulment Order Did Not Retroactively Validate Hynie's Bigamous 2001 Marriage to Brown.

The trial court erred in failing to abide by the unambiguous holding of the South Carolina Supreme Court in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) ("*Lukich*"), which strictly construed the bigamy statute, S.C. Code Ann. § 20-1-80. *Lukich* and Section 20-1-80 are dispositive of this appeal as a matter of law, in light of the parties' Joint Stipulation,[23] such that the trial court's grant of summary judgment to Hynie must be reversed and summary judgment entered in favor of the Appellants.

In *Lukich*, the Supreme Court was faced with a wife's first marriage that was annulled subsequent to her second marriage. The Court found that while the family court's annulment order rendered the first marriage void *ab initio*, this did not resurrect the bigamous second marriage. *Id.* at 592, 666 S.E.2d at 907. In a nutshell, *Lukich* bars the lower court's application of the 2004 Annulment Order to validate retroactively

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

Hynie's 2001 marriage to Brown, which was bigamous under Section 20-1-80. *Lukich* unequivocally holds that a subsequent order declaring a first marriage void *ab initio* does *not* relate back so as to validate a second bigamous marriage. *Id.* at 592–93, 666 S.E.2d at 907.

It is thus crystal-clear that Hynie's marriage to Brown was bigamous under the Supreme Court's analysis of Section 20-1-80:

> Under the statute's terms, Wife's "marriage" to Husband #2 was "void" from the inception since *at* the time of that marriage she had a living spouse and that marriage had not been "declared void." . . . The statute speaks to ***the status quo at the time the marriage was contracted, and does not contemplate*** either a prospective or ***a retroactive perspective***. Any other construction of §20-1-80 would lead to uncertainty and chaos.

Id. (emphasis added). *Lukich* did not equivocate or limit its holding to the reasons for an annulment order, and instead focused on that point in time when the wife attempted to contract her second marriage. *Id.* Because the wife, as here, failed to annul her first marriage prior to her second marriage, the Supreme Court found it to be bigamous under the statute *as a matter of law*. *Id.* The same is true in the instant case.

The Supreme Court's analysis comports with the general rule set forth in 52 Am. Jur. 2d *Marriage* §57, which is quoted by this Court in *Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 (Ct. App. 2006):

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

> held that there must be a new ceremony following the termination of the earlier marriage.

(Emphasis added.)

Lukich's insistence that one's first marriage be annulled by a competent court *before* attempting a second marriage is supported by the plain language of the bigamy statute:

> 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. The exceptions listed in the statute would be nonsensical if they applied to an indeterminate point in time *after* the second marriage. The first sentence unequivocally states the general rule that "[a]ll marriages" contracted while one has a living spouse are void. *Id.* The second sentence provides just three exceptions to the general rule. If a person has a spouse 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.*

In the instant case, none of the exceptions in Section 20-1-80 are met. It was undisputed that Hynie and Ahmed 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, Hynie had not obtained a divorce, and her first marriage had not been declared void by a court.[24] In

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

short, Hynie lacked the legal capacity to contract marriage to Brown as a matter of South Carolina law.

Yet, contrary to the plain wording of the bigamy statute, the Supreme Court's mandate in *Lukich*, and the general rule in this country, the lower court adopted Hynie's 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.[25] This conclusion was erroneous as a matter of law.

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

The trial court's ruling is based on a parsing distinction between later-annulled marriages that were "void" and those that were "voidable"[26]—a distinction found nowhere in the Supreme Court's controlling decision or in Section 20-1-80. In place of the Supreme Court's express holding, the trial court relied on a passing footnote in *Lukich v. Lukich,* 368 S.C. 47, 55 n.2, 627 S.E.2d 754, 758 n.2 (Ct. App. 2006) ("Footnote 2"). Footnote 2 stated this Court's decision did not address those situations in which the annulled first marriage never had legal validity in South Carolina, including "(1) bigamous marriages ...; (2) same sex marriages ...; and (3) marriages of minors under the age of 16...."

The Supreme Court, however, wrote its own opinion in *Lukich* to clarify the analysis, and refrained from making any distinction between annulments of "void" and "voidable" marriages, *because the statute contains no such distinction in determining whether a second marriage is bigamous. Lukich,* 379 S.C. at 592–93, 666

[25] R. pp. 72 and 97, MSJ Order, at pp. 20 and 45; R. p. 115, Order Denying Reconsideration at p. 13.

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

S.E.2d at 907. It is persuasive that the Supreme Court knew of the reservation in Footnote 2 but chose not to adopt it.

Lest there be any remaining doubt, the following passage in *Lukich* demonstrates that its holding applies equally to the case at hand—a first marriage, later annulled for bigamy:

> Moreover, under South Carolina's current view of ***bigamy***, the family court has jurisdiction to decide all ancillary matters where it annuls a marriage and declares it void *ab initio*. *Rodman v. Rodman,* 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004). ***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). *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 whose marriage it has declared void *ab initio* as bigamous. If, as held by the lower court, an annulment for bigamy "related back" such that the marriage was non-existent, the family court would lack such jurisdiction. *Lukich, Rodman, White,* and *Splawn*, however, all reject this circular notion.

Nor is this a new interpretation of the bigamy statute. The Supreme 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 v. Splawn*, 311 S.C. at 425, 429 S.E.2d at 806 (1993). *See also Rodman v. Rodman*, 361 S.C. 291, 296, 604 S.E.2d 399, 401 (Ct. App. 2004) ("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.'").

A bigamous relationship may be void *ab initio.* However, *the legal capacity to contract a new marriage* is not cleared until *after* an annulment order is issued by a competent court. S.C. Code Ann. § 20-1-80. As emphasized by the Supreme Court, "[t]he statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of Section 20-1-80 would lead to uncertainty and chaos." *Lukich*, 379 S.C. at 593, 666 S.E.2d at 907.

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. The question of whether someone may legally contract a second marriage, when she/he previously contracted marriage to another, is too critical a legal question to be left to subsequent whims and circumstances, uncertain and unknown at the time of the second marriage.

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 a later annulment order. At one moment in time, a particular marriage is void *ab initio* due to bigamy, but, years later, a void marriage suddenly becomes valid all along due to a subsequent annulment of a prior marriage? It cannot be. The variations are unlimited, and exemplify the uncertainty and "chaos" the Supreme Court sought to preempt in *Lukich.*

Lukich's analysis is both a practical necessity and assures an equitable result. Hynie, at the time she purported to marry Brown, was the only one of the two who knew of her marriage to Ahmed. Before entering into a bigamous marriage with Brown, Hynie had both the moral and legal 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 Ahmed was "void" or "voidable." What matters is that Hynie'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. As Hynie did not divorce Ahmed nor annul their marriage until 2004, she lacked the legal capacity to contract marriage to Brown in 2001. *Id.*

Appellants are entitled to summary judgment that: (1) Hynie 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 Hynie did not marry after the 2004 Annulment Order; and accordingly, (5) Hynie is not Brown's surviving spouse as a matter of law.[27]

II. SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO APPELLANTS BECAUSE HYNIE FAILED TO PRESENT ANY ADMISSIBLE EVIDENCE THAT HER MARRIAGE TO AHMED WAS INVALID.

Whereas the reason for an annulment of a first marriage is legally irrelevant under Section 20-1-80 and *Lukich*, under which this Court can readily dispose of Hynie's spousal claim, it bears mention that the lower court granted Hynie summary judgment on the purported ground that the Hynie/Ahmed Marriage was bigamous without any

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

evidentiary support for its finding. In fact, the only evidence before the court compelled a finding that the Hynie/Ahmed Marriage was *not* bigamous.

A. Hynie Bears the Burden of Proving She is Decedent's "Surviving Spouse."

Hynie has the burden of proving she is Decedent's "surviving spouse" in each of her will and trust challenges. *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 41 5 (1982). Hynie's production of a marriage certificate, showing that she and Brown engaged in a marriage ceremony on December 14, 2001, does not relieve her ultimate burden of proof.

The party challenging the validity of a marriage bears the burden of proof. *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992) *citing Yarbrough v. Yarbrough*, 280 S.C. 546, 314 S.E.2d 16 (Ct. App. 1984). Thus, Appellants bear the burden of establishing the Hynie/Brown Marriage is invalid. This burden is discharged by the Joint Stipulation, which shows Hynie entered into a marriage with Ahmed on February 17, 1997.[28] 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,"[29] that presumption was easily rebutted in this case.

First, Hynie stipulated that no other occurrence ended the marriage between her and Ahmed,[30] and in December 2003 she therefore filed her Annulment Action. The parties' Joint Stipulation further rebuts that Hynie's marriage was dissolved by divorce.[31]

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

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

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

[31] R. p. 256, *Id.*, ¶ 6 states: "From the February 17, 1997 marriage ceremony between Petitioner and Javed Ahmed through the December 14, 2001 marriage ceremony between

Second, any notion that Ahmed died prior to December 14, 2001, was also readily overcome. The September 30, 2014 affidavit of attorney David Bell provided detailed testimony that he spoke to Ahmed in February 2008 and engaged an attorney in Pakistan who interviewed Ahmed later that same month.[32]

Having overcome the presumption that the Hynie/Ahmed Marriage was dissolved by death or divorce, a presumption arose in favor of the validity of that marriage. *See Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906), relied upon in *Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18. As Hynie challenges the validity of the Hynie/Ahmed Marriage on grounds of alleged bigamy, she bears the burden of presenting *admissible* evidence that Ahmed already was 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 16, 18 (citing 52 Am. Jur. 2d *Marriages*, § 130 (1970)).

The lower court made a fundamental error of law in misapplying the burdens of proof.[33]

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

The trial court also committed error in relying upon the Annulment Order for the truth of the matters asserted in its findings of fact because in South Carolina such findings are inadmissible hearsay not subject to an exception. 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 by the declarant that is offered to prove the truth of

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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 Ahmed."

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

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

the matter asserted. *Compare* Rule 801(c), SCRE, *with* Rule 801(c), FRE. South Carolina courts thus often look to and adopt the federal courts' interpretation of the Rules of Evidence. *See State v. Broadnax*, 414 S.C. 468, 477, 779 S.E.2d 789, 793 (2015), *reh'g granted* (Sept. 8, 2015) ("[W]e note that we routinely look to the federal interpretation of the Rules of Evidence to guide us in our interpretation of our own Rules of Evidence.").

In *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993), the Fourth Circuit considered whether the South Carolina district court erred in allowing into evidence a state court order, *involving the same parties*, to prove the facts therein. The Fourth Circuit found that the order was inadmissible hearsay that did not fall within any FRE exception. *Id.* at 417. 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, "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 state court order's findings of fact to be admitted at trial. *Id.* at 418.

The South Carolina Supreme Court has adopted the holding of *Nipper* and other federal courts that "judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial." *Mizell v. Glover*, 351 S.C. 392, 402, 570 S.E.2d 176, 181 (2002). In *Mizell*, the Supreme Court considered whether the introduction into evidence of a jury interrogatory from another case to impeach an expert witness in the current case was reversible error. *Id.* at 398, 570 S.E.2d at 179. Relying on

Nipper, the Supreme Court found the interrogatory to be inadmissible hearsay, reversed the Court of Appeals and remanded the case for a new trial. *Id.* at 402, 570 S.E.2d at 182.

In *Hill v. USA Truck, Inc.*, C.A. No. 8:06-CV-1010-GRA, 2007 WL 1574545, *4 (D.S.C. May 30, 2007), the South Carolina district court considered whether a new trial should be granted because the trial court admitted a probate court order from a different case to prove the truth of its findings of fact. The district court, citing *Nipper*, found that the probate court order was hearsay that did not fall under the public records exception, but that ultimately the error was harmless as other admissible evidence proved the same facts. *Id.* at *6.

In the instant case, however, the trial court based its finding that the Hynie/Ahmed Marriage was bigamous *solely* on the findings of fact in the Annulment Order—no other evidence was presented to support Hynie's contention that Ahmed was already married. Under the above line of cases beginning with *Nipper*, the findings of fact in the Family Court proceeding were inadmissible hearsay; thus, it was plainly erroneous for the trial court to admit and rely upon the Annulment Order for this purpose. Without any evidence whatsoever to support an independent finding of fact, the trial court had no basis to conclude that Hynie's first marriage was bigamous.

C. The Admissible Evidence Before the Trial Court Established that Ahmed Was Not Married When He Married Hynie in 1997.

The record before the trial court contains the sworn testimony of Javed Ahmed that he was <u>not</u> married when he married Hynie: Ahmed's own sworn, notarized statement that "I am not presently married" on the couple's Texas Marriage License

Application.[34] 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.[35] As the Hynie/Ahmed Marriage License Application is a sworn statement and a certified public record, it is admissible in this proceeding. S.C. Code Ann. § 19-5-10; Rules 803(8), 902(4) and 1005, SCRE.

In contrast, the sole "evidence" before the trial court that Ahmed was already married on February 17, 1997, is the "finding" in the Annulment Order, which was based solely on Hynie's uncorroborated self-serving assertion. In fact, in the 19 years since the Hynie/Ahmed Marriage, in the 14 years since the Hynie/Brown Marriage, in the 12 years since Hynie filed her Annulment Action, and in the 9 years since she filed this case, Hynie has not provided any *admissible evidence* to support her convenient, *post-hoc* assertion that her marriage to Ahmed was bigamous.

The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). As to an issue on which the non-moving party bears the burden, the moving party need only point to the lack of evidence supporting the non-movant's position. *Id.* Then, the non-movant must come forward with specific facts and evidence that indicates there is a genuine issue of material fact. *Id. See also Fairfield County Sch. Dist. Bd. of Trs. v. State,* 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014)

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

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

("[T]he non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence . . . in support of its proposition.")

Thus, even if the purported basis for Hynie's belated annulment of the Hynie/Ahmed marriage were relevant under *Lukich* (it is not), Hynie would have had to present some admissible evidence to support her bald assertion that her marriage to Ahmed was bigamous. *See Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Because Hynie utterly failed to provide any admissible evidence to support her motion and to overcome Appellants' motion for summary judgment, the trial court should have granted summary judgment to Appellants.

III. THE TRIAL COURT COMMITTED ERROR IN HOLDING THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ANNULMENT ORDER WERE PRECLUSIVE AS TO APPELLANTS.

A. Because the Annulment Order is a Judgment *In Rem*, its Findings Are Not Binding on Non-Parties.

As the circuit court rightly acknowledged, "[t]here is no question that a judgment annulling a marriage is a judgment in rem."[36] *See Carnie v. Carnie*, 262 S.C. 471, 167 S.E.2d 297 (1969); 4 S.C. Jur. *Action* § 5. The terms "in personam" and "in rem" distinguish between actions that seek a personal judgment against the defendant ("in personam") and judgments which operates only upon a specific property *or status* ("in rem"). *See* 4 S.C. Jur. *Action* § 5; C.J.S., *Actions* § 69; 1 Am. Jur. 2d, *Actions* §§ 39, 40. "Although a valid judgment in rem is binding on all the world as to the existence of *a status* which is the subject of the action, *it is not conclusive as to a fact upon which the judgment is based in any subsequent action* . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." Restatement (First) of

[36] R. p. 87, MSJ Order, at 35.

Judgments § 73 (1942), cmt. c (emphasis added); *see also id.*, at § 74(2) ("A judgment in such [in rem] proceeding ... is not conclusive as to the fact upon which the judgment is based except as to persons who have actually litigated the question of the existence of the fact.")

The trial court, in declaring that that the Annulment Order is "binding on all the world," misconstrued this essential distinction.[37] The U.S. Supreme Court expressed the distinction as follows: "Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S. Ct. 356, 357, 73 L. Ed. 752 (1929) (citation omitted); *see also Gratiot County State Bank v. Johnson,* 249 U.S. 246, 39 S. Ct. 263, 63 L. Ed. 587 (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted).

To recognize that the Annulment Order's findings of fact are not binding in this case does not mean, as the lower court misunderstood, that the Annulment Order must be re-opened, undone, or disregarded.[38] The *in rem* Annulment Order binds "all the world" as to the marital status of Hynie and Ahmed *as of April 15, 2004*, the date the order was filed. However, the Annulment Order's *findings of fact and conclusions of law* are not binding on those who were not parties to that proceeding, such as the Decedent and the Appellants.

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

[38] R. pp. 72-80, MSJ Order, at 20–28.

The trial court committed reversible error in concluding that the findings and conclusions in the Annulment Order bound Brown and Appellants.[39]

B. Appellants Are Not Collaterally Estopped From Contesting the Findings of Fact and Conclusions of Law in the Annulment Order.

The trial court erroneously held that the Decedent, and by extension Appellants, were collaterally estopped from challenging the findings of fact and conclusions of law in the Annulment Order.[40]

The doctrine of collateral estoppel or issue preclusion prevents *a party* to a prior action from re-litigating an issue that was decided in that action. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). For collateral estoppel to apply, the issue must have been (1) actually litigated, (2) directly determined, and (3) necessary to the prior judgment. *Id.* Thus only a party to an action who had a "full and fair opportunity to previously litigate the issue" therein may be collaterally estopped by such action. *Id.* Finally, collateral estoppel should not be rigidly or mechanically applied, and where it would result in unfairness, the court may decline to apply it. *Id.*

1. The Issue of Ahmed's Alleged Bigamy Was Not "Actually Litigated."

The Annulment Order was essentially granted by default, and the issue of Ahmed's alleged bigamy was never actually litigated. Thus, the first element of collateral estoppel was never met.

The Fourth Circuit has cautioned, regarding collateral estoppel, that courts should determine "with particular care" whether a matter has been "actually litigated" in the

[39] R. pp. 80-86, MSJ Order, at 28–34.

[40] R. pp. 86-97, MSJ Order, at 34–45.

prior action. *In re Raynor,* 922 F.2d 1146, 1148 (4th Cir. 1991) *(quoting Combs v. Richardson,* 838 F.2d 112, 113 (4th Cir. 1988)). In South Carolina, a *default* judgment cannot support collateral estoppel—not even as to a party to the case—because the issues were not actually litigated. *See State v. Bacote*, 331 S.C. 328, 330–31, 503 S.E.2d 161, 162–63 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation."); *Kunst v. Loree*, 404 S.C. 649, 658, 746 S.E.2d 360, 364 (Ct. App. 2013) ("Accordingly, we hold the doctrine of collateral estoppel cannot be applied to default judgments because the essential element requiring the claim sought to be precluded actually have been litigated in the earlier action is not met.").[41]

Ahmed was served by publication locally.[42] "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."[43] As a result, the only testimony at the perfunctory Family Court hearing was Hynie's self-serving testimony. Because Ahmed was not present to oppose her assertions, the Family Court accepted them, granting the annulment by default.[44]

This is more than sufficient to constitute a judgment by default under Rule 55, SCRCP, which states that a default occurs "[w]hen a party against whom a judgment for

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[41] Courts in other jurisdictions are in accord. *See e.g. In re Kalita,* 202 B.R. 889, 914 (Bankr. W.D. Mich. 1996) (holding that because a party did not file an answer, the facts were never actually litigated, thus, the ensuing default judgment is not entitled to collateral estoppel effect).

[42] R. pp. 256-257, Joint Stipulation, ¶7, ¶ 17.

[43] R. p. 257, Joint Stipulation, ¶ 17.

[44] Even Hynie's counsel noted this at the annulment hearing (R. p 256, *Id.*, ¶ 8; R. p. 300, Exhibit 13 to Joint Stipulation, 4:6–8).

affirmative relief is sought has failed to plead or otherwise defend." *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 Hynie did not formally move to place Ahmed in default is of little consequence as the entry of default is simply "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 estoppel, the defendant is still "in default." *See RRR, Inc. v. Toggas,* 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).

The trial court erroneously held that the *findings of fact and conclusions of law* of the Annulment Order bound the Decedent and Appellants when such would not even bind a named party to that action—the absentee Ahmed—in a subsequent proceeding, under settled principles of law.

In addition, it appears that Ahmed was not even properly served with Hynie's summons and complaint. Ahmed was purportedly served by publication when Mr. Tannell, Hynie's process server in Texas, allegedly was unable to locate Ahmed.[45] The ensuing service by publication was buried in the Houston Chronical on page 2 of the classified section. *Id.* Mr. Tannell's affidavit requesting publication does not reflect the requisite due diligence to locate Ahmed, merely that he did not find a valid address on a "national" database, and that "[t]he results were inconclusive."[46] He says nothing about searching U.S. immigration databases or trying to locate Ahmed in Pakistan. *Id.*

[45] R. p. 256, Joint Stipulation, ¶ 7; R. pp. 274-289, Exhibits 6, 7, 8 and 9.

[46] R. p. 256, *Id.*, ¶ 7; R. pp. 283-289, Exhibit 9.

Hynie knew Ahmed was from Pakistan,[47] but she made no effort to locate and serve Ahmed pursuant to Rule 4(h)(5), SCRCP, for foreign service of process.[48] Ahmed was readily located in 2008, however, by an attorney in this action.[49]

In *Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324 (1924), the South Carolina Supreme Court determined that an affidavit requesting publication was "fatally defective ... on its face, in that it does not show that diligence was used to find the defendant." As courts favor decisions on the merits, strict compliance with the rules governing service by publication is required. *Id.* The Order for Publication in the hasty Hynie/Ahmed Annulment Action was secured without the requisite showing of due diligence, rendering such service defective.

2. As Neither Decedent Nor Appellants Were Parties to the Annulment Action Nor in Privity to a Party, They Lacked a Full and Fair Opportunity to Litigate Whether the Hynie/Ahmed Marriage Was Bigamous.

In South Carolina, as in virtually every jurisdiction, collateral estoppel only applies to *parties* to the prior action and their privies. *See Carman v. South Carolina Alcoholic Beverage Control Com'n,* 317 S.C. 1, 451, S.E.2d 383 (1994); *Roberts v. Recovery Bureau, Inc.,* 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (holding re-litigation of issues is "precluded as to parties and their privies in any subsequent action based upon different claim"). The only named parties in the Ahmed Annulment Action were Hynie and Ahmed.

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[47] R. p. 256, *Id.*, ¶ 8, R. p. 303, Exhibit 13, 7:7–9.

[48] Per Rule 2 of the South Carolina Family Court Rules, the SCRCP apply to Family Court actions.

[49] R. pp. 645-647, Affidavit of David Bell, Esq., 9/30/2014, attached as Exhibit 2 to LSA's Memo in Support.

Decedent and Appellants were not parties to the Family Court action[50], *nor could they have intervened* such that their interests were fairly represented. *See Ex parte GEICO,* 373 S.C. 132, 644 S.E.2d 699 (2007) (holding that a third party with an indirect interest in the validity of a marriage does not have standing to intervene in a family court action); *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (holding that only the parties to the marriage have a sufficient interest in the subject matter of the litigation to be parties to a divorce action); *Powell ex rel. Kelley v. Bank of America,* 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008) (holding that a third party does not have standing to intervene); *Lukich v. Lukich,* 368 S.C. at 51, 627 S.E.2d at 756 (Ct. App. 2006) (Trial court "denied [second husband's] motion to intervene [in annulment action], finding he did not have standing because he was not a party to the [first] marriage.").

As to whether Decedent was "in privity" with Hynie regarding the Annulment Action, South Carolina courts strictly construe "privity." As held by this Court:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. ***Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.***

Wade v. Berkeley County, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) (emphasis added, citations omitted). *See also Wyndam v. Lewis*, 292 S.C. 6, 8, 354 S.E.2d 578, 579–80 (Ct. App. 1987).

Under this standard, Brown was clearly not in privity with Hynie regarding the Annulment Action due to his alleged "interest" in the outcome. *Carrigg v. Cannon*, 347

[50] R. p. 257, Joint Stipulation, ¶¶ 12, 15, and 16; R. pp. 297-313, Exhibit 13.

S.C. 75, 82, 552 S.E.2d 767, 771 (Ct. App. 2001). Decedent's legal interests (or by extension, those of the Appellants) were never litigated in the action, nor even addressed.

In *Carolina Renewal*, this Court found that a party may be estopped from litigating an issue if its interests are *identical* to those of a party to a prior action where the issue was *actually litigated.* 385 S.C. at 556, 684 S.E.2d at 782. In that case, a company filed a breach of contract action, but this Court found an earlier adjudication involving *the same company's sole officer and sole shareholder* was dispositive. *Id.* at 556, 684 S.E.2d at 782–83. This Court found there was no prejudice in holding the company to the prior determination as the company's interests were identical and in very close proximity to those of its *sole* officer and owner. *Id.* Here, by contrast, the Decedent's and Appellants' interests are neither identical to nor closely aligned with any party to the Annulment Action.

In *Palm v. General Painting Co., Inc.*, 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988), this Court affirmed the trial court's ruling that an alleged child of the decedent was not estopped from re-litigating her parentage despite *two* previous orders finding her illegitimate. *Id.* at 44, 370 S.E.2d at 465. The Court held that even though the child's paternity had already been determined *twice* before, she was *not* estopped from challenging paternity in a *third* action because she was not a party to those actions nor in privity to her parents. *Id.*

The trial court erroneously found without support that the Decedent exercised control over the Hynie/Ahmed Annulment Action, and on that basis that he was in privity with Hynie or somehow estopped from litigating any findings in the Annulment Order.[51]

[51] R. pp. 84-86, MSJ Order, at 32–34.

In keeping with the policy rationale that only persons who had *a full and fair opportunity to litigate an issue* may be barred by collateral estoppel, the Fourth Circuit has held that a non-party may be estopped from litigating an issue in a later proceeding only "if (1) the person had a direct financial or proprietary interest in the prior litigation; and (2) the person assumed control over the prior litigation." *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1312 (4th Cir. 1987). As to the second prong, the court explained:

> To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain [appellate] review. . . ***It is not sufficient, however, that the person merely contributed funds or advice in support of the party, [or] supplied counsel to the party***, or appeared as amicus curiae.

Id. at 1313 *(citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)) (emphasis added). The Court found that the appellant did not exercise control over the prior litigation because it did not have "any effective choice as to the legal theories and proofs advanced in the prior suit, and there is no suggestion that [it] had control over whether or not to appeal the judgment in that case." *Id.*

None of these factors are present here either: Brown did not participate in the Family Court hearing or in any other aspect of the Hynie/Ahmed Annulment Action, was not a client of Hynie's attorney in that action,[52] and there is no evidence in the record to show that Brown had any choice as to "the legal theories and proofs to be advanced in behalf of" Hynie.[53] *Id.* at 1312.

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[52] R. p. 257, Joint Stipulation, ¶¶ 12, 15 and 16; R. pp. 297-313, Exhibit 13.

[53] In fact, the evidence in the record shows that Hynie's counsel in the Annulment Action did not provide a filed copy of the complaint to Decedent's counsel until nearly two months after it had been filed (R. p. 257, Joint Stipulation, at ¶14; R. pp. 314-328, Exhibit 14). The record also indicates that Decedent's attorney was not informed of the final hearing until *after* the Annulment Order had been filed. *Id.*

The lower court's holding that Brown would be estopped from contesting the findings and conclusions of the Annulment Order mischaracterizes the facts and misapplies the law. The court pointed to the fact that Brown paid Hynie's legal fees.[54] The mere payment of legal fees, however, does not place one in privity with a party to a litigation, nor demonstrate control over the litigation. *See Virginia Hosp. Ass'n*, 830 F.2d at 1313; *Martin v. American Bancorp. Retirement Plan,* 407 F.3d 643, 652–53 (4th Cir. 2005) (stating the mere fact that parties to a second action helped finance a party in a prior action "is not sufficient... to warrant the application of res judicata") *citing General Foods Corp. v. Mass. Dept. of Public Health,* 648 F.2d 784, 788 (1st Cir. 1981) (noting the general rule that "a non-party is not bound by a judgment *merely* because he paid the expenses of a litigation"); *See also McKeown v. Wheat,* 231 F.2d 540, 543 (5th Cir. 1956); Restatement (Second) of Judgments § 39, cmt. c (1982) ("It is not sufficient that the [non-party] merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae.").

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. 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 . . . ."). Here, the conflicts were even more apparent because Brown was adverse to

[54] R. p. 86, MSJ Order, at 34.

Hynie in his own annulment action filed on January 29, 2004 in Aiken County, South Carolina, shortly after Hynie filed her annulment action.[55]

It is well established that the doctrine of collateral estoppel only bars a party from litigating an issue when that party had a full and fair opportunity to litigate the issue in a prior action. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. In the unlikely event this Court finds Hynie's *post-hoc* bigamy allegations to be relevant under *Lukich*, it would be manifestly unjust to preclude Appellants from litigating this disputed issue of fact when they have never been afforded the full and fair opportunity to do so.

3. Even if the Elements of Collateral Estoppel Were Present, Application of the Doctrine is Discretionary and Should Not be Applied Where Inequitable.

"Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg v. Cannon,* 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) (*citing State v. Bacote,* 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)), *see also Carolina Renewal, Inc.*, 385 S.C. at 554, 684 S.E.2d at 782. Collateral estoppel should be applied "sparingly, with clear regard for the facts of the particular case." *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004) (emphasis added). "[E]stoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court." *Id.*

"[R]es judicata will [also] not be applied where it will contravene other important public policies; the court must weigh the competing public policies." *Johns v. Johns*, 309 S.C. 199, 203 (Ct. App. 1992) (holding that *the public policy against*

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

bigamous marriages overrides the policy concerns of preclusion doctrines). As in *Johns*, public policy favors allowing Brown's heirs to challenge Hynie's bigamous marriage to him. This case is a clear example where non-parties have not been given a fair opportunity to litigate their own interests. It would be inequitable to bar Appellants from challenging the hasty findings of a prior action in which the Decedent was not a named party, had no right to intervene, did not control the proceedings, and his interests were not heard or adjudicated.

For all of the foregoing reasons, the Decedent, and by extension, Appellants were not bound by the findings of fact or conclusions of law in the Annulment Order.

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

A. The Trial Court Committed Error in Barring Appellants From Taking Discovery of Hynie.

On March 31, 2014, Hynie asked the trial court to stay discovery and protect her from being deposed, answering 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."[56] In response, the Court ruled that if Hynie asserted disputed facts, "summary judgment goes out the window."[57] "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."[58]

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

[57] *Id.*

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

Based upon Hynie's representations, the trial court barred the parties from conducting *any* discovery pending its ruling on her motion for summary judgment.[59] Six months later, Hynie filed two self-serving affidavits in support of her summary judgment motion, alleging a host of disputed facts[60] that the trial court appeared to rely upon in ruling in her favor.[61]

The circuit court also sealed Hynie's handwritten Diaries[62] and did not make them available until *after* granting Hynie summary judgment. The trial court erred in granting Hynie's motion for summary judgment without allowing Appellants to depose and take written discovery of Hynie and to use her Diaries.

If a trial court considers a motion for summary judgment before discovery has taken place, it is axiomatic that the court should not grant such motion 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 v. Courtney,* 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (internal citation omitted). *See also Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). This is even more so where, as here, the trial court affirmatively *stayed all discovery* prior to entertaining Hynie's summary judgment and prevented the use of potentially relevant evidence that may be adverse to the moving party.

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

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

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

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

The Appellants had an absolute right to depose and cross-examine Hynie with her Diaries in hand, and to take written discovery of Hynie, prior to the Court hearing her motion for summary judgment, but were improperly denied the opportunity for discovery.

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

The lower court and Hynie agreed that unless her motion for summary judgment could be determined solely upon the parties' Joint Stipulation, the motion must be denied.[63] The court relied, however, upon facts outside of the Joint Stipulation, and that were contested by Appellants.

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

- On February 17, 1997, Hynie participated in a marriage ceremony with Javed Ahmed;
- On December 14, 2001, Hynie participated in a marriage ceremony with Brown;
- From February 17, 1997, to December 14, 2001, no court order had been entered to end Hynie's marriage to Ahmed;
- On April 15, 2004, Hynie obtained the Annulment Order from the Charleston County Family Court; and
- Hynie has no purported evidence that Ahmed had other wives when he married her on February 17, 1997 other than her own assertions that Ahmed told her this.[64]

As discussed in Section I above, these undisputed facts squarely demonstrate that Hynie's purported second marriage was bigamous under Section 20-1-80 and the South

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

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

Carolina Supreme Court's mandate in *Lukich* because Hynie'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.

The converse, however, is not true—summary judgment *could not be granted in Hynie's favor* based on the parties' Joint Stipulation. In order for the trial court to have decided as a matter of law that Hynie is Brown's surviving spouse, it would have had to conclude that there is no triable issue of fact bearing on whether Hynie was married to Ahmed 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 Hynie:

- Javed Ahmed swore under oath in the 1997 Hynie/Ahmed Marriage License Application, signed by Hynie, that he was not married.[65]
- Hynie stipulated that she cannot identify a single person who can testify that Ahmed was married to another when she and Ahmed participated in the 1997 marriage ceremony.[66]
- In the 19 years since her marriage to Ahmed, Hynie has not provided any admissible evidence whatsoever that Ahmed was already married.
- Hynie agreed she was not Brown's spouse in the Brown/Hynie Consent Order which settled the Brown/Hynie Annulment Action.[67]

In the event summary judgment is not granted to Appellants as a matter of law pursuant to Sections I and II above, the above evidence[68], especially when viewed in the light most

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

[65] R. p. 257, Joint Stipulation, ¶ 10.

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

favorable to Appellants—the non-movants—was more than sufficient to raise a triable issue of fact as to whether the Hynie/Ahmed Marriage was bigamous, as shown below.

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

If, as Hynie asserted, Ahmed had *three* or more wives in Pakistan when he married Hynie, records of such marriages surely would exist. Pakistan is a modern 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."[69] Pursuant to the Muslim Family Law Ordinance of 1961, the Nikah Nama must be registered with the Nikah Registrar at the local Union Council. *Id.* Such records can be obtained from NADRA and/or the Karachi Union Councils via multiple internet services[70] or attorneys in Pakistan. If they existed, Hynie's qualified legal team would certainly have searched for, obtained, and presented such records: (1) in support of the 2004 Hynie/Ahmed Annulment Action; (2) in opposition to the 2004 Brown/Hynie Annulment Action, and (3) in support of Hynie's current summary judgment motion under review. Instead, at each juncture Hynie failed to present any evidence supporting her self-serving assertion.

2. The 1997 Hynie/Ahmed Marriage License Application Evidences That Ahmed Was Not Already Married.

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[68] Appellants, in fairness, should not even be confined to this evidence in assessing whether triable issues of fact precluded Hynie's motion because the trial court barred them from taking discovery on the issues surrounding the Hynie/Ahmed Marriage.

[69] *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).

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

As discussed in Section II above, Ahmed's own sworn, notarized statement that "I am not presently married" on the Texas Marriage License Application underlying his 1997 marriage to Hynie is admissible evidence that Hynie'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 Brown/Hynie Consent Order Further Evidences She Was Not Legally Married to Brown.

The Brown/Hynie Consent Order resulted from and effectively settled the Brown/Hynie Annulment Action and Hynie's counterclaim therein for divorce. The Consent Order expressly provides: "Defendant [Hynie] 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 Hynie were married.

Brown filed the Brown/Hynie Annulment Action on January 29, 2004, on the grounds that their marriage was bigamous shortly after Hynie filed for annulment of her marriage to Ahmed.[72] On May 4, 2004, soon after Hynie obtained her annulment of the Hynie/Ahmend Marriage by default, Brown amended his complaint re-asserting Hynie's bigamy.[73] On July 6, 2004, Brown similarly replied to Hynie's counterclaim

[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 . . .").

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

CONCLUSION

The trial court erred in granting Hynie and denying Appellants summary judgment. Based on the Joint Stipulation of Facts, Hynie is not James Brown's "surviving spouse" because the Hynie/Brown Marriage was bigamous as a matter of law under Section 20-1-80 and *Lukich*, *supra*. The trial court misconstrued both the statute and controlling precedent. Notwithstanding that the purported reason for Hynie's belated annulment is irrelevant under *Lukich*, the trial court erroneously relied on and gave preclusive effect to the findings of fact in the Hynie/Ahmed Annulment Order, contrary to well-established South Carolina law. Thus Hynie completely failed to carry her burden on summary judgment, as there was no admissible evidence in the record to support her self-serving allegation that her marriage to Ahmed was bigamous. Finally, and again, to the extent Hynie's bigamy assertion is even relevant, obvious triable issues of fact precluded the trial court from granting summary judgment to Hynie on this basis; an error compounded by the court improperly preventing Appellants from deposing and taking written discovery of Hynie.

Appellants therefore respectfully request that this Court (i) find that summary judgment was entered erroneously in favor of Hynie, and (ii) grant summary judgment to

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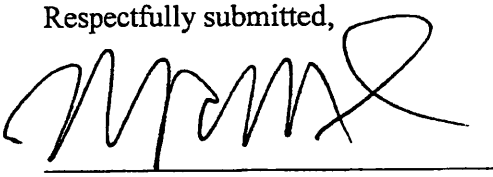
[74] R. p. 347, *Id.*, Exhibit 18, ¶4 ("Defendant remained married to this man at the time she entered into the marriage to Plaintiff.").

Appellants because, as a matter of law, Hynie lacked the legal capacity to contract marriage with the Decedent on December 14, 2001.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

In Re: The Estate of James Brown a/k/a James Joseph Brown,

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v.

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Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.

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ARGUMENT

Respondent has muddied the waters on what is a relatively simple issue: Should Respondent be able to retroactively claim the status of "spouse" under South Carolina law, and obtain spousal benefits, when her marriage to James Brown was bigamous and contrary to the law of this State? The answer to that question is no.

Appellants will briefly respond to Respondent's unavailing arguments to clarify the issues before this Court.

I. RESPONDENT ERRONEOUSLY CLAIMS THAT THE CIRCUIT COURT LACKS SUBJECT MATTER JURISDICTION AND THAT APPELLANTS LACK STANDING TO PARTICIPATE IN THE DETERMINATION OF RESPONDENT'S SPOUSAL RIGHTS UNDER THE PROBATE CODE.

The circuit court properly has subject matter jurisdiction over this matter and Appellants have standing because this matter arises under the South Carolina Probate Code, not in family court. The Probate Court has exclusive jurisdiction to determine the heirs of an estate, including purported spouses. See S.C. Code Ann. § 62-1-302 (a)(1); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 757 S.E.2d 399 (2014); *see also* S.C. Code Ann. § 62-3-105. Respondent's arguments regarding subject matter jurisdiction and standing are based upon a mischaracterization of Appellants' arguments – namely, that Appellants are somehow seeking to re-litigate the annulment of the Hynie/Ahmed Marriage.

As Appellants have clearly stated, they neither seek nor have any interest in undoing this annulment. It is well established, however, that Appellants are not bound by the *factual findings* in that *in rem* proceeding to which they were never joined as parties, and in which they could not have intervened. Throughout her opposition Respondent repeatedly mischaracterizes Appellants' arguments and asserts straw man arguments like

this to distract this Court from the real issue in this appeal: whether the belated Annulment Order can turn back the hands of time so as to retroactively "cure" Respondent's bigamous marriage to Brown. Pursuant to S.C. Code Ann. § 20-1-80 and the plain language of the South Carolina Supreme Court's decision in *Lukich v. Lukich*, 379 S.C. 589, 592, 666 S.E.2d 906, 907 (2008) ("*Lukich*"), which control, the subsequent Annulment Order, cannot, as a matter of law, be applied retroactively to resuscitate Respondent's knowingly illegal marriage to Brown. No amount of judicial contortionism advocated by Respondents can or should change this result.

II. RESPONDENT PROPOSES A TWISTED READING OF *LUKICH* THAT WOULD LEAD TO UNNECESSARY CHAOS AND INSTABILITY IN FAMILY AND PROBATE LAW DETERMINATIONS.

Under *Lukich's* common-sense, bright-line rule Respondent is not James Brown's surviving spouse. The rule in South Carolina, as set forth in S.C. Code Ann. § 20-1-80, and as pragmatically interpreted by our Supreme Court is that a spouse's annulment of her first marriage *after* her attempted second marriage *does not relate back* so as to validate her bigamous second marriage. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907 ("The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective.") The Supreme Court rightly concluded that "[a]ny other construction of S.C. Code Ann. § 20-1-80 would lead to uncertainty and chaos", exemplified here by Respondent's tortured arguments to arrive at a polar-opposite result.

Lukich is not notable for the principle, touted by Respondent, that a bigamous marriage is void *ab initio*, as that was black-letter law long before *Lukich. See, e.g.* *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*, "from the inception."). *Lukich* is noteworthy for its unequivocal holding that a spouse's belated annulment of her first marriage *after* her second marriage does not operate so as to revive her second marriage because any other application of S.C. Code Ann. § 20-1-80 would cause too much uncertainty in an area of the law that requires certainty. *Lukich*, 379 S.C. at 592, 666 S.E.2d at 907. *Lukich's* holding is clear, unequivocal and emphatic. It contains no carve-outs or exceptions based on the different ground for belated annulment of a first marriage, because *Lukich*'s core rationale – to prevent "uncertainty and chaos" in this fundamental area of the law – does not, by its very nature, allow for case-by-case exceptions.

Notably, Respondent not once addresses in her 75-page Opposition *Lukich's* unequivocal language, highlighted by Appellants. Instead, Respondent repeats her mantra that bigamous marriages are void *ab initio*. First, this does nothing to alter or alleviate *Lukich*'s concern over the chaotic inability to ascertain a marriage's validity *at the time of marriage* if that were subject to the parties' choices and conduct at an indeterminate time, years after marriage. Nor is there anything remarkable about the void *ab initio* status argued by Respondent as it is common place for annulments declare to declare a marriage "void *ab initio*" for any number of reasons. *See* 52 Am. Jur. 2d Marriage § 57 ("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 . . . there must be a new ceremony following the termination of the earlier marriage."); *see also Splawn v. Splawn*, 311 S.C. at 425, 429 S.E.2d at 806 (1993)

(there is "no legal distinction between a marriage which is annulled and one terminated by reason of bigamy. Legally, they are both void *ab initio*.").

Furthermore, the Supreme Court firmly closed the door on Respondent's circular argument by stating in *Lukich*: "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 (citing *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004)). A bigamous marriage may be void *ab initio.* However, *the legal capacity to contract a new marriage* is not cleared until *after* an annulment order is issued by a competent court because "[t]he statute [S.C. Code Ann. § 20-1-80] speaks to the status quo at the time the marriage was contracted, and does not contemplate ... a retroactive perspective." *Id.*

This is the law which controls; *irrespective* of the fact that Respondent's entire opposition relies on her unproven assumption that her marriage to Ahmed was bigamous – a self-serving fiction for which she and her attorneys have failed in all this time to present any admissible evidence.

Ultimately, this Court is presented with a simple question of timing as to when a party's legal capacity to marry must be defined. In determining whether a second marriage is void due to one spouse's bigamy, does the law look to the status quo when the second marriage was attempted or does the question remain speculative and open for some other indefinite period of time? The latter suggestion and the total lack of certainty it entails is unworkable and untenable as the Supreme Court *expressly* recognized. *Id.* The correct result mandated by *Lukich* and S.C. Code Ann. § 20-1-80, and the only result

that makes any sense from a legal, equitable and pragmatic perspective, is that a court must look to a spouse's *legal capacity* to marry at the time her second marriage was attempted, notwithstanding a later annulment of her first marriage.

Here, Respondent actively obtained a marriage license and engaged in a marriage ceremony with Ahmed in 1997, and was well aware that she was married at the time she purported to marry James Brown in 2001.[1] In the intervening five years Respondent could well have obtained an annulment of her marriage to Ahmed, prior to "marrying" Brown; instead she hid this from Brown and the State of South Carolina.[2] South Carolina law does not condone or reward such conduct. A person desiring legal marriage has both a legal and moral obligation to ensure that he or she is legally eligible to marry *before* actually marrying. This includes, of course, the resolution of any prior marriage *before* undertaking to marry once again. *See Johns v. Johns*, 309 S.C. 199, 202-03, 420 S.E.2d 856, 858-59 (Ct. App. 1992) (noting that even "good faith" will not change this bright-line rule). In the eyes of the law what matters is that Respondent's "first marriage shall have been declared void by the sentence of a competent court" *before* she attempted to remarry in 2001. S.C. Code Ann. § 20-1-80.

Any other application of the law would be inequitable and dysfunctional. Marital status under the law, and all of the financial, familial, and legal consequences of that status, cannot seesaw between absolute invalidity and retroactive validity based on the subsequent discretionary actions of the participants, including Respondent's belated 2004 annulment. Marriages that are void at the time cannot be "un-voided" due to an annulment years later for whatever purported reason. *Lukich* specifically acknowledged

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

[2] R. pp. 329-335, Joint Stipulation, Exhibits 15-16.

the "chaos" that would result from this type of discretionary retroactive application and *explicitly* rejected it. 379 S.C. at 592, 666 S.E.2d at 907.

As it is undisputed that Respondent did not divorce Ahmed nor annul their marriage until 2004, she lacked the legal capacity in 2001 to contract marriage to Brown, as a matter of law. *Id.* It is also undisputed that after Respondent obtained an annulment of her marriage to Ahmed in 2004 ("Annulment Order") that she and Brown did not marry prior to his death on December 25, 2006. As a result, Respondent is not the decedent's surviving spouse as a matter of law.

III. RESPONDENT ERRONEOUSLY CLAIMS APPELLANTS ARE BOUND BY ALL FINDINGS CONTAINED IN A DEFAULT JUDGMENT ENTERED IN A CASE TO WHICH THEY WERE NOT PARTIES.

As a threshold matter, no discussion of Respondent's Annulment Order is even necessary under *Lukich* because the annulment does not relate back so as to retroactively "un-void" Respondent's marriage to Brown, which the law does. not recognize. Notwithstanding this, Respondent, again, mischaracterizes Appellants' arguments regarding the Annulment Order.

Appellants acknowledge that the Annulment Order terminated the Hynie/Ahmed marriage on April 15, 2004. The Annulment Order, as a judgment *in rem*, binds the entire world as to its dissolution of the Hynie/Ahmed marriage on that date. *See Carnie v. Carnie,* 262 S.C. 471, 167 S.E.2d 297 (1969).

Appellants challenge, however, Respondent's erroneous assertion that the factual findings in the *in rem* Annulment Order, are somehow binding on Appellants and conclusive as to their rights in this probate proceeding and beyond. Respondent's arguments are contrary to well-established law. The United States Supreme Court has

held that "[e]stablishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment in rem binds all the world, but the facts on which it necessarily proceeds are not established against all the world . . . ." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S. Ct. 356, 357, 73 L. Ed. 752 (1929) (citation omitted); *see also Gratiot County State Bank v. Johnson,* 249 U.S. 246, 39 S. Ct. 263, 63 L. Ed. 587 (1919) ("judgments in rem [are] not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto") (citations omitted).

To steer the Court in her direction Respondent equivocates, arguing that a judgment "is not functionally binding unless both its factual findings and its conclusions of law are binding". This is nonsensical and, again, directly contrary to well-settled law. Id.; *see also* Restatement (First) of Judgments § 73 (1942), cmt. c.

Similarly, Respondent attempts to evade the clear effect of binding precedent by distinguishing between factual findings essential to a judgment and nonessential factual findings. But, of course, *Becher* makes no such distinction. Under *Becher*, neither category of facts is binding upon a third party. Importantly, such a distinction has been explicitly rejected by this Court in *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013). In *Kunst*, the lower court ruled that the preclusion doctrine of collateral estoppel could be applied "as to matters essential to the judgment." *Id.* This Court reversed the lower court, holding that South Carolina stood with the majority of states in refusing to divide factual findings into categories or treat them differently based upon their classification as "essential" or "non-essential." *Id.*

Applying *Becher* and its progeny here, Respondent's marriage to Ahmed is annulled, and the *in rem* judgment is binding upon third parties as to its termination on April 15, 2004 of the Hynie/Ahmed Marriage. But to the extent, if any, that the truth or falsity of the Annulment Order's factual findings affect or are relevant to Appellants' legal rights, Appellants are not bound by such factual findings, under *Becher*, because Appellants were not parties to the annulment action. To the extent that the factual issue of whether Ahmed was married to an unidentified other person when Respondent chose to marry him is even relevant under the *Lukich* analysis (it is not) Appellants are guaranteed constitutional due process to litigate these factual questions – not to "undo" the annulment – but to determine *Appellants'* legal rights.

There is likewise no merit to Respondent's argument that the doctrine of collateral estoppel binds Appellants to the factual findings of the Hynie/Ahmed Annulment proceedings. Appellants' opening brief cites numerous cases in support of two fundamental barriers to Respondent's attempts to have its overcooked doctrinal spaghetti stick to the wall.

First, the issue of whether Ahmed was actually married to another was *never* "actually litigated" in the Charleston County family court annulment, which the Supreme Court described *sua sponte* as "hastily granted." *Wilson v. Dallas*, 403 S.C. 411, 434; 2013 S.C. LEXIS 240, *35 (S.C. 2013), n. 16 ("Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her."). It is undisputed that Respondent and her counsel ran to the Charleston County family court on December 15,

2003 to obtain a quickie annulment of the Hynie/Ahmed Marriage[3] upon news that Brown would shortly file the annulment/divorce action, filed by Brown on January 29, 2004.[4] Respondent's uncontested and one-sided hearing was held on April 15, 2004, and the order she submitted annulling her marriage was signed the same day.[5] Ironically, the putative wife in *Lukich*, sneaked off to the *same* court and received a speedy annulment from the *same* family court judge in an unsuccessful attempt to stave off her second husband's action to void their marriage based upon her bigamy. *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (S.C.Ct. App. 2006).

No matter the label that Respondent now seeks to give the resulting one-sided Annulment Order, the facts remain that Ahmed never appeared, never answered the complaint or otherwise pled, and never participated in any hearing or otherwise defend himself against Respondent's sudden and convenient accusations.[6] In addition, there was zero evidence presented at the perfunctory annulment hearing other than Respondent's own self-serving and completely uncorroborated testimony, replete with inadmissible hearsay and double hearsay. These circumstances constitute the very essence of a *default judgment* (*see RRR, Inc. v. Toggas,* 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008)) to which the doctrine of collateral estoppel simply does not apply. *State v. Bacote*, 331 S.C. 328, 330 S.E.2d 161 (1998); *Kunst*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).[7]

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

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

[5] R. pp. 293-313, *Id.*, Exhibits 12, 13.

[6] R. p. 257, *Id.*, ¶ 17.

[7] Respondent's loophole logic that because the annulment of a marriage is important, or Respondent's counsel did not move for a default judgment (while stating "[t]he Defendant, I guess, arguably is in default"), the uncontested annulment proceedings wherein Ahmed never appeared did not effectively result in a default judgment is, again, nonsensical. Resp. Br. p. 48.

Even today, Respondent still has presented no admissible evidence whatsoever that Ahmed was married to other women when she married him, "cannot identify a single person who can testify that Ahmed was married to another person when [she] and Ahmed participated in the 1997 marriage ceremony"[8] and is aware of "no order or other occurrence of which . . . ended or caused to end any marriage . . . between her and Ahmed."[9]

Second, neither Appellants nor Brown were in privity with Respondent, and neither Appellants nor Brown could have intervened in the family court action. *See Ex parte GEICO*, 373 S.C. 132, 644 S.E.2d 699 (2007) (holding that a third party does not have standing to intervene in a family court action despite an interest in the validity of the marriage in question). It is also undisputed that neither Appellants' nor Brown's legal interests were determined in the Hynie/Ahmed Annulment proceedings. *See Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998) (holding that "[t]o be in privity a party's legal interests must have been litigated in the prior proceeding.") Nor was any finding regarding Brown's marriage to Respondent included in the Annulment Order. Brown did not attend any hearings, nor is there any assertion that he exerted any control over the legal strategies or theories advanced in the case. Brown and Respondent's interests were not even aligned.

In fact, *after* Respondent filed her annulment action on December 15, 2003, Brown filed *his* divorce/annulment action against her on January 29, 2004.[10] Moreover, Brown maintained his divorce/annulment action *even after* the Ahmed Annulment Order

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

[9] R. p. 257, *Id.*, ¶¶ 9-10.

[10] R. pp. 271-273, 349-350, *Id.*, Exhibits 5, 19.

was entered in April 2004, consistently taking the position that his marriage to Respondent was a nullity.[11] Respondent tries to argue this reality away by claiming that Brown's reference to the Ahmed Annulment Order in his own divorce/annulment action should bind him and Appellants to the findings of the Ahmed Annulment Order because he has "accepted the benefits" of the Order, but this argument both mischaracterizes Brown's reference to the Ahmed Annulment Order and minimizes the result of Brown's own divorce/annulment action. First, Brown referenced the Ahmed Annulment Order to show that *Respondent* was bound by it.[12] Of course, this makes sense because Respondent was *a party* to the proceedings. Brown never claimed that the findings of the Ahmed Annulment Order were true or that he was bound by them. Second, Brown did not "accept" any "benefits" from the Ahmed Annulment Order because there was no ruling in his favor based upon his arguments. Brown and Respondent reached an out-of-court agreement.

Due to the severe legal consequences that flow from privity and collateral estoppel, privity is strictly construed. *Wade v. Berkeley County*, 330 S.C. at 317, 498 S.E.2d at 687. The only support cited by Respondent for her unpersuasive "privity" theory is that Brown ended up paying her legal fees. The law is clear, however, that the payment of another party's legal fees does <u>not</u> render one in privity with that party. *See* Restatement (Second) of Judgments § 39, cmt. c, at 384 (1982). Respondent cites one 1934 Kentucky case in support of her argument that payment of legal fees may result in privity, but this case will not overcome our strongly worded Fourth Circuit precedent, which, in turn, cites the Restatement of Judgments on this point: "It is not sufficient [for

[11] R. pp. 329-335, Joint Stipulation, Exhibits 15-16.

[12] *Id.*

privity], however, that the person merely contributed funds or advice in support of the party, [or] supplied counsel to the party...". *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987) *(citing Restatement (Second) of Judgments* § 39 comment c, at 384 (1982)); *see also Kunst*, 404 S.C. at 656, 746 S.E.2d at 363 ("South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel."). Moreover, the idea that payment of some legal fees automatically results in the level of involvement and control required for privity directly contradicts to the admonishment in S.C. App. Ct. R. RULE 407 RPC 1.7 which expressly provides that the payment of legal fees cannot in itself confer any right of control over the legal proceedings in question.

To the unlikely extent, if any, that this Court finds Respondent's *post-hoc* bigamy allegations regarding her first marriage to be relevant under *Lukich* (they are not), Appellants have never been afforded the full and fair opportunity to litigate this unproven highly disputed issue of fact. Moreover, Respondent asserts that the ruling of this Court on the ultimate question of whether Respondent qualifies as James Brown's surviving spouse under South Carolina law will have effects as far-reaching as under federal copyright law. *See* 17 U.S.C.A. § 203(a), 304(c)(d) (West).[13] If that is true, then Respondent ultimately seeks to have Appellants bound by the Annulment Order's unsupported factual findings, which they have *never had any opportunity to litigate*, with respect to wholly separate rights under federal copyright law as to which Appellants unquestionably have independent standing that is in no way based upon or confined to the

[13] Such copyright "termination" interests were also referenced in the 2009 Settlement Agreement prior to the South Carolina Supreme Court's rejection of the overall Agreement. (R. pp. 2742-2837, Addendum to Private Agreement of August 10, 2008 to Include Settlement Agreement With Terry Brown Creating Restated and Amended Private Agreement.)

shoes of the Decedent. *See Ray Charles Found. v. Robinson*, 919 F. Supp. 2d 1054, 1066 n.9 (C.D. Cal. 2013), *rev'd on other grounds*, 795 F.3d 1109 (9th Cir. 2015) (holding that the plaintiff's "invocation of Ray Charles's testamentary intent is unpersuasive because the intent of the author is irrelevant under the termination provisions of the Copyright Act."). The stakes are far too high for the truth to be hidden behind the hasty Annulment Order based on nothing more than Respondent's self-serving hearsay. Thus, even notwithstanding the insurmountable legal barriers to holding that Appellants are precluded by collateral estoppel from contesting the so-called findings in the Annulment Order, because the doctrine of collateral estoppel is "grounded upon concepts of fairness", courts always retain discretion to decline to apply it where, as here, it would be highly inequitable and/or thwart the truth-seeking mission of every court. *Bacote*, 331 S.C. at 331; 503 S.E.2d at 163.

In a final attempt to prevent Appellants from discovering and presenting evidence regarding the truth or falsity of Ahmed's alleged bigamy, Respondents claim the Annulment Order is the "law of the case." That doctrine, however, obviously does not apply here. The "law of the case" doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision." *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 513 S.E.2d 96 (1999). Of course, this probate proceeding is wholly separate from the uncontested proceeding resulting in the Ahmed Annulment Order, so the law of the case doctrine does not and cannot apply.

The trial court committed reversible error in concluding that the findings and conclusions in the Annulment Order were preclusive and binding upon Appellants, and in

preventing Appellants from taking any discovery as to Respondent's uncorroborated claim, to the extent this Court holds that such claim is even material under *Lukich* .

IV. RESPONDENT ASKS THIS COURT TO ENFORCE A SETTLEMENT AGREEMENT ALREADY STRUCK DOWN BY THE SUPREME COURT AS ILLEGAL.

Respondent points to the 2009 Settlement Agreement as a purported additional ground to sustain the judgment below. Any reliance upon the 2009 Settlement Agreement, however, is wholly unavailing, as the South Carolina Supreme Court held the Agreement to be without consideration and refused to approve the Agreement. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). In doing so, the Supreme Court stated that "[a] compromise agreement is void unless executed in compliance with the governing statute" and proceeded to hold that the 2009 Settlement Agreement was not in compliance with the mandatory court approval process contained in S.C. Code Ann. § 62-3-1102, rendering it void and of no effect. *Id.* (quoting *In re Estate of Riley,* 228 Ariz. 382, 266 P.3d 1078, 1080 (Ct.App.2011)). *See also Mackey v. Kerr-McGee Chem. Co.*, 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984) (holding that a settlement agreement reached pursuant to workers' compensation statutes was not binding on the parties thereto because the Industrial Commission approval required by statute had not been obtained).

Respondent vaguely claims that "estoppel" bars Appellants from claiming that she does not qualify as Brown's spouse under South Carolina law, but she does not specify what theory of estoppel would support her argument. South Carolina generally recognizes two forms of estoppel, judicial estoppel and equitable estoppel, but neither are applicable here.

First, judicial estoppel requires a showing that, among other things, the "party taking the [allegedly inconsistent] position must have been successful in maintaining that

position and have received some benefit". *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013). Here, the Settlement Agreement contained a bargained-for exchange only a portion of which was that Respondent could be treated as Brown's spouse. The 2009 Settlement Agreement was determined to be contrary to South Carolina law, however, and Appellants received no benefit from it. Parenthetically, the notion that Respondent obtained the benefits of this disapproved settlement compromise, while Appellants have none makes no sense. *Second*, judicial estoppel requires that "the inconsistency must be part of an intentional effort to mislead the court", but a term in a Settlement Agreement bargained for by Respondent does not qualify. Moreover, there is not, nor can there be, any claim that Appellants have tried to mislead the court as to the facts or their positions regarding what is essentially a question of law. *Id.* Appellants have consistently maintained that Respondent does not qualify as Brown's surviving spouse because her marriage to Brown was contrary to South Carolina law. Respondent simply cannot satisfy the elements of judicial estoppel.

Likewise, equitable estoppel requires proof of the following elements: (1) conduct which amounts to a false representation; (2) intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). As above, Respondent cannot meet her burden as to any of these elements. The contents of the 2009 Settlement Agreement were arrived upon in good faith, but the South Carolina Supreme Court's ruling that the Agreement was void and wholly unenforceable as contrary to South Carolina law gutted the Agreement's consideration and purpose.

Importantly, equitable estoppel also requires Respondent to demonstrate that she has relied upon Appellants' representation to her detriment, but she cannot. *Bailey v. Lyman Printing & Finishing Co.*, 245 S.C. 13, 23, 138 S.E.2d 410, 414 (1964) (holding that essential elements of equitable estoppel are "reliance upon [the party's] conduct, representations or silence; and [] resulting action, to his detriment, by the party claiming the estoppel"). Respondent points to no action taken or omission made in reliance upon the 2009 Settlement Agreement, nor would that be credible as the Agreement was struck down. Because Respondent cannot satisfy the elements of either judicial estoppel or equitable estoppel, her vague estoppel references regarding the 2009 Settlement Agreement are unavailing.

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

Once again, Respondent attempts to blind this Court to the forest by propping up cardboard trees. It is clear that Respondent has the burden of proving she is the decedent's "surviving spouse" in each of her will and trust challenges. *See Byrd v. Byrd,* 279 S.C. 425, 308 S.E.2d. 788 (1983); *Calhoun v. Calhoun,* 277 S.C. 527, 290 S.E.2d 41 5 (1982). Respondent's production of a marriage certificate, showing that she and Brown engaged in a marriage ceremony on December 14, 2001, is insufficient to carry her ultimate burden of proof because she stipulated that her marriage to Ahmed had not been annulled at the time she improperly obtained the Hynie/Brown marriage certificate.

As demonstrated in their opening brief,[14] Appellants have met the burdens of proof applicable to them. Here, of course, the parties have stipulated to the key fact: At

[14] App. Br., pp. 16-17.

the time Respondent attempted to marry Brown, she knew and believed she was already married to Ahmed.[15]

Respondent essentially argues that she somehow unwittingly participated in not one, but *two* bigamous marriages, but that Appellants are estopped from challenging her self-serving uncorroborated assertions about Ahmed, or have the burden of proof, after convincing the trial court to erroneously prevent Appellants from taking discovery, a decision which Appellants have strenuously argued should be reversed.[16]

Even more ironically, Respondent ignores the Supreme Court's pointed admonition in *Lukich* regarding the "chaos" that would result if subsequent annulment orders were retroactively applied to revivify bigamous marriages, but tries to sway this Court with vague policy arguments about "chaos in the law of marriage". She erroneously charges Appellants with shifting the burden of proving a marriage's validity onto those who are married to distract the Court from the simple fact that Respondent was secretly already married at the time she tried to marry Brown anyway. Appellants do not suggest that every married person "be prepared to prove, at a moment's notice, to every third party who seeks to contest the issue, the validity of the second marriage."[17] But surely it is not too much to ask that a party seeking spousal benefits in a probate proceeding, involving significant assets, be prepared to prove that her admitted first marriage was legally terminated prior to her a second marriage with the decedent.

Because the factual stipulations, exhibits and affidavits of record overcome the presumption that the Hynie/Ahmed Marriage was dissolved by death or divorce, a

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

[16] App. Br., pp. 32-37.

[17] Resp. Br. p. 71.

presumption arose in favor of the validity of that marriage. *See Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613, 614 (1906), relied upon in *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). As Respondent challenges her marriage to Ahmed on grounds of his alleged bigamy, and has wholly failed to meet her burden of presenting *admissible* evidence that Ahmed was married to another at the time Respondent married him, her marriage to Brown was void as bigamous. S.C. Code Ann. § 20-1-80; *E.D.M.*, 307 S.C. at 475, 415 S.E.2d at 815; *Yarbrough*, 280 S.C. at 550, 314 S.E.2d 16, 18 (citing 52 Am. Jur. 2d *Marriages*, § 130 (1970)).

The Annulment Order itself cannot serve as evidence of Ahmed's bigamy because the South Carolina Supreme Court has adopted the holding of *Nipper v. Snipes*, 7 F.3d 415, 416–17 (4th Cir. 1993), and other federal courts, that "judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial." *Mizell v. Glover*, 351 S.C. 392, 402, 570 S.E.2d 176, 181 (2002).[18] Respondent asserts that this argument has not been preserved for this Court's review, but that is incorrect. The transcript from the November 24, 2014 hearing before Judge Early clearly includes arguments from counsel that the Ahmed Annulment Order has been "only offered to prove facts".[19] Counsel then unequivocally states to the lower court, "That's hearsay."[20] The argument was presented with specificity to the lower court and is now properly before this Court on appeal.

---

[18] Respondent's disingenuous argument (Resp. Br. pp. 43-44) that Appellants refute the collateral estoppel effect of the Annulment Order based on *Nipper* is yet another straw man mischaracterization with no basis in Appellants' opening brief (*see* App. Br. pp.17-18).

[19] R. p. 2529, Nov. 24, 2014 Hr'g Tr. pp. 66:12-25; R. p. 2530, 67:1-5.

[20] *Id.*

The lower court therefore made a fundamental error of law in mis-assigning the burdens of proof.[21] Notwithstanding that *Lukich* is already dispositive of this issue, because Respondent had the burden of proof, and the Annulment Order is incompetent as evidence of Ahmed's bigamy, but was the *only* evidence presented by Respondent to support her bigamy allegations, the trial court should have granted summary judgment to Appellants. *See Fairfield County Sch. Dist. Bd. of Trs. v. State,* 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014); *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

CONCLUSION

Ultimately, this Court is asked to determine how best to resolve this mess of Respondent's own making. It is undisputed that in 1997 Respondent obtained a marriage license, engaged in a marriage ceremony and secured a marriage certificate with another man in Texas before she attempted in 2001 to marry James Brown in South Carolina, without bothering to annul her first marriage.

Respondent suggests that her legally bigamous marriage to Brown can be retroactively "un-voided" by a hasty family court order annulling her first marriage years after her purported second marriage. *First*, this contravenes the statute (S.C. Code Ann. § 20-1-80) and *Lukich* – controlling Supreme Court authority which holds, without exception or equivocation, that "the statute speaks to the status quo at the time the marriage was contracted, and does not contemplate . . . a retroactive perspective." 379 S.C. at 593, 666 S.E.2d at 907. *Second*, and as emphasized in *Lukich*, Respondent's

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

path leads to uncertainty in areas needing it the most – family, parentage, and the panoply of legal rights and obligations flowing from marriage. *Id.* ("Any other construction of §20-1-80 would lead to uncertainty and chaos.")

Appellants submit, and *Lukich* mandates, that a person who participated in a marriage lacks the legal capacity to consummate a second marriage unless and until she annuls her first marriage. A person's marital status and legal capacity to remarry must be determined at the time he/she attempts to remarry, a fixed point in time, fair and predictable to all, and conducive to consistent judicial application. Applying this rule to our case results in a clear and well-supported holding that Respondent's purported marriage to Brown was void and of no legal force. The Ahmed Annulment Order did not serve to reinstate or revive it. Once the Annulment Order was entered terminating Respondent's first marriage, she could have, but failed to marry Brown. Indeed, they entered into a Consent Order that she would not assert even a common-law marriage to Brown.[22] Accordingly, when Brown's died, he and Respondent were not legally married, and Respondent is not the Decedent's surviving spouse.

The law does not permit speculative, uncertain and retroactive loopholes of the kind advanced by Respondent when it comes to the institution of marriage. The law dictates a simple solution. People, like Respondent, who know they are married, need to do something about it *before* they attempt to marry again.

To the unlikely extent that this Court determines that Ahmed's alleged bigamy could serve as a time machine to resuscitate Respondent's void marriage to Brown, Respondent bears the burden of proof as to Ahmed's supposed bigamy – a burden she has

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

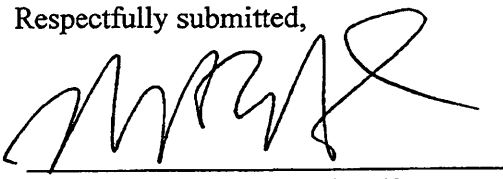
wholly and consistently failed to meet. As far as Appellants' legal interests are concerned, the perfunctory uncontested Hynie/Ahmed annulment proceeding in which Ahmed never appeared and the *in rem* Annulment Order that resulted by default provides no legal basis to bind Appellants to its purported factual findings because Appellants were neither parties to nor in privity with a party to that family court action.

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 Respondent lacked the legal capacity to contract marriage with Brown in 2001, she did not obtain her Annulment Order until 2004, and Respondent and Brown never married prior to his death on December 25, 2006.

[SIGNATURE PAGE FOLLOWS]

June 9, 2017

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

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

In Re: The Estate of James Brown a/k/a James Joseph Brown,

Tommie Rae Brown ..... Respondent,

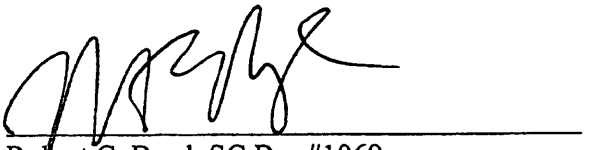
v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown and Daryl Brown ..... Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.



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June 9, 2017

Charleston, South Carolina

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Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

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STATEMENT OF ISSUES ON APPEAL

I. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE WHEN THE LUKICH DECISION OF THE SOUTH CAROLINA SUPREME COURT IS APPLIED TO THE JOINT STIPULATION OF FACTS IN THIS CASE IT PROVES MS. HYNIE A BIGAMIST.

II. THE LOWER COURT ERRED IN APPLYING COLLATERAL ESTOPPEL TO JAMES BROWN'S ESTATE AND HIS HEIRS WHEN IT DETERMINED THAT THE FACTS CONTAINED IN THE APRIL 14, 2004 CHARLESTON COUNTY FAMILY COURT ORDER WERE BINDING AND DISPOSITIVE AS TO JAMES BROWN'S MARITAL STATUS EVEN THOUGH THAT ISSUE WAS NEVER LITIGATED AND JAMES BROWN WAS NEVER A PARTY TO THE PROCEEDING.

III. THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN THE WEIGHT OF THE EVIDENCE PROVES THAT MS. HYNIE WAS NEVER THE WIFE OF JAMES BROWN.

STATEMENT OF THE CASE

The issues before this Court are the result of the Limited Special Administrator's ("LSA") motion to modify protective orders issued by the lower court in 2008 allowing the LSA to view Tommie Rae Hynie Brown's ("Ms. Hynie") writings ("Diaries") thereby allowing the parties use of the same in litigating the underlying undue influence and trust challenges. At a hearing on the LSA's motion ("March 31, 2014 Hearing"), Ms. Hynie's attorneys argued against producing her Diaries or the need for further discovery and, as an alternative, stated they would file a motion for partial summary judgment proving as a matter of law she was Mr. Brown's "surviving spouse", without reference to any disputed fact, including whatever evidence might be contained in her

Diaries.[1]

As opposed to arguing that Ms. Hynie's marriage to Javed Ahmed ("Ahmed") was factually bigamous, Ms. Hynie's attorneys contended she was entitled to a ruling that she is Mr. Brown's surviving spouse based solely upon the Charleston Family Court's April 15, 2004 annulment of Petitioner's February 1997 marriage to Javed Ahmed ("Ahmed Annulment Action").[2] Ms. Hynie argued the April 15, 2004 Order ("Ahmed Annulment Order")[3] is "binding on the world" and she is, accordingly, entitled to summary judgment based entirely "on the law and not the facts."[4] Ms. Hynie sought stay of discovery in these cases pending a summary judgment motion limited to the "surviving spouse" issue. The Court allowed Ms. Hynie to file such motion and granted stay of discovery, but ruled if her motion turned upon any contested facts or involved factual issues "the summary judgment goes out the window."[5] Around April 24, 2014, she filed her motion for partial summary judgment. On June 2, 2014, the LSA filed a motion for partial summary judgment. The parties entered into a joint stipulation of facts with exhibits on September 5, 2014. On September 12, 2014, Ms. Hynie filed a brief supporting her motion for partial summary judgment. On October 3, 2014, Appellants filed briefs in opposition. On October 17, 2014, Ms. Hynie filed a reply. On October 31, 2014, the LSA, Terry Brown and Jeannette Mitchell each filed a reply. On November 24, 2014, the lower court held a hearing on the respective

[1] March 31, 2014 Hearing Transcript, pp. 54-61. (R., Vol. VII, pp. 2454-2462)
[2] Joint Stipulation of Facts, ¶ 7, Exhibits 5 through 12. (R., Vol. I, pp. 254-296)
[3] Id. at Exhibit 12. (R., Vol., I, p. 293-296)
[4] March 31, 2014 Hearing Transcript, p. 54. (R., Vol. VII, pp. 2454-2455)
[5] Id. at p. 60. (R., Vol. VII, p. 2461)

motions. All parties were present and represented by counsel. The Court entered its Order granting Ms. Hynie summary judgment on January 23, 2015 ("Final Order"). Appellant filed a timely Motion to Alter, Amend and Reconsider the Final Order on February 2, 2015. On February 19, 2015, the South Carolina Supreme Court stayed all proceedings in this matter. On June 10, 2015, the stay was lifted. On June 18, 2015, the lower court held a status conference and set a July 1, 2015 hearing. At the July 1, 2015 hearing on the Appellants' Motions to Alter, Amend or Reconsider, the lower court directed the parties to brief and argue Lukich.[6] The parties filed briefs on July 30, 2015. The lower court issued an Order denying the Motions to Alter, Amend or Reconsider, which was entered on October 26, 2015. Appellant timely filed a Notice of Appeal on November 24, 2015.

STATEMENT OF FACTS

Ms. Hynie is a bigamist. When she married James Brown, she was legally married to Ahmed. It is undisputed that Ms. Hynie married Ahmed on February 17, 1997 ("Hynie-Ahmed Marriage").[7] Ms. Hynie married James Brown on December 14, 2001.[8] From the 1997 marriage to Ahmed and the 2001 marriage to James Brown, she stipulated that "no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between her and Ahmed."[9] She further stipulated that she "cannot identify a single person who can testify that Ahmed was married or not to another person when Tommie Rae and Ahmed

[6] Lukich v. Lukich, 379 S.C. 589 (2008)
[7] Joint Stipulation of Facts, ¶¶ 1 and 2, Exhibit 1. (R., Vol. I, pp. 254-256; 265-266; R. Vol. II, pp. 515-526)
[8] Id., at ¶¶ 4 and 5. (R., Vol. I, p. 256)
[9] Id. at ¶ 6. (R., Vol. I, p. 256)

participated in the 1997 marriage ceremony."[10] In fact, the only admissible evidence provided regarding whether Ahmed was married when he married her, is in the form of sworn statement by Ahmed that he was not married prior to marrying Ms. Hynie.[11] Additionally and subsequent to the Ahmed Annulment Order, Ms. Hynie and James Brown entered into a Consent Order wherein she agreed she was not James Brown's wife.[12]

Ms. Hynie's entire argument in support of her motion for partial summary judgment, therefore, may be summed up in one simple phrase which is "because I said so." Better explained, Ms. Hynie's entire argument in support of her motion for partial summary judgment does not dispute she was a bigamist, but instead that because the Charleston County Family Court ("CCFC") ordered her marriage to Ahmed annulled that she was suddenly married to James Brown. Further, without any proof other than Ms. Hynie's own unsupported, uncorroborated, inadmissible, hearsay statements, the lower court proclaims that she is Mr. Brown's wife. The lower court retroactively applied an annulment action determining that because Ms. Hynie told the CCFC, in a matter that Mr. Brown was not a party, that Ahmed had other wives, she was married to Mr. Brown. The lower court erred.

Ms. Hynie hid the facts and truth under a shroud of irrelevant technical arguments. When viewed in their simplest terms, this Court must look beyond this shroud and reach but one conclusion on the evidence as applied to the law at hand. Ms. Hynie is a bigamist. She was never married to Mr. Brown. At a minimum, she has

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[10] Id. at ¶¶ 9-10. (R., Vol. I, p. 257)
[11] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, Line 8 and 18 of the application)
[12] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

known this to be true since the conclusion of Mr. Brown's annulment action ("Brown-Hynie Annulment") by entering into a consent order ("Brown-Hynie Consent Order") wherein she agreed she was not Mr. Brown's spouse.[13] In reality, she knew the moment she married Mr. Brown because, as she stipulated, she knows of "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 Tommie Rae and Ahmed."[14] These statements are incontestable facts.

Contrary to Ms. Hynie's assertion that Mr. Brown supported her annulment to Ahmed so that she and Mr. Brown could continue as husband and wife, Mr. Brown clearly indicated his desire to void the marriage to Ms. Hynie by filing for his own annulment against Ms. Hynie, ("Brown-Hynie Annulment") on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed ("Hynie-Ahmed Annulment").[15] Mr. Brown continued his efforts to terminate the marriage to Ms. Hynie when on May 4, 2004, a mere 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating:

> 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 . . .[16]

Even as late as July 6, 2004, Mr. Brown continued to take the position that Ms. Hynie was a bigamist in his Reply to Counterclaim responding to Ms. Hynie's counterclaim for

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[13] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[14] Id. at ¶6. (R., Vol. I, p. 256)
[15] Id. at Exhibits 5 and 15. (R., Vol. I, pp. 271-273; 329-331)

divorce to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[17]

Throughout the two annulment actions (Ms. Hynie's and his own), Mr. Brown consistently claimed Ms. Hynie a bigamist. The Brown-Hynie Annulment was concluded by negotiated settlement and memorialized in the Brown-Hynie Consent Order.[18] In the settlement and Brown-Hynie Consent Order, Ms. Hynie agreed she was not Mr. Brown's spouse.[19] Specifically, the Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future."[20] The Brown-Hynie Consent Order was the last judicial declaration regarding the parties' status.[21] The Brown-Hynie Consent Order unequivocally reflects Mr. Brown's state of mind and that the parties reached a contractually valid meeting of the minds that Ms. Hynie was not married to Mr. Brown and that he did not want her to try to sidestep their agreement by later claiming a common law marriage.[22] The parties did not want a very public and ugly litigation over Ms. Hynie's bigamy as the Brown-Hynie Consent Order also provided for the sealing of the Court's entire file.[23]

The only admissible facts this Court has before it are: 1) Ms. Hynie married Ahmed;[24] 2) Within five years of marrying Ahmed, Ms. Hynie married Mr. Brown;[25] 3) Ms. Hynie's marriage to Ahmed had not terminated before Ms. Hynie and Mr. Brown

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[16] Id. at Exhibit 16. (R., Vol. I, pp. 332-335)
[17] Id. at Exhibit 18. (R., Vol. I, pp. 347-348)
[18] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[19] Id. (R., Vol. I, pp. 349-350)
[20] Id. at ¶ 3 of Exhibit 19. (R., Vol. I, p. 349)
[21] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)
[22] Id. (R., Vol. I, pp. 349-350)
[23] Id. (R., Vol. I, pp. 349-350)
[24] Id. at Exhibit 1. (R., Vol. I, pp. 255; 265-266)

were allegedly married;[26] 4) Mr. Brown filed the Brown-Hynie Annulment;[27] 5) Ms. Hynie agreed in the Brown-Hynie Consent Order, which indicated she was not Mr. Brown's spouse;[28] 6) Ms. Hynie further stipulated that she "cannot identify a single person who can testify that Ahmed was married to another person when Tommie Rae and Ahmed participated in the 1997 marriage ceremony";[29] and 7) Ahmed swore under oath in the Ahmed-Hynie Marriage License Application that he was not married at the time he married Ms. Hynie.[30]

ARGUMENT

On an appeal from the Court of Common Pleas, this Court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to SCRCP 56. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361(2002). "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'" Schmidt v. Courtney, 357 S.C. 310, 319 (S.C. Ct. App. 2003). "Summary judgment is appropriate when there is no remaining genuine issue of material fact such that the moving party must prevail as a matter of law." SCRCP 56(c), Fleming v. Rose, 350 S.C. 488, 493 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490,

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[25] Id. at Exhibits 4 and 7. (R., Vol. I, pp. 269-270; 280)
[26] Ms. Hynie attempted to argue that Appellants failed to prove that Mr. Ahmed was still alive or had not divorced Ms. Hynie. Appellants refer to the simple fact that Ms. Hynie filed an annulment as proof that he was alive, as such action would be unnecessary if Mr. Ahmed was deceased or they were divorced. Further, the Affidavit of David Bell 9/30/14 conclusively proves this fact. (R., Vol. II, pp. 515-521)
[27] Joint Stipulation of Facts, Exhibits 15 and 16. (R., Vol. I, pp. 329-335)
[28] Id. at Exhibit 19. (R., Vol. I., 349-350)
[29] Id. at ¶10. (R., Vol. I, p. 257)

493 (1994). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 378 (2000). "To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330 (2009). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610 (1976). Further, in accordance with SCACR 208(6), Appellant adopts the briefs of all other Appellants in this matter as if set forth and incorporated herein.

I. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE WHEN THE LUKICH DECISION OF THE SOUTH CAROLINA SUPREME COURT IS APPLIED TO THE JOINT STIPULATION OF FACTS IN THIS CASE IT PROVES MS. HYNIE A BIGAMIST.

A. Lukich v. Lukich declares Ms. Hynie a bigamist.

Ms. Hynie took great strides to tender to the lower court that a bigamous marriage is void and not voidable and that Lukich only addresses voidable annulments. Appellant agrees and does not dispute that bigamous marriages are void, but disagrees as to the lower court's interpretation of Lukich as it applies to annulments for bigamy. In analyzing Lukich, the following facts are all that is needed for the Lukich analysis:

[30] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, Line 8 and 18 of the application)

1. Ms. Hynie married Ahmed on February 17, 1997 ("Hynie-Ahmed Marriage").[31]

2. Ms. Hynie married Mr. Brown on December 14, 2001.[32]

3. Ms. Hynie obtained the Ahmed Annulment Order from the Charleston County Family Court (CCFC) on April 15, 2004 a/k/a Tommie Rae Brown v. Ahmed, 2003-DR-1 0-4609 (the "Ahmed Annulment Action") on April 15, 2004.[33]

4. From the February 17, 1997 marriage between Ms. Hynie and Ahmed through the December 14, 2001 marriage ceremony between Ms. Hynie and Mr. Brown, no order of any court or other occurrence of which Ms. Hynie is aware at this time ended or caused to end any marriage that certain parties assert existed between Ms. Hynie and Ahmed.[34]

The lower court's analysis and application of Lukich is simply wrong.[35] The South Carolina Supreme Court affirmed this Court's ruling in Lukich, but wrote its own opinion to clarify the analysis used in its decision. The analysis supports granting Appellants' motion for partial summary judgment, not Appellee's. The South Carolina Supreme Court in Wilson v. Dallas[36] suggested a road map to the lower court in footnote 16 as follows:

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

Although the South Carolina Supreme Court expressed no opinion on the lower court's void marriage analysis and its attempt to distinguish Mr. Brown's situation, it noted that

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[31] Joint Stipulation of Facts, ¶¶1-2, Exhibit 1; Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. I, pp. 255; 265-266; R., Vol. II, pp. 522-526)
[32] Joint Stipulation of Facts, at ¶ 5. (R., Vol. I, p. 256)
[33] Id. at Exhibit 12. (R., Vol. I, pp. 293-296)
[34] Id., at ¶ 6. (R., Vol. I, p. 256)
[35] Final Order denying Motions to Alter, Amend, Reconsider dated October 27, 2015. (R., Vol. I, pp. 101-119)

subsequent to such lower court's ruling it issued its Lukich opinion affirming the Lukich decision of this Court. The South Carolina Supreme Court felt this footnote would aid the lower court in making its decision on remand. Lukich makes it clear that Ms. Hynie's alleged marriage to Mr. Brown was bigamy *ab initio*. Any other facts discovered in this matter do not change this result. The South Carolina Supreme Court makes analysis for bigamous relationships clear when it states:

> Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'...The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of §20-1-80 would lead to uncertainty and chaos. ... **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.** (Emphasis added)

Placing the Lukich opinion language with the facts in this matter results in the following:

> Under the statute's terms, Wife's **(Hynie's)** marriage to Husband #2 **(Mr. Brown)** was void from inception since at the time of the marriage she had a living spouse **(Ahmed)** and that marriage had not been "declared void" **(§20-1-80)**[37] . . . The statute speaks to the status quo at the time the marriage **(Brown-Hynie)** was contracted and does not contemplate a prospective or retroactive perspective **(a Hynie-Ahmed Annulment)**. Any other construction of §20-1-80 would lead to uncertainty **(Mr. Brown not knowing of a future annulment)** and chaos **(this case)**. . . It would be inconsistent at best to hold that a marriage declared void ab initio **(Hynie-Ahmed Marriage)** never existed for bigamy purposes, yet can serve as the foundation for a family court's division of property, alimony, and/or child support.

South Carolina Code §20-1-80 provides:

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

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[36] Wilson v. Dallas, 403 S.C. 411(2013).

[37] **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.**

> 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.

The terms "contracted while" indicates the status at the time Ms. Hynie contracted to marry Mr. Brown. The term "while" cannot mean "subject to future determinations by competent courts." The South Carolina Supreme Court in its Lukich opinion, in interpreting such unambiguous language clearly supports this Court's opinion in Lukich. This Court emphasized its position in its Lukich opinion when it specifically referenced the general rule applicable in 52 Am. Jur. 2d Marriage §57:

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

Lukich v. Lukich, 368 S.C. 47, 55 (S.C. Ct. App. 2006).

The South Carolina Supreme Court has determined that the public policy of attempting to prevent bigamy has overridden all other considerations. The Lukich language when broken down into an analytical framework works for every situation on the continuum of multiple marriages if analyzed from each individual's perspective in the relationship at the point in time at which the parties attempt to get married. The South Carolina Supreme Court determined that a person's capacity to marry a subsequent spouse will be determined by that individual's capacity and status **at that time and does not contemplate either a prospective or a retroactive perspective.** In other words, the power to free one's own capacity to marry another individual rests solely in the hands of

the person seeking to marry another individual. Simply put, the first spouse in time to enter into a bigamous relationship is the gatekeeper who has the ability to clear his or her own capacity to marry another individual and declare to the world that the first marriage does not exist. As between Mr. Brown and Ms. Hynie, she was the only party with knowledge of her prior marriage. She could have and should have legally recorded the prior marriage's conclusion to let the rest of the world know that she was free to marry. By not doing so, chaos, such as we have in the matter sub judice is the result. The South Carolina Supreme Court suggested this would occur without the Lukich rule.

In this matter, Ms. Hynie does not know of any facts proving Ahmed was married. Even if the alleged Ahmed statements regarding his other wives actually happened, that certainly does not make the alleged statements a fact. Further, such statements alone, for obvious reasons, do not actually annul Ms. Hynie's marriage without the entry of an annulment order. As a result, an individual seeking a subsequent marriage faces the harshest penalty (i.e. being declared a bigamist) under the South Carolina Supreme Court analysis without clearing the capacity to marry. The sanctity of marriage must be protected at all costs. This analysis works in both relationships in the matter at hand (i.e. the Hynie-Ahmed and Brown-Hynie) applying a consistent protection to the sanctity of marriage and prevention of bigamy. As such, the analysis must be correct because the result is the same for both Ms. Hynie in her relationship with Ahmed and Mr. Brown in his relationship with her. It does not matter whether Ahmed was married prior to entering into his relationship with Ms. Hynie. What matters is whether either she or Ahmed rectified the restrictions on her capacity to marry when she attempted to marry a subsequent individual. Upon the grant of an annulment order by a

competent court, she removes the impediments on her capacity to marry. Ms. Hynie did exactly this on April 15, 2004.[38]

Ms. Hynie became a bigamist when she attempted to marry Mr. Brown. At the time of her attempted marriage to Mr. Brown in 2001,[39] she was married to Ahmed. From the February 17, 1997 marriage between her and Ahmed through the December 14, 2001 marriage ceremony between her and Mr. Brown, no order of any court or other occurrence ended or caused to end any marriage that existed between Ms. Hynie and Ahmed.[40] An annulment order was not obtained until April 15, 2004. As such, she had no capacity to marry Mr. Brown. Ms. Hynie is a bigamist and neither party may enforce the relationship as it relates to rights and obligations among one another *ab initio*. Mr. Brown regained his capacity to marry another party when he and Ms. Hynie sought an annulment (which he did) and obtained an Order, which he did.[41] Even if Ms. Hynie's argument is correct that that the Brown-Hynie Consent Order was not an annulment, it would not matter. Ms. Hynie could not enforce any rights of the marriage to Mr. Brown *ab initio* due to her incapacity to marry at the time of the ceremony with Mr. Brown. The only person who would have an issue with the fact that an annulment may or may not have occurred would be a subsequent spouse that Mr. Brown attempted to marry, which he did not do. As can be seen from this analysis, the continuum is intact and the analysis produces the same result in every situation, which is to protect the sanctity of marriage and avoid bigamy.

The South Carolina Supreme Court makes it clear that the statute does not

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[38] Joint Stipulation of Facts, Exhibits 5 through 12. (R., Vol. I, pp. 271-296)
[39] Id. at Exhibit 4. (R., Vol I, pp. 269-270)
[40] Id. at ¶ 6. (R., Vol I, p. 256)
[41] Id. at Exhibits 15, 16 and 18. (R., Vol. I, pp. 329-335; 347-348)

contemplate a retroactive or prospective analysis in the determination of bigamy. The lower court applied the Lukich analysis in a retroactive fashion which is the fatal flaw in its analysis.[42] The lower court claimed that the April 15, 2004 annulment order proved that the Hynie-Ahmed Marriage was void from the beginning. This is a retroactive application of the annulment action because such fact had not been declared by a competent court at the time James Brown allegedly married her on December 14, 2001.

As the lower court's analysis fails to do, bigamy under the Lukich analysis may only be viewed on an individual basis from a particular point in time. For purposes of example, what if Ahmed actually had other wives when he married Ms. Hynie and then he had all those marriages annulled *ab initio* for reason of bigamy in 2016? Do those annulments *ab initio* for bigamy make Ahmed's marriage to Ms. Hynie valid because the other marriages were void *ab initio* for bigamy? That is Appellee's argument that the lower court has incredulously agreed with and adopted, which fails for the reasons noted. A bigamous relationship is void *ab initio* and neither party may enforce the rights and obligations of a marriage. However, capacity is not cleared until the annulment order is issued by a competent court. Once cleared, a party could enter into a subsequent marriage to a third party. The equity that is provided to all parties, including third parties to the bigamous relationship, involved with the application of this analysis is sublime.

B. Under the Lukich analysis, it does not matter if the underlying marriage that allowed for the Annulment Order was Void or Voidable.

Lukich applies regardless of Appellee's attempt to obfuscate and confuse the discussion with the terms of void versus voidable. The South Carolina Supreme Court

[42] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, pp. 12-15. (R., Vol. I, pp. 114-117)

did not make this distinction. However, for purposes of argument, Appellant provides the following analysis. The Appellee and now the lower court attempts to distinguish Lukich from the case sub judice by denoting Lukich's first marriage was voidable and in this case, Hynie's first marriage was void for bigamy rather than voidable and as a result bigamous marriages are void from inception not voidable.[43]

Void versus voidable was not addressed in Lukich, however, this Court in its Lukich opinion referenced 52 Am.Jur. 2d Marriage §57.[44] In fact, 52 Am.Jur. 2d Marriage §57 clearly addresses bigamy in its analysis in such clear concise language that inserting the names of the parties in the matter sub judice is exactly the answer that this Court must reach:

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

Instead of the above, the lower court ruled that the Hynie-Ahmed marriage was void from the beginning which validated the Brown-Hynie marriage (the above language makes it

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[43] Id., pp. 4-16. (R., Vol. I, pp. 106-118)

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

clear this is not the correct result).[45] Query what happens if Ahmed had filed a Rule 60 Motion on the fraudulently obtained CCFC annulment order within a year of its issuance and proven it to be just that. What if Ahmed in 2016, seeks an annulment of all of the alleged marriages and is successful in being granted the same? Under Ms. Hynie's theory of how the Lukich analysis works and the lower Court's ruling, this would mean that the Hynie-Ahmed Marriage was no longer void. Suddenly, Ms. Hynie's bigamy would be resurrected because now Ahmed was not married when Ms. Hynie married him in 1997 and everything is void ab initio. If the analysis works for Ms. Hynie, it would work for Ahmed. As such, under the lower court's ruling, Mr. Brown would yoyo from being not married, to married when the CCFC Order was issued, and then not married again when the CCFC annulment order was overturned. This is absolute lunacy and the chaos that the South Carolina Supreme Court references. The continuum could never end. That is why the analysis requires a specific point in time. That is why Appellants' analysis and the South Carolina Supreme Court's analysis are absolutely correct and the lower court's current ruling is wrong. Regardless of the actions of third parties, Appellants' and the South Carolina Supreme Court's analysis has the same result each time. Mr. Brown was never married to Ms. Hynie because she was a bigamist when they attempted to marry.

Under Appellants' and the South Carolina Supreme Court's analysis of Lukich, Mr. Brown's marriage is void from the beginning and unaffected by any of the above changes in circumstances related to the Hynie-Ahmed marriage because it is analyzed at

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ceremony following the termination of the earlier marriage. (Emphasis added). Lukich v. Lukich, 368 S.C. 47, 55 (S.C. Ct. App. 2006).

[45] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, p. 16. (R., Vol. I, p. 118)

one point in time, which is December 14, 2001. All that matters is what each party's marital status is at the time of an attempted marriage. The lower court enforced Lukich in a manner that creates retrospective and prospective application of its rules. The South Carolina Supreme Court very clearly said this is not how the analysis works. The relation back in time effect the lower court applies is the exact chaos Lukich describes if everything after the bigamist marriage is washed away as if it never occurred. Affirming the lower court's ruling will open flood gates and create chaos.

An additional issue with the void versus voidable argument arises when, interestingly, Ms. Hynie argues that a drunkenness annulment was voidable and bigamy is void.[46] She used this as her main point, in an attempt to distinguish Lukich, and the lower court agreed.[47] However, there is no evidence that Ms. Hynie's marriage to Ahmed was actually bigamous. In fact, it is incontrovertible and stipulated that Ms. Hynie has no factual knowledge of Ahmed's alleged prior marriages. Therefore, Ms. Hynie did not and does not know whether Ahmed had a wife or wives at the time he married her. As a result, it is not a fact that Ahmed was a bigamist and that her marriage was void as a result of being bigamous. It was not until April 15, 2004 that the CCFC granted an annulment for bigamy among other issues. Ms. Hynie, if she had chosen to do so, could have continued life married to Ahmed, because she really did not or does not know whether he had other wives or not. By way of example, had Ahmed won the lottery after his marriage to Ms. Hynie and before the annulment, Ms. Hynie would have a spousal claim for the lottery winnings. There is no fact of Ahmed's actual bigamy so Ms. Hynie only has manufactured bigamy by order of a court. Based on Hynie's

[46] Final Order denying Motions to Reconsider, Alter, Amend dated October 26, 2015, pp. 6-16. (R., Vol. I, pp. 108-118)

argument, her marriage to Ahmed was therefore voidable, not void until the ruling of April 15, 2004. However, with all of this said, it does not matter. Lukich does not distinguish between void versus voidable and neither does 52 Am. Jur. 2d Marriage §57.

As a final problem with the lower court's adoption of Appellee's argument that injects the concepts of void versus voidable, in an attempt to distinguish Lukich, it ignores some very important facts. The South Carolina Supreme Court simply stated that a bigamous marriage is void. The term voidable appears nowhere in the actual construct of the opinion (as noted below it appears in a 1947 case cite, but only as a reference that such relationship is absolutely void and not merely voidable). Any attempt to distinguish between these terms reads language into the Lukich case that does not exist. The South Carolina Supreme Court made it very clear that the way to review South Carolina Code Section 20-1-80 was through the plain language of the statute. They did not say that you look through to the type of marriage (i.e. void or voidable) that may or may not exist. All bigamous relationships fall into one category regardless of how they came to be, which is that they are void *ab initio* after being declared such by a competent court. Specifically, they noted:

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

Lukich v. Lukich, 379 S.C. 589, 592 (2008)(citing Howell v. Littlefield, 211 S.C. 462 (1947)).

At the time that Ms. Hynie attempted to marry Mr. Brown, she was still legally married to Ahmed because an annulment was not declared until April 15, 2004. As such, the language cited above applies and Ms. Hynie's attempt to marry Mr. Brown was

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[47] Id. (R., Vol. I, pp. 108-118)

"absolutely void." Appellee argued and the lower court adopted that it is this same language that made Ms. Hynie's marriage to Ahmed void thereby freeing her capacity to marry Mr. Brown. However, there is a major fallacy in this argument under South Carolina law. South Carolina Code Section 20-1-80 requires that the "first marriage (Hynie-Ahmed Marriage) shall be declared void **by the sentence of a competent court.** This did not occur until April 15, 2004. As such, the Hynie-Ahmed marriage was not void for purposes of her capacity to remarry until the ruling of a competent court declared it so.

This Honorable Court has the ability to dispose of this entire action, as it relates to Ms. Hynie, in one swift ruling and close a longstanding chapter and saga in this legal matter. All of the arguments made by the parties regarding evidence, annulment, service, extrinsic and intrinsic evidence, collateral estoppel, res judicata and every other argument made by any party in this matter need not be addressed because the entire matter may be disposed of as a matter of law. The South Carolina Supreme Court in Lukich provides the vessel for such result when it states:

> Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.'...The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of §20-1-80 would lead to uncertainty and chaos. ... 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.

The parties jointly stipulated that Ms. Hynie was married to Ahmed at the time she allegedly married Mr. Brown on December 14, 2001. She did not annul her relationship with Ahmed until April 15, 2004. Ms. Hynie never had another marriage ceremony of

any type with Mr. Brown after the first one of December 14, 2001. There are no other facts obtainable through discovery that will alter these facts. The parties have stipulated to them. Applying the Lukich analysis to these facts, this Honorable Court can reach but one conclusion, Ms. Hynie is a bigamist. Based on such determination, Appellants' motion for partial summary judgment must be granted as matter of law and the lower court's grant of Appellee's motion for partial summary judgment reversed.

II. THE LOWER COURT ERRED IN APPLYING COLLATERAL ESTOPPEL TO JAMES BROWN'S ESTATE AND HIS HEIRS WHEN IT DETERMINED THAT THE FACTS CONTAINED IN THE APRIL 14, 2004 CHARLESTON COUNTY FAMILY COURT ORDER WERE BINDING AND DISPOSITIVE AS TO JAMES BROWN'S MARITAL STATUS EVEN THOUGH THAT ISSUE WAS NEVER LITIGATED AND JAMES BROWN WAS NEVER A PARTY TO THE PROCEEDING.

The lower court determined that James Brown's estate and heirs were collaterally estopped from challenging the facts set forth in the Charleston County Family Court ("CFCC") Order dated April 14, 2004 ("CCFC Order") and that such facts effectively proved that James Brown was married to Ms. Hynie. The lower court failed in its forty-six (46) page Final Order to set forth the law of collateral estoppel and then subsequently apply such law to the facts. Instead, the lower court focused on inapposite cases that stand for the proposition that a party who accepts the benefits of an order precludes a party from latter challenging such order.[48] These cases cited do not relate to the matter at hand, as James Brown was never a party to the action and never accepted any of the benefits of the CCFC Order. To the contrary, Ms. Hynie is collaterally estopped from arguing that she was not married to Ahmed at the time she allegedly married James Brown. Furthermore, James Brown's Estate and heirs are not estopped from arguing he

[48] Final Order, p. 45. (R., Vol. I, p. 97)

was never married to Ms. Hynie. The South Carolina Supreme Court's ruling in Lukich v. Lukich is controlling.

A. Res judicata and Collateral Estoppel.

1. Res Judicata does not preclude Mr. Brown from proving that he was not married due to bigamy.

"The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188 (1992); Treadaway v. Smith, 325 S.C. 367(S.C. Ct. App. 1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189 (S.C. Ct. App. 1993). Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533 (S.C. Ct. App. 1999). In the matter sub judice, clearly and indisputably, neither Mr. Brown, nor his privies (heirs) were parties to the CCFC proceeding. Res judicata prevents a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11(1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30 (1999). The Hynie Annulment Action was not litigated and was by all essence a

default judgment. (see discussion supra).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543 (1986); Rogers, 336 S.C. at 537; Owenby v. Owens Corning Fiberglas, 313 S.C. 181 (S.C. Ct. App. 1993). Clearly, all three prongs fail as it relates to Mr. Brown. Mr. Brown was not a party. The subject matter of the Hynie Annulment Action was the annulment of a marriage that was not Mr. Brown's. Mr. Brown's estate and his heirs currently seek to have his alleged marriage to Ms. Hynie declared void due to bigamy which was not litigated by the CFCC.

2. Collateral Estoppel does not preclude Mr. Brown from proving that he was not married due to bigamy.

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363 (S.C. Ct. App. 1984):

> The doctrines of res judicata and collateral estoppel are . . . two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes re-litigation of only those issues 'actually and necessarily litigated and determined in the first suit.' Id. at 369 n.1, 315 S.E.2d at 190 n.1.

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

determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275 (S.C. Ct. App. 1996) (noting that collateral estoppel will bar re-litigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit).

A party may assert non-mutual collateral estoppel to thwart re-litigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to re-litigate the issue. Wade v. Berkeley County, 330 S.C. 311 (S.C. Ct. App. 1998). The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: (1) whether privity exists, (2) whether the doctrine is used offensively or defensively, and (3) whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426 (S.C. Ct. App. 1997). In this action, Ms. Hynie used the vacuous CCFC Order as a weapon and indisputably, Mr. Brown was not a party and never had any opportunity, much less a full and fair opportunity to litigate the issue determining his own marital status. The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001); Beall v. Doe, 281 S.C. 363 (S.C. Ct. App. 1984). Ms. Hynie has provided no proof the matter was actually litigated. In fact, all evidence to the contrary, she has merely provided an ex parte, default judgment that ultimately casts Mr.

Ahmed as a criminal bigamist as her only evidence.[49] Only a party to a prior action or one in privity with the party can be precluded from re-litigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770. Again, how can it be argued that Mr. Brown was a party when Ms. Hynie argued at length he had no right to intervene. Mr. Brown was not in privity with Ms. Hynie and as such the doctrine of collateral estoppel cannot apply.

3. Exceptions to res judicata and collateral estoppel allowing Mr. Brown to prove he was not married due to bigamy would apply in this matter.

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

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

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

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

Pye, 325 S.C. at 437-38.

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

> A party precluded from re-litigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:
>
> (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined; (Procedural opportunities?)
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

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

Beall, 281 S.C. at 371.

The elements outlined in Beall v. Doe, adopting section 29 of the Restatement (Second) of Judgments express exactly the issues in this case. Mr. Brown and his heirs were not party and had no right to intervene in the Hynie Annulment Action and as such it was not fully litigated as to them. As a result, they now have the right to challenge any of the facts and issues that may have been presented in that matter that are now a part of this action.

4. Mr. Brown was not in privity with the Hynie and Ahmed marriage and as such has the right to prove he was not married due to bigamy.

In regard to res judicata or collateral estoppel, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." Wyndam v. Lewis, 292 S.C. 6, 8 (S.C. Ct. App. 1987). "Privity" means one so identified in interest with another that he represents the same legal right. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001). In Wade v. Berkeley County, 330 S.C. 311 (S.C. Ct. App. 1998), this court discussed privity by stating:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action. Id. at 317, 498 S.E.2d at 687 (citations omitted).

Mr. Brown's legal interests were not even addressed. Ms. Hynie argues that Mr. Brown

had an interest in whether Ahmed was married at the time he married Ms. Hynie. Legally and according to Wade, it does not matter whether he did or did not have an interest in Ahmed's marital status. The fact of the matter is there is no privity, therefore neither do his heirs subject to privity. As a result, all avenues of challenge as to the claims Ms. Hynie is making are available to the heirs and the estate, including the right to argue she was legally married to Ahmed (which the evidence clearly indicates) at the time of her marriage to Mr. Brown. Ms. Hynie stipulated "she cannot identify a single person who can testify that Ahmed was married to another person when Ms. Hynie and Ahmed participated in the 1997 marriage ceremony." She is a bigamist.

5. Public policy dictates that Mr. Brown was not married due to bigamy.

Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it. Carrigg v. Cannon, 347 S.C. 75 (S.C. Ct. App. 2001). "Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203 (S.C. Ct. App. 1992).

In Johns, a husband and wife signed a consent order where the family court found they were married at common law and ordered their legal separation. At the time the parties entered into the consent order, the husband was married to another person. The wife brought suit against the husband seeking a divorce, custody of the couple's child, an increase in alimony and child support, and attorney's fees. The husband contested the divorce, arguing the parties were not married. The wife sought to use the consent order declaring they were married at common law to bar the husband's defense under res

judicata and collateral estoppel grounds. This court did not allow the wife to assert res judicata or collateral estoppel to bar the husband's defense because public policy declaring bigamous marriages void overrode the policy concerns for res judicata.

This matter is the same as Johns. A bigamous marriage existed. Public policy concerns allowing Mr. Brown to challenge the validity of his own marriage as a result of the bigamous relationship of Ms. Hynie outweigh and override any policy concerns for collateral estoppel or res judicata, and most importantly in this matter, a hasty CCFC Order based on solely self-serving, hearsay testimony.

6. The CCFC order was a default judgment. Mr. Brown is not precluded by res judicata or collateral estoppel to prove that he was not married due to bigamy.

In essence and procedurally, Ahmed's failure to respond to the Hynie Annulment Action and failure to appear for the hearing would be treated as a default. Ms. Hynie's counsel at her annulment hearing went so far as to note this in the transcript of the hearing.[50] In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation.[51] South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated.[52] South Carolina courts have consistently followed the Restatement (Second) of Judgments with regard to the issue of collateral estoppel.[53] The Restatement takes the position that default judgments have not

[50] Joint Stipulation of Facts, ¶ 8, Exhibit 13, Page 4, lines 6-8. (R., Vol. I, pp. 256; 300, l. 6-8)
[51] 50 C.J.S. Judgments § 797 (1997); State v. Bacote, 331 S.C. 328, 330-31 (1998).
[52] Powell v. Lane, 289 S.W.3d 440, 451 (Ark. 2008) (Wills, J., dissenting)
[53] See, e.g., S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213 (1991) (adopting the general rule set forth in the Restatement for offensive use of collateral estoppel); Beall v. Doe, 281 S.C. 363, 370 (S.C. Ct. App. 1984) ("[A] fair rule regarding the application of issue preclusion in

been "actually litigated," and therefore cannot be used as the basis for collateral estoppel in subsequent actions. [54] The Restatement's position is the view taken by the majority of the courts throughout our nation.[55] "Although a party against whom a default judgment is entered certainly had an opportunity to litigate, most courts have concluded that an opportunity to litigate should not be given the same effect as actual litigation . . . .".[56]

As the Hynie Annulment Action was an ex parte, default judgment because Mr. Ahmed failed to appear due to insufficient service among other items, none of the issues were actually litigated. Based on the foregoing, Mr. Brown and/or his heirs have every right to challenge the facts and issues whether Ms. Hynie was married at the time she married Mr. Brown. As a result, Ms. Hynie was a bigamist.

B. Mr. Brown was not a party to the Hynie Annulment Action.

It is indisputable that Mr. Brown did not participate in the Hynie Annulment Action, however, the lower court attempts to draw a conclusion that Mr. Brown supported and acquiesced to the Hynie Annulment Action and Hynie Annulment Order by referencing payments to Ms. Hynie's attorney and referencing the Hynie Annulment Action facts.[57] The lower court's suggestion that because Mr. Brown paid Ms. Hynie's attorney meant that he acquiesced to the outcome and desired a void ab initio result is neither factually nor chronologically sound. Mr. Brown filed his own annulment proceeding against Ms. Hynie merely 46 days later evidently wanting his marriage to Ms.

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subsequent litigation with different parties is the rule recently formulated by the American Law Institute [in the Restatement (Second) of Judgments].").

[54] See Restatement (Second) of Judgments § 27 cmt. e (1982) ("In the case of a judgment entered by . . . default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.").

[55] See Powell, 289 S.W.3d at 450 (Wills, J., dissenting) (stating that the "majority view" is that default judgments cannot serve as the basis for collateral estoppel);

[56] 50 C.J.S. Judgments § 1049 (2013)

Hynie terminated.[58] Additionally, Rule 1.8(f) of the South Carolina Rules of Professional Conduct ("SCRPC") requires that a lawyer obtain consent of the client before accepting compensation from someone other than the client. The lawyer also must not allow the person paying the fees to interfere with the exercise of judgment, SCRPC 1.8(f)(2) and 5.4(c), and must not disclose protected information to that person unless permitted under SCRPC 1.6. Ms. Hynie's attorney could not accept any direction from Mr. Brown or share confidential factual information received or discovered. He could only accept his money. Mr. Brown was not his client and not a party to the action. As the SCRPC clearly indicate, payment of money does not make one a party to an action or even a client for an attorney. As such, Mr. Brown's payment of money is irrelevant to the issue of whether or not he was a party to the Hynie Annulment Action. Mr. Brown's immediate filing of the Brown Annulment Action, certainly contradicts Ms. Hynie's allegations of Mr. Brown's involvement in Ms. Hynie's annulment action. Not to mention, the fact that immediately after the Hynie Annulment Order, Mr. Brown amended and continued his own annulment action reasserting his bigamy claims and thereafter Mr. Brown and Ms. Hynie entered into the Brown-Hynie Consent Order wherein Ms. Hynie agreed she was not his spouse and would never make a claim of common law marriage.[59]

C. The Charleston Family Court's order does not apply to the case sub judice.

Somehow, the lower court determined that in an action that Mr. Brown was not a party where Ms. Hynie presented self-serving hearsay testimony along with other suspect

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[57] Final Order at p. 45-46. (R., Vol. I, pp. 97-98)
[58] Joint Stipulation of Facts, ¶ 19. (R., Vol. I, p. 258)
[59] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

facts, that such CCFC Order bound Mr. Brown and any in privy to him.[60] This falsehood creates a public policy entwined in complete chaos should South Carolina allow third parties to ultimately, and dramatically, be affected by cases to which they could not intervene to protect their interests. Mr. Brown could not and did not intervene in the CCFC action. Mr. Brown, in any effort to protect his assets from a bigamous spouse, could not intervene in the Hynie Ahmed Annulment Action. Therefore, Mr. Brown must be afforded protective measures outside the CCFC and the CCFC Order to challenge the hearsay evidence as presented by Ms. Hynie. The CCFC in the Hynie Annulment Action based its decision on self-serving, uncorroborated, hearsay evidence and conjecture.[61] No authenticated evidence or testimony other than Ms. Hynie's was provided.[62] Res judicata and collateral estoppel should not be applied to such a vacuous legal proceeding. Ms. Hynie has used such proceeding as the foundation to grab an economic interest in Mr. Brown's estate which is particularly troubling as she had already agreed she was not Mr. Brown's wife.[63] Effectively, Ms. Hynie wants this Court to affirm that non-parties and their successors are bound by court orders from actions that they had no right to challenge or be considered a party. Such a result offends even the basic sense of due process and fair dealing, and violates all of the rules of res judicata and collateral estoppel.

[60] Final Order, p. 32-34. (R., Vol. I, pp. 84-86)
[61] Joint Stipulation of Facts, ¶¶ 9, 10 and 18. (R., Vol. I, pp. 257-258)
[62] Id. (R., Vol. I, pp. 257-258)
[63] Id. at ¶ 19, Exhibit 19. (R., Vol. I, pp. 258; 349-350)

III. THE LOWER COURT ERRED IN GRANTING APPELLEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN THE WEIGHT OF THE EVIDENCE PROVES THAT MS. HYNIE WAS NEVER THE WIFE OF JAMES BROWN.

A. The lower court erred in granting summary judgment to Ms. Hynie without allowing discovery and allowing use of the Diaries.

As James Brown and his heirs are not collaterally estopped from proving that Ms. Hynie is a bigamist, the lower Court erred when it allowed no discovery whatsoever, not even limited discovery as it relates to the validity of the Hynie-Brown Marriage and instead tried to resolve this matter on summary judgment for Appellee. Appellants presented the following evidence that proves that Ms. Hynie is a bigamist and not married to Mr. Brown:

1. Ms. Hynie agreed in the Brown-Hynie Consent Order that she was not Mr. Brown's spouse;[64]

2. Ms. Hynie has never proposed that she and Ahmed divorced, but she instead filed for an annulment, which very clearly denotes that the parties were still married;[65]

3. Ms. Hynie has not shown a death certificate of Ahmed, which would have made an annulment action moot;[66]

4. Ms. Hynie's marriage to Mr. Brown was less than 5 years after the marriage to Ahmed thereby demonstrating that Ahmed was not missing for more than 5 years;[67]

5. The fact under consideration as to whether Ahmed was married to three women in Pakistan has never been proven;[68]

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[64] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)
[65] Id. at Exhibit 5. (R., Vol. I, pp. 271-273)
[66] Id. at Exhibits 5 through 12. (R., Vol. I, pp. 271-296)
[67] Id. (R., Vol. I, pp. 271-296)
[68] R., Vol. II, pp. 515-526.

6. In the 19 years since her marriage to Ahmed, 14 years since her marriage to Mr. Brown, 12 years since filing her annulment action against Ahmed ("Hynie-Ahmed Annulment"), and 9 years since filing the matter sub judice, Ms. Hynie has never provided proof of Ahmed's prior marriage(s), or death; and [69]

7. Ms. Hynie further stipulated that she cannot identify a single person who can testify that Ahmed was married to another person when Ms. Hynie and Ahmed participated in the 1997 marriage ceremony.[70]

8. Ahmed swore under oath in the Ahmed-Hynie Marriage License Application that he was not married at the time he married Ms. Hynie.[71]

Ms. Hynie, on the other hand, has provided no admissible evidence (for example an Ahmed prior marriage license or death certificate), that she was not married to Ahmed except self-serving inadmissible hearsay in a court where Ahmed was not present that proclaims Ahmed told her that he had three wives in Pakistan and that she and Ahmed did not consummate their marriage.[72]

1. The Ahmed-Hynie marriage license and marriage license application are more than a scintilla of proof and admissible.

In the Hynie –Ahmed Marriage License application, Ahmed swore under oath that he was not married.[73] South Carolina Rule of Evidence 803(9) provides: "Records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report thereof was made to a public office pursuant to the requirements of law." Section 1.03 of the Texas Family Code of 1995 (which was the statute in effect at the time Ahmed and Ms. Hynie were married) provided:

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[69] Id. at Exhibits 1 through 19. (R., Vol. I, pp. 254-350)
[70] R., Vol. I, p. 257
[71] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[72] Joint Stipulation of Facts, Exhibit 13, p. 8-10. (R., Vol. I, pp. 304-306)
[73] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)

§ 1.03. Application Form

(a) The county clerk shall furnish the application form as prescribed by the Bureau of Vital Statistics of the State Department of Health.

(b) The application form shall contain:

> (1) a heading entitled "Application for Marriage License, County, Texas";(2) spaces for each applicant's full name (including the woman's maiden surname), address, social security number, if any, date of birth, and place of birth (including city, county, and state);(3) a space for indicating the document tendered by each applicant as proof of identity and age;(4) spaces for indicating whether each applicant has been divorced within the last 30 days;(5) printed boxes for the applicant to check "true" or "false" inresponse to the following statement: "I am not presently married.";(6) printed boxes for each applicant to check "true" or "false" in response to the following statement: "The other applicant is not related to me as: (A) an ancestor or descendant, by blood or adoption;(B) a brother or sister, of the whole or half blood or by adoption;(C) a parent's brother or sister of the whole or half blood; or (D) a son or daughter of a brother or sister of the whole or half blood or by adoption.";(7) a printed oath reading: "I SOLEMNLY SWEAR (OR AFFIRM) THAT THE INFORMATION I HAVE GIVEN IN THIS APPLICATION IS CORRECT.";(8) spaces immediately below the printed oath for the applicants' signatures;(9) a certificate of the county clerk that the applicants made the oath and the date and place that it was made (or that the applicant did not appear personally but the prerequisites for the license have been fulfilled as prescribed by Section 1.05 of this code);(10) spaces for indicating the date of the marriage and the county in which it is performed; and (11) a space for the address to which the applicants desire the executed license to be mailed.

As specifically noted under Texas law, the marriage license application form under Texas law was reported to the Bureau of Vital Statistics of the State Department of Health. The Texas form required both parties to swear under oath that "I am not presently married." To obtain a marriage license in Texas both parties swore before the County Clerk of Harris County, Texas that they were not married. This evidence is absolutely admissible and irrefutable. Finally, this piece of evidence by itself is enough to deny Ms. Hynie's motion for partial summary judgment when taken in light most

favorable to the Appellants as it is more than a scintilla of evidence. Therefore, the only admissible evidence related to Ahmed's marital status demonstrates that Ms. Hynie was married to Ahmed in a vaild non-bigamous marriage at the time she married Mr. Brown.

2. Ms. Hynie fails to present any admissible evidence that Ahmed was married prior to their marriage.

Ms. Hynie's qualified and capable legal team must have considered seeking, Ahmed's marital records in Pakistan in order to prove their case. They failed, however, to locate and/or collect one shred of evidence linking Ahmed to any prior marriages. If such proof existed, the Court, the press, and whoever would listen would have received it. Further, Pakistan is a modern nuclear country with modern data collection capabilities. Ms. Hynie and her legal team easily could have acquired a marriage license, known as a Nikah Nama, from the Pakistani National Data and Registration Authority (NADRA) and/or the Karachi Union Councils. Under the Muslim Family Law Ordinance of 1961, it is mandatory that the Nikah Nama is registered with the local Union Council, where an original copy of Nikah Nama is kept as public record and two other copies served to the bride and groom. The Nikah Nama, is registered with a Nikah Registrar, who is appointed by the municipality, Panchayat committee, cantonment board or union council. Ms. Hynie could have, and it is expected they did, seek such documents and failed. They could have done so by going directly to the source, (i.e. NADRA) and/or the Karachi Union Councils, hiring Pakistani attorneys to search and locate such documents or utilize available web services.[74]

Based on the foregoing, only one conclusion can be reached. Ms. Hynie, and or

[74] http://inp.org.pk/nikkah-nama-registration, http://birthcertificatespakistan.com/how-to-get-pakistani-marriage-registration-certificate/, http://mamooinpakistan.com/services/marriage-certificate/

her legal team, looked and found nothing. As such Ms. Hynie is unable to provide any actual admissible evidence to any court of her self-serving claims that Ahmed was married at the time she married him. Similarly, in this case, she has failed to produce a shred of evidence supporting her contention that she was validly married to Mr. Brown. As such, she is a bigamist and summary judgment must be granted against Ms. Hynie and in favor of the Appellants.

3. The Brown-Hynie Consent Order is sufficient evidence to support the Appellants' motion for partial summary judgment and deny Ms. Hynie's motion for partial summary judgment.

In the Brown-Hynie Consent Order, Ms. Hynie agrees she will not claim to be Mr. Brown's common law spouse.[75] The only reason for inclusion of such language in the Order is because both parties did not consider themselves married at that time. Mr. Brown's actions in his own annulment action, which include amendments that denote Ms. Hynie was previously married and continuing such action to a final Consent Order resolution, indicate the parties understood that they were not married.[76] Finally, the Brown-Hynie Consent Order was the most recent Order entered in any court that actually involved both Mr. Brown and Ms. Hynie where the parties denote their understanding of their marital relationship, which was that they were not married.[77]

4. The lower court indicated on March 31, 2014 that should factual issues arise in the presentation of Appellee's motion for partial summary judgment that such motion would be denied.

As noted in the transcript of the March 31, 2014 hearing: [78]

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https://www.facebook.com/jalwastyle/posts/3945661577099, http://birthcertificatekarachi.com/nadra-marriage-registration-certificate/

[75] Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)

[76] Id. at Exhibits 15, 16 and 18. (R., Vol. I, pp. 329-335; 347-348)

[77] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

[78] See March 31, 2014 transcript of hearing Page 60, Line 12-21. (R., Vol. VII, p. 2461, l. 12-21)

> Mr. Beach: Now, Judge, there are –that simple questions could be legal questions. On the other hand, if Mr. Rosen asserts that the - - if Mr. Rosen asserts that James Brown is estopped by that order, then Mr. Rosen is probably going to have to assert some facts to support that estoppel argument...
> The Court: Well, if he does that – if he does that, then I think the summary judgment goes out the window.

Consistent with the discussion with the lower court, several facts have been raised which would preclude summary judgment for Ms. Hynie such as:

> 1) the supportive effects of Brown-Hynie Consent Order and annulment dismissal which is challenged by Ms. Hynie and used by Appellants supporting their respective positions;
>
> 2) the communications between Ms. Hynie's attorney and Mr. Brown's attorney during the Brown Hynie Annulment action;
>
> 3) the estoppel arguments raised suggesting that because Mr. Brown financed the Hynie-Ahmed Annulment that Mr. Brown desired the annulment of the Ahmed-Hynie relationship which calls into question the correspondence between Mr. Brown's attorney (Jim Huff) and Ms. Hynie's attorney (Robert Rosen);
>
> 4) the Hynie-Ahmed Marriage license where Mr. Ahmed swore under oath he was not married that has not been refuted by any other evidence other than Ms. Hynie's inadmissible hearsay testimony; [79]
>
> 5) Ms. Hynie's actual versus purported knowledge of Ahmed's whereabouts as it pertains to service of process and due diligence;
>
> 6) private investigator Pannell's full report and search efforts to locate Ahmed;
>
> 7) Ahmed's immigration status and related paperwork; and
>
> 8) evidence from Mr. Brown's attorney regarding the Brown-Hynie Consent Order and the understanding of the status of the parties relationship.

None of these items would preclude summary judgment being granted to Appellants. As has been noted, Appellee has no admissible evidence that she and Ahmed did not enter into a legal marriage and that she is not a bigamist. As such, Appellants should be granted summary judgment based on the joint stipulation of facts in accordance with

Lukich.

5. The Brown-Hynie Consent Order is incontestable.

The Brown-Hynie Consent Order in essence outlined to the court the settlement of the Brown-Hynie Annulment. The Brown-Hynie Consent Order provides: "Defendant agrees to and does hereby forever waive any claim of a common law marriage to the Plaintiff, both now and in the future."[80] The question begs, why would an actual and legal current spouse agree to never make a claim for common law marriage? The only reasonable answer is that the parties were not married. This Court should consider, and it is important to note, that the Brown-Hynie Consent Order was negotiated and entered into as a result of, and to bring to a conclusion, Mr. Brown's complaint for annulment and Ms. Hynie's complaint for divorce. Both parties were seeking to conclude and finally define the relationship. Both parties had ugly and embarrassing allegations against the other. It was in everyone's best interest that their actions were concluded as privately and expeditiously as possible. All available evidence indicates Mr. Brown wanted an annulment and Ms. Hynie wanted a divorce.

Mr. Brown filed the Brown-Hynie Annulment on January 29, 2004 in Aiken County, South Carolina asserting Ms. Hynie's bigamy, merely 46 days after Ms. Hynie filed for annulment against Mr. Ahmed.[81] As stated in Mr. Brown's complaint for annulment: "Defendant was never legally divorced from her previous husband prior to entering into marital contract with the Plaintiff. As such, this marriage is void *ab*

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[79] See Affidavit of Scott Keniley 10/2/2014 with attached Ahmed-Hynie Marriage License Application. (R., Vol. II, p. 526, line 8)
[80] Joint Stipulaton of Facts, Exhibit 19, ¶ 3 (R., Vol. I, p. 349)
[81] Joint Stipulation of Facts, Exhibit 15. (R., Vol. I, pp. 329-331)

initio."[82] On May 4, 2004, 19 days after the Hynie-Ahmed Annulment concluded ("Hynie-Ahmed Order"), Mr. Brown amended the Brown-Hynie Annulment re-asserting Ms. Hynie's bigamy stating: "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. . ." [83] On July 6, 2004, Mr. Brown's reply to counterclaim responding to Hynie's counterclaim for divorce ("Hynie Divorce Counterclaim") to the Brown-Hynie Annulment re-alleging and stating: "Defendant remained married to this man at the time she entered into the marriage to Plaintiff."[84] Further, at the conclusion of the Hynie-Ahmed Annulment, there would be no need for Mr. Brown to actually continue his annulment action if he was in favor of being married (as Ms. Hynie's contention would be that the parties were in fact married) and that Mr. Brown allegedly supported the Hynie-Ahmed action as alleged. Based on such flawed logic, Mr. Brown should have simply dismissed his annulment action with no stipulations or conditions, but that is not what happened.[85] Instead, the parties continued to litigate and negotiate a final resolution to the matter with the Brown-Hynie Consent Order.[86] When it comes to the validity of all the marriages in question, i.e. Brown-Hynie, Hynie-Ahmed, Ahmed and three other wives, the one absolute and indisputable fact is that Mr. Brown and Ms. Hynie were not legally married at any time as a result of Ms. Hynie's bigamy.

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[82] Id., at ¶ 3. (R., Vol. I, p. 330)
[83] Id., Exhibit 16, ¶ 5. (R., Vol. I, p. 333)
[84] Id., Exhibit 18. (R., Vol. I, p. 347)
[85] Id. at Exhibit 19. (R., Vol. I, pp. 349-350)

B. Ms. Hynie bears the burden of proving she was legally married to James Brown and has failed in that burden.

Ms. Hynie bears the burden of proving that her marriage to Mr. Brown is valid. "Once a marriage is shown to exist, the person attacking its validity has the burden of proving invalidity."[87] Ms. Hynie and Ahmed's marriage has been proven to be valid.[88] That fact is undisputed and stipulated to by the parties. The onus is therefore on Ms. Hynie to prove how her marriage to Ahmed was void prior to her marriage to Mr. Brown so that her purported marriage to Mr. Brown could be valid. Ms. Hynie has failed in meeting this burden in every way. She failed to prove that she did not enter into the admitted bigamous marriage. She failed in the intervening time to produce a shred of evidence related to the purported marriages of Ahmed. Her bigamy voids any chance she entered into a marital relationship with Mr. Brown. Ms. Hynie takes a different and more concerning viewpoint, that is, it does not matter if the marriage to Mr. Brown was factually bigamous or not because she was able to secure a hasty court default order, based solely on uncorroborated hearsay, from an unrelated jurisdiction and no one can do anything about it. This position is an insult to American Jurisprudence.

1. Fraudulent Annulment.

Ms. Hynie ineffectually attempts to utilize the third prong of S.C. Code § 20-1-80 by filing the Hynie Annulment Action and securing an order of a competent court without corroborating witnesses or supporting evidence.

i. Suspect Jurisdiction.

Ms. Hynie filed for annulment from Ahmed on December 15, 2003 in the

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[86] Id. (R., Vol. I, p. 349-350)

[87] Day v. Secretary of Health and Human Services, 519 F. Supp. 872, 878 (D.S.C. 1981); 52 Am. Jur. (2d) Marriages Section 129 (1970)."; Yarbrough v. Yarbrough, 280 S.C. 546, 550 (S.C. Ct. App. 1984).

CCFC.[89] Interestingly enough, neither Ms. Hynie, nor Ahmed lived in or near Charleston.[90] She lived across the state of South Carolina in Aiken County, South Carolina.[91] She testified she married Ahmed in Texas, and that Ahmed's last known address was 14403 Ella Boulevard, Apartment Number 314, Houston, Texas 77014 and that Ahmed was a Pakistani citizen with no relation to South Carolina.[92]

ii. Ahmed was not personally served.

Ahmed, we know, was not personally served with service of process, but was arguably served by publication when, conveniently, Ms. Hynie's Texas process server allegedly was unable to locate Ahmed.[93] The alleged service by publication was in the Houston Chronical buried on page 2 of the classified section.[94] Rule 2 of the South Carolina Family Court rules indicates that the South Carolina Rules of Civil Procedure ("SCRCP") shall apply to Family Court actions.[95] Ms. Hynie, knowing Ahmed was from Pakistan, made no effort to perform due diligence to locate and serve Ahmed in Pakistan pursuant to Rule 4 (h)(5) of the SCRCP for foreign service of process and utilizing the service of process rules prescribed by the Hague Service Convention. Specifically, Ms. Hynie's service by certified mail was not valid in accordance with Rule 4(d)(8) of the SCRCP in that an ex parte, default judgment against Mr. Ahmed was entered. "Service pursuant to this paragraph shall not be the basis for an entry of a default or judgment by default unless the record contains a return receipt showing the acceptance by the

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[88] Joint Stipulation of Facts, ¶ 1 and 2, Exhibit 1. (R., Vol. I, p. 255; 265-266)
[89] Id. at ¶ 7, Exhibit 5. (R., Vol. I, pp. 256; 271-273)
[90] Id. (R., Vol. I, pp. 256; 271-273)
[91] Id. at ¶ 8, Exhibit 13, page 4, line 25, page 5, lines 1-12. (R., Vol. I, pp. 256; 300, l. 25-301, l. 12)
[92] Id. at page 15, lines 10-18. (R., Vol. I, p. 311, l. 10-18)
[93] Id. at ¶ 7, Exhibits 6, 7, 8 and 9. (R., Vol. I, pp. 256; 274-289)
[94] Id. at Exhibit 10. (R., Vol. I, pp. 290-291)
[95] See Rule 2 of the South Carolina Rules of Family Court.

defendant." See. Rule 4(d)(8) of the SCRCP. Ms. Hynie's return receipt attached is blank.[96] Further, her service by affidavit failed as Ahmed was likely located outside of the United States. Finally, her service failed in accordance with the Hague Service Convention, T.I.A.S. No. 6638, 20 U.S.T. 361 (1965). Pakistan is a non-member signatory to the Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters and provides as the proper address for service documents as: The Solicitor, Ministry of Law and Justice, R Block, Pak. Sectt., Islamabad, Pakistan. Since Mr. Brown's death, Ahmed was easily found by attorneys involved with this action and proven not to have any wives prior to marrying Ms. Hynie.[97]

In a decision regarding an appeal of an action brought in both North Carolina and South Carolina, the South Carolina Supreme Court determined the affidavit requesting publication was "fatally defective, under the North Carolina law, on its face, in that it does not show that due diligence was used to find the defendant." Ray v. Pilot Fire Ins. Co., 128 S.C. 323, 324 (1924). The Ray court noted the applicable statute required a showing of due diligence in order to secure the order of publication. Id. In support of its decision, the Ray court noted multiple North Carolina cases that had approved the holding in Wheeler v. Cobb, 75 N.C. 21 (1876), where the Supreme Court of North Carolina held that the service of summons by publication was fatally defective and did not conform to the requirements of the statute because the affidavit requesting service by publication failed to allege that the defendant could not, after due diligence, be found within the state. Id. at 325, 121 S.E. at 780. The affidavit submitted by Ronald Tannell,

[96] Joint Stipulation of Facts, at ¶ 7, Exhibit 9. (R., Vol. I, pp. 283-289)
[97] Affidavit of David Bell 9/30/2014. (R., Vol. II, pp. 515-521)

clearly did not identify due diligence was made to ascertain the whereabouts of Ahmed, but merely that a "national" data base search did not provide a valid address.[98] The Tannell affidavit states: "The results were inconclusive." Id. It said nothing about searching immigration databases or in Pakistan. Ms. Hynie was clearly aware that Ahmed was from Pakistan and testified to the same.[99] To avoid resolving litigation by default, strict compliance with the publication statute is appropriate strive for disposition of cases on their merits.[100] Therefore, the affidavit for service by publication was defective on its face since Ms. Hynie specifically avoided searching and serving Ahmed where she knew she would most likely find him. The Order for publication was obtained without the necessary diligence thereby making service defective.

iii. Self-serving hearsay evidence is the only evidence presented by Ms. Hynie.

Ms. Hynie's prior statements regarding Ahmed's marital status are not admissible in this proceeding as such statements are hearsay.[101] She was granted an annulment on April 15, 2004 subsequent to a hearing where her unsupported, uncorroborated, self-serving, hearsay testimony laced with allegations fraudulent and criminal in nature against Ahmed, and his attorney, were provided as the sole grounds and information before the court.[102] In the Hynie Annulment Complaint, she claims, without corroboration, Ahmed wanted to marry her to obtain United States citizenship.[103] She also indicated that she was informed by Ahmed he had three or more wives in Pakistan

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[98] Joint Stipulation of Facts, ¶ 7, Exhibit 6. (R., Vol. I, p. 274-279)
[99] Id. at ¶ 8, Exhibit 13, Page 7, lines 7-9. (R., Vol. I, pp. 256; 303, l. 7-9)
[100] See Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits").
[101] See Rule 801 of the South Carolina Rules of Evidence.
[102] Joint Stipulation of Facts, ¶ 7, Exhibit 12. (R., Vol. I, pp. 256; 293-296)
[103] Id. at ¶ 7and 8, Exhibit 5 and Exhibit 13, Page 10, lines 16-20. (R., Vol. I, pp. 256; 277; 306, l. 16-20)

the parties married on February 17, 1997.[104] The only indisputable fact in the Hynie Annulment Complaint is that they were married on February 17, 1997 confirming she married Ahmed. There was a hearing for the annulment on April 15, 2004.[105] Ms. Hynie was the only party to testify.[106] Notably absent was her husband, Ahmed, to defend against the criminal allegations alleged by Ms. Hynie. Additionally absent was her "guitar player" whom she testified was with her the day she claims Ahmed told her he was already married to three wives and just married her to get United States citizenship.[107] Equally as important, Ahmed's immigration attorney was absent who could have testified, if it were true, that he was given $350.00 and a signed piece of paper by Ms. Hynie to terminate the marriage.[108] Apparently, like all of Ms. Hynie's evidence, the lawyer referenced in her testimony has vanished as well.[109]

Rule 802 of the South Carolina Rules of Evidence indicates that the general rule of evidence with regard to hearsay is that it is not admissible unless an exception applies. "[W]here there is difficulty in obtaining other equally probative evidence and in the particular circumstances of the case there are sufficient guarantees that it is trustworthy, hearsay may be admitted as an exception to the general rule of exclusion." Need alone is not sufficient, though.[110] There must also be sufficient guarantees of trustworthiness to serve as the substitute for cross-examination.[111] The proponent of a statement alleged to be within a hearsay exception bears the burden of proving that the requirements of the

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[104] Id at ¶8, Exhibit 13, Page 10, lines 11-13. (R., Vol. I, p. 256; 306, l.11-13)
[105] Id. (R., Vol. I, p. 297)
[106] Id. (R., Vol. I, pp. 297-313)
[107] Id. at Page 8, lines 10-20. (R., Vol. I, p. 304, l. 10-20)
[108] Id. at Page 11, lines 1-21. (R., Vol. I, p. 307, l. 1-21)
[109] Id. (R., Vol. I, p. 307, l. 1-21)
[110] State v. Thomas, 159 S.C. 76 (1930).
[111] See Idaho v. Wright, 497 U.S. 805 (1990).

particular exception are satisfied.[112] When the requirements of the proposed exception are not satisfied, the offered statement or record is inadmissible hearsay.[113]

Ms. Hynie's prior statements about Ahmed's marital status, while proven to be untrue by Ahmed's own testimony on the Ahmed-Hynie Marriage License Application, are not admissible because of the hearsay rules. Ms. Hynie attempts to admit such statements to prove the truth of the matter asserted (i.e. that Ahmed was previously married). She has failed to meet her burden by proving that such statements are not hearsay or subject to an exception. As a result, this Court should not consider such evidence and should exclude the same thereby leaving the only evidence that is admissible is that Ms. Hynie was married to Ahmed at the time she married Mr. Brown.[114]

iv. Common sense dictates that Ms. Hynie's citizenship assertions are fabricated for economic gain.

Ms. Hynie alleged in her self-serving, non-corroborated, non-cross examined testimony that Ahmed told her on her wedding day that "he just needed to stay in the country."[115] She further testified that she went to Mr. Ahmed's immigration attorney and told him "This guy just wanted to get into the country."[116] This line of testimony is certainly questionable when Ahmed was legally in the United States and had a Social Security Number ("SSN") issued in Texas in 1995. Ms. Hynie knew this when she testified because she provided the CCFC Ahmed's SSN in her attempted service exhibits.

As part of her fabrication, Ms. Hynie asserts that she had to obtain the annulment

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[112] See Marshall v. Thomason, 241 S.C. 84 (177) (1962).
[113] See Anders v. Nash, 356 S.C. 102 (1971).
[114] Joint Stipulation of Facts, ¶¶ 1 and 2. (R., Vol. I, p. 255)
[115] Id. at ¶ 8, Exhibit 13, Page 8, lines 19-20. (R., Vol. I, p. 304, l. 19-20)
[116] Id. at Page 9, lines 4-8. (R., Vol. I, p. 305, l. 4-8)

thereby making her marriage to Ahmed void ab initio because Ahmed merely married her in order to stay in the United States. She further added that the marriage to Ahmed was never consummated.[117] If a marriage ceremony was the only requirement to staying in the United States, Ms. Hynie's testimony might have some shred of believability. However, United States immigration law regarding marriage for a green card requires substantially more. Any immigration attorney, such as the one Ms. Hynie claims Ahmed had, would know that.

Immigration law is concerned more with the couple's matrimonial intention at the time of marriage, rather than consummation or engaging in sexual relations. Immigration marriage fraud is governed by the Immigration Marriage Fraud Amendment ("IMFA") of 1986. (8 U.S.C. § 1186a(g) (2000). The IMFA specifically provides that couples married for less than twenty-four months are subject to more scrutiny and must wait an additional two years before obtaining permanent residence.[118] During that time, the immigrant spouse has only "conditional" permanent residency and is subject to deportation if the marriage is determined to not be bona fide. Id § 216 (b). With the passage of IMFA, the Immigration Naturalization Services ("INS") promulgated regulations illustrating how a couple could demonstrate that their marriage was bona fide when entered. Under the regulation, the couple must attach evidence to their joint petition that demonstrates that the marriage was not entered into for the purposes of evading United States immigration law. Our courts have determined that a marriage is a sham if the bride and groom did not intend to establish a life together at the time that they married.[119] Although different than the standard applied by the IMFA, nevertheless, the regulations encourage petitioners to

[117] Id. at Page 10, lines 2-10. (R., Vol. I, p. 306, l. 2-10)
[118] (INA § 216 (c)-(d); 8 U.S.C. § 1186a(c)-(d) (2000).

produce evidence in support of their petitions that is responsive to both Bark and IMFA. Such evidence includes:

> (1) documentation showing joint ownership of property, (2) lease showing joint tenancy of a common residence, (3) documentation showing commingling of financial resources, (4) birth certificates of children born to the marriage, (5) affidavits of third parties having knowledge of the bona fides of the marital relationship, and (6) other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.[120]

All of these factors involve events that happen after the marriage and courts use these events to try to determine what the couple intended at the moment of marriage.[121]

In order to prove the bona fide marriage and ultimately for Ahmed to receive status to stay in the United States, retroactive to the laws of 1997 (the year of the Hynie-Ahmed Marriage), several documents needed to be filed. First, Ms. Hynie was required to file a Form I-130 Alien Relative Visa Petition to adjust Ahmed's immigration status on the basis that they were husband and wife. Ahmed, concurrently, would file a Form I-485 Application to Register Permanent Residence or to Adjust Status. Thereafter, there shall, in the facts of the marriage between Ms. Hynie and Ahmed, be a Form I-130 Petition interview. In the Hynie-Ahmed Marriage, as the facts stated by Ms. Hynie in her testimony on April 15, 2004, the I-130 and I -485 would have been concurrently filed. With few exceptions, the I-130 Petition Interview would have been mandatory.[122]

This begs the question, why would Ahmed marry a United States Citizen to acquire permanent residential status and a green card and not go through all of the steps required, i.e. filing a concurrent I-130 Form and I-485 Form and the required I-130

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[119] Bark v. INS, 573 F.2d 1200, 1201 (9th Cir. 1975),
[120] 8 C.F.R. 216.4(a)(5)(i)-(iv).
[121] Bark, 573 F.2d at 1202 (conduct occurring after the wedding may be considered to the extent that it "bears upon the subjective state of mind" at the time of the wedding.")
[122] See Operating Instruction 245.28 C.F.R. §§ 1245.6; Operating instruction 245.2.

interview? Maybe Ms. Hynie did not know and presumes Ahmed did not know there were procedural steps after the marriage ceremony. Ms. Hynie, interestingly, disposed of this possibility when she testified that Ahmed had an immigration attorney and it therefore should be assumed that the attorney knew the steps required subsequent to the marriage and counseled his clients accordingly.[123] The marriage for a green card argument does not hold water. A fact known by Ms. Hynie is that Ahmed was already legally in the United States with a SSN issued in Texas in 1995. Ms. Hynie's testimony is a fabrication that was created to further her own interests.

CONCLUSION

Most importantly, and supportive of an immediate reversal and remand with an order granting summary judgment to Appellants, is the analysis of Lukich v. Lukich. This Court may dispose of this entire action, as it relates to Ms. Hynie, in one swift ruling. The parties stipulated to the facts. Ms. Hynie was married to Ahmed when she allegedly married Mr. Brown on December 14, 2001. She did not annul her relationship with Ahmed until April 15, 2004. Ms. Hynie never had another marriage ceremony of any type with Mr. Brown after her annulment. No other facts are necessary in discovery. When the Lukich analysis is applied to these facts, this Court can reach but one conclusion, Ms. Hynie is a bigamist.

Additionally, collateral estoppel does not apply in this matter as Mr. Brown was neither a party nor did he have the opportunity to litigate the issue of his marriage to Ms. Hynie in the Charleston Court. As a result, Mr. Brown had no privity with the Hynie-Ahmed Annulment Action. Therefore, his heirs and estate also had no privity and are not collaterally estopped from pursuing the issue of Ms. Hynie's bigamy.

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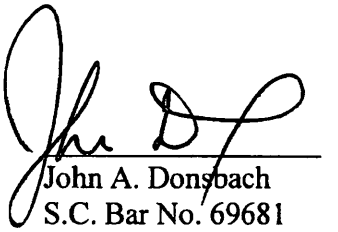
[123] Joint Stipulation of Facts, ¶8, Exhibit 13, p. 8, l. 23-24. (R., Vol. I, p. 304, l. 23-24)

Finally, if this Court were not inclined to enforce Lukich, and as Appellants are not collaterally estopped to pursue Ms. Hynie's bigamy, the Appellants should be allowed additional discovery to prove Ms. Hynie's bigamy. Appellants have proven the existence of additional evidence on which discovery should continue in the form of the Ahmed-Hynie marriage license, the marriage license application, the Brown-Hynie Consent Order, and Diaries. Discovery should continue based on these available items of evidence. Appellants have a right to challenge the facts as presented in the Hynie-Annulment Action without the application of res judicata or collateral estoppel.

For the reasons stated above, the Appellant respectfully requests that this Court at a minimum reverse the lower court's grant of summary judgment to Appellee. However, based on Lukich, this court should reverse and remand with a grant of summary judgment to Appellants.

This 12th day of June, 2017.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown

Tommie Rae Brown, Respondent,

v.

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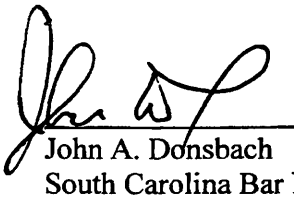
Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 12, 2017.



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FINAL REPLY BRIEF OF APPELLANT TERRY BROWN

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TREATISES

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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by Respondent. Appellant, in accordance with SCACR 208(6), adopts the reply briefs of all Appellants in this matter as if set forth and incorporated herein.

INTRODUCTION

In order to weed through the seventy-five pages of Respondent's brief, in what may be best described as analogous to political rhetoric, sound bites and logic twisting, this reply will eliminate the noise. The truth will be all that remains. The summary of Respondent's position is that a bigamous marriage is revived by a post bigamous marriage annulment *ab initio*, on the grounds of bigamy, regardless as to whether the first marriage was factually bigamous or not. Respondent legally could have remained married to Javed Ahmed("Ahmed"), if she so chose as there is no impediment to the continued relationship. Respondent provides no evidence of Ahmed's bigamy and no evidence of any effort to present evidence, testimony, marriage certificates, actual wives (or their names), witnesses presented (or their names), etc. Reducing this argument to simple logic, Respondent has no evidence of Ahmed's bigamy because if she did she would have presented it. That is why Respondent hides behind the Charleston County Family Court ("CCFC") order annulling Respondent's marriage to Javed Ahmed ("Ahmed") on April 15, 2004[1]("CCFC Order"). Respondent's arguments are grounded in technicalities behind twisted facts, red herrings and camouflage. Without the court

[1] *See* Joint Stipulation of Facts, Exhibit 12. (R., Vol. I, p. 293-296)

manufactured, default judgment CCFC Order, which was based entirely on uncontested, self-serving, hearsay testimony and unprovable bigamy of Ahmed, the Respondent's case is dead in the water.

I. RESPONDENT MISSTATES THE LAW AND FACTS IN HER INTRODUCTION.

A. The action in this matter is not a posthumous annulment but rather a determination of heirs which falls squarely within the jurisdiction of the Probate Court.

The CCFC Order did not directly determine whether or not Respondent was the wife of James Brown, and therefore his heir. This action determines whether or not Respondent is an heir of the Estate of James Brown ("Estate"). The Family Court in South Carolina does not have this right, as Respondent claims. The Probate Court in South Carolina has exclusive jurisdiction to determine the heirs of an estate. *See* S.C. Code Ann. § 62-1-302 (a)(1). Whether someone is actually the spouse and was validly married to a deceased individual is a proper action that should be heard **exclusively** before the Probate Court in South Carolina when it is determinative of that person as an heir. When the ultimate issue is heirship, the Probate Court (not the Family Court as argued by Respondent) has exclusive jurisdiction over determining marital rights. *See* Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (2014); Thomas v. McGriff, 368 S.C. 485, 629 S.E.2d 359 (2006). As James J. Brown is now deceased, the ultimate issue is heirship. Therefore, the issue left to be determined, as it relates to Respondent, is whether she is a proper heir of his estate as the surviving spouse. The Court of Common Pleas, sitting in the shoes of Probate Court through removal, has exclusive jurisdiction to review the issue of whether Respondent is the surviving spouse

for purposes of being an heir of the estate of James J. Brown. The lower court has exercised this right and made an erroneous final determination that Respondent is an heir of James J. Brown, based on the CCFC Order, which this Court needs to rectify.

Further, it is Respondent, in her twisted logic, who is arguing that posthumous annulments can occur in South Carolina rather than Appellants as Respondent contends. If the lower court's ruling were allowed to stand, then posthumous annulments could occur in South Carolina. Respondent has gone to great lengths to argue, before the lower court and this Court, that neither James Brown nor his heirs had standing to be involved in the CCFC decision as it was an annulment action between Ahmed and Respondent.[2] If the ruling in this matter is allowed to stand, which purportedly collaterally estops a challenge to decedent's own marital status, posthumous annulments in South Carolina would be allowed from this point forward. In fact, based on the Respondent's arguments, James Brown could not have challenged the CCFC Order in his own annulment action. This argument is ludicrous, chaotic and unfounded.

For instance, if James Brown died in 2003, prior to Respondent obtaining the annulment order, then by her argument and the lower court's ruling, she could file an action for annulment after the death of James Brown. As she contends, neither James Brown nor the Estate have standing to be involved in a Respondent-Ahmed annulment action as they are not parties. The family court in which she was applying for the annulment action would have no reason to know that she had a second husband who was dead and would not even think to ask about such a fact because it is bigamy. The family court ruling would occur, and based on Respondent's argument, it would be binding on

[2] *See* Respondent's Brief, p. 33.

James Brown, the Estate and his heirs posthumously (which is really no different than what she has done in this matter). The only facts that would be necessary, under Respondent's argument for the above to occur, are that she and Ahmed were both alive and still married in accordance with their marriage ceremony and license on the records. Based on this logic, Respondent could file the annulment action years from now and become James Brown's spouse. This is the chaos that Lukich addresses. Respondent's analysis and argument is the type of prospective/retrospective application that Lukich warns cannot happen. Based on the foregoing, Respondent's argument is logically flawed. Ruling in Respondent's favor would validate the ability of bigamists to obtain an order from a family court invalidating a prior marriage at any point in time, including after the death of a second bigamously married spouse, who, according to Respondent, would have no ability to challenge the result. With Respondent's logic, a decedent in South Carolina could become posthumously married even though the relationship was supposed to be void *ab initio* in accordance with S.C. Code Ann. § 20-1-80. Lukich precludes this result when applied in accordance with Appellants and the South Carolina Supreme Court's approach.

Respondent attempts to argue that Appellants are challenging the CCFC Order.[3] Appellants are challenging its effect based on timing, collateral impact on James Brown's marital status, and as a default judgment that does not bind James Brown. These are wholly different issues, which this Court should examine and determine in favor of Appellants as already argued in their initial briefs.

[3] *See* Respondent's Brief, p. 35.

B. The Personal Representative and heirs have standing to determine the heirs of an estate.

Respondent first argues that surviving spouse status is determined under the South Carolina Probate Code[4] and then in the very next section of her brief attempts to argue that Appellants have no standing to address such an issue.[5] These sections could not be more contradictory. As noted above, this matter is one to determine the heirs of the Estate of James J. Brown. In fact, the first sentence of Respondent's brief states: [t]he issue sub judice is whether Mrs. Brown is the surviving spouse of James Brown for purposes of her elective share and omitted spouse claims ("spousal claims").[6] Respondent apparently agrees that surviving spouse status is at issue and determined under the South Carolina Probate Code.[7] Therefore, this is clearly a probate action. S.C. Code Ann. § 62-3-105 provides:

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

S.C. Code Ann. § 62-3-105.

Appellants are all clearly interested persons, as defined in the South Carolina Probate Code. As interested persons, the Appellants all have standing to be involved in the determination of the heirs of the Estate and spousal status of Respondent.

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[4] Id., pp. 6-10.
[5] Id., p. 10-11.
[6] Id., p. 1.
[7] Id., p. 6 (citing to S.C. Code § 62-2-802(a))

C. The Consent Order does not make James Brown married.

Respondent and James Brown entered into a Consent Order of Dismissal dated August 14, 2004("Consent Order").[8] The Consent Order does not determine that James Brown is married. In fact, it is the opposite. Appellant addressed this in detail in his initial brief.[9] While Respondent attempts to argue that Lukich was not decided at the point that James Brown and Respondent entered into the Consent Order[10], S.C. Code § 20-1-80 existed at that time. James Brown based his dismissal on such statute because it legally determined that his relationship to Respondent was void *ab initio* and the parties consented to the same. Contrary to Respondent's argument in her brief[11], Appellants are not taking the position that dismissal of the James Brown's annulment action granted him an annulment. Appellants merely argue that the annulment was unnecessary because of the application of S.C. Code §20-1-80, which voided the relationship from the beginning thereby making it unnecessary for James Brown to continue with his own annulment action. Respondent claims this argument is inconsistent with Appellants' position, in that if James Brown's marriage is void *ab initio*, then the same would be true for Respondent's marriage to Ahmed[12]. Nothing could be farther from the truth. At the time of the execution of the Consent Order, Respondent's bigamy was a proven fact before a court. The CCFC Order addressed it. Respondent herself admitted that she was married to another man at the time she married James Brown.[13] She had to seek an annulment action to clear her capacity wherein she admitted to such prior marriage. Therefore, there

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[8] *See* Joint Stipulation of Facts, Exhibit 19. (R., Vol. I, pp. 349-350)
[9] Brief of Appellant Terry Brown, pp. 37-39.
[10] *See* Respondent's Brief, p. 12, footnote 15.
[11] Id.
[12] Id., p. 15.
[13] *See* Joint Stipulation of Facts, Exhibit 13, p. 6:17-20. (R., Vol. I, 302, l. 17-20)

was no need to continue the annulment action as facts necessary to invoke S.C. Code § 20-1-80 had been proven thereby enabling the parties to reach a Consent Order. Respondent had no such order at the time she married James Brown relative to her marriage with Ahmed. As such, at the same time Respondent annulled her marriage to Ahmed, she proved that her marriage to James Brown was void for bigamy. No additional action was necessary on the part of James Brown relative to an alleged statutory marriage.

The CCFC Order is further proof as to why the Consent Order only addressed common law marriage. An alleged statutory marriage was impossible based on the facts that Respondent admitted to in the CCFC proceeding. This Court should not confuse the Respondent's binding admitted facts (i.e admissions of a party opponent) with the unsupported hearsay testimony that was created to obtain her court manufactured default judgment annulment. In the same vein, Respondent claims the language in the Consent Order wherein she "waived any claim of a common law marriage" did not waive an alleged statutory marriage. A waiver of an alleged statutory marriage was unnecessary as James Brown and Respondent were not statutorily married based on her own testimony that resulted in the CCFC Order. Therefore, the Consent Order needed only to waive Respondent's right to claim she was James Brown's wife in a common law proceeding or posthumous common law proceeding as contemplated by S.C. Code § 62-2-802(b)(4). As noted under Section II of this brief, Respondent was not James Brown statutory wife in accordance with S.C. Code § 62-2-802. Contrary to Respondent's argument[14], the Consent Order did not need to address this issue.

[14] *See* Respondent's Brief, pp. 6-9.

D. Respondent completely misstates the compensation provisions contained in the estate documents as support for an undue influence claim.

Respondent contends that the estate planning documents of James Brown gave "three discredited men" the right to fifty percent of the gross income plus trustees' fees of the Estate and James Brown Irrevocable Trust u/a/d/ August 1, 2000 ("Trust").[15] First, this is irrelevant to this matter, as it is not an issue at hand, and arguably only interjected for bias. Second, it is factually incorrect based on the actual documents in this matter. Respondent apparently attempts to argue that the provision under Article X(2)[16] of the Trust is a compensation provision. It is not. Item IV(3) of the Last Will and Testament dated August 1, 2000("Will") and Article VIII(3) of the Trust are the compensation provisions.[17] The improperly alleged Article X(2) of the Trust is a tax allocation provision that limits the amount of income, for tax purposes, that may be allocated to administrative expenses for deductibility purposes. It does not allow the Trustee to receive or be paid fifty percent of the gross income of the Trust or Estate as Respondent alleges. Article X(2) of the Trust is in place to protect the charitable status of the Trust, in accordance with Internal Revenue Service regulations and rulings, by limiting the amount of income that can be allocated to a

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[15] *See* Respondent's Brief, p. 5.

[16] Article X(2) of the Trust states: "The stated intent(s) of the Trust Agreement and various Trust(s) established or to be established does not prevent my Trustee(s) from making or directing an allocation of up to 50% of gross income from this Trust for the payment of administrative and managerial expenses incurred on behalf of this Trust as in the sole discretion of my Trustee may be advisable."

[17] The Will compensation provisions are contained in ITEM IV(3): "the individual personal representative shall receive reasonable compensation...." and the Trust compensation provisions in Article VIII(3): "the Trustee shall receive reasonable compensation...".

charitable trust's administrative expenses thereby protecting such trust's charitable exempt status. This provision does not in any way effect the actual compensation paid to the personal representative of the Estate or trustee of the Trust. The compensation paid to the trustee and personal representative is governed by and restricted by the reasonable compensation standard clearly delineated in the documents.[18] To interpret these documents otherwise, is not only misleading but an error.

II. RESPONDENT'S ANALYSIS OF S.C. CODE ANN. §62-2-802(a) FAILS.

Respondent claims that Appellants are precluded from addressing the issue of Respondent as James Brown's wife because the Appellants failed to challenge the issue prior to James Brown's death.[19] Specifically, Respondent argues that Appellants' attempt a post mortem annulment or divorce. Respondent's analysis and case law citation is inapposite to the facts at hand. The cases and argument that Respondent presents relate to claims, by and among, the actual parties that were married (or not married as the case was), who were seeking relief or enforcement of their own rights. The instant action is clearly distinguishable. This action revolves around the impact of a third party order (CCFC Order) on the marital relationship of James Brown and Respondent. The CCFC Order did not involve a direct action between the parties in this matter. Further, if Respondent's argument was correct, an individual, who was already married, could marry a terminally ill individual and then seek to enforce their rights thereafter in the second spouse's estate. Based on Respondent's interpretation of S.C. Code Ann. § 62-2-802, such decedent's estate and heirs would have no right to challenge such individual as a

[18] Id.
[19] *See* Respondent's Brief, p. 7.

bigamist. This cannot be correct. As a result, Respondent's argument that Appellants' are precluded from challenging that she is an heir of the Estate is incorrect. Appellants' seek a declaration that Respondent is not an heir of the Estate because she is not James Brown's wife. They do not seek a post mortem annulment or divorce as Respondent suggests.

Respondent's argument, as to the application of S.C. Code Ann. § 62-2-802, fails on a more fundamental level. This section states:

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

S.C. Code Ann. § 62-2-802.

Respondent glosses over a critically important fact relative to her analysis of S.C. Code Ann. § 62-2-802. She had to actually be married to James Brown at his death for it to apply. S.C. Code § 20-1-80 addresses the issue of her marriage to James Brown at the time of his death. It was void *ab initio* as she was a bigamist. Her CCFC Order and underlying proceeding provided the facts to prove this issue. No marital relationship existed to be analyzed under S.C. Code Ann. §62-2-802.

III. RESPONDENT'S ANALYSIS OF LUKICH V. LUKICH FAILS.

A. The CCFC Order and self-serving, uncontested, inadmissible hearsay testimony used to obtain a default judgment are all that Respondent has in support of her argument.

A simple review of the evidence along with a deep sense of justice and common sense point to but one result this Court should reach. Respondent has no actual evidence that her relationship with Ahmed was bigamous. During the last almost three (3) years of this case while addressing this particular issue, Respondent continues to walk into each

and every hearing, look at the court, state: "CCFC Order", drop the microphone, and walk away. Appellants have been quite frankly confounded by Respondent's continued success in this approach. The reason she does this is because she has not one shred of actual evidence of a bigamous relationship with Ahmed. She has never and does not now present any of the evidence she claims in her testimony to the CCFC that could exist. Without the CCFC Order, this case was over before it began.

She used the CCFC Order to confound the lower court and now attempts to again take the parties and this Court down a rabbit hole of Lukich analysis. She continues her attempt to dazzle and amaze with her legal analysis of Lukich, case law and other statutes all the while hoping no one actually pulls back the shroud on her actual evidence. It is this shroud Respondent creates to hide the conflated facts and conjecture that is the CCFC Order, on which she solely relies.

If she had actual evidence that her relationship with Ahmed was bigamous, it would have and should been presented long ago in an effort to resolve this matter. The reason she continually points to the CCFC Order is because it is all she has. When the self-serving, hearsay laced, court manufactured, default judgment CCFC Order is examined for what it is, only one conclusion can be reached. It is a fantastical story of hearsay and whimsy. It is her portrayal of a self-created bigamous relationship with Ahmed so she could attempt to continue her relationship with the famous James Brown. There is no admissible factual bigamy, no legal bigamy, or even bigamy as it relates to Ahmed. She attempts to present a legal technical argument in the hopes that it will completely remove the evidentiary scales of justice. Respondent desperately wants to avoid further discovery in this matter because she knows she will turn over hollow

weights for her side of the scales. Without, the CCFC Order, her claim as the surviving spouse was over before it began. That is Lukich, pure and simple. Now, she wants this Court to allow this self-created fiction to continue. This cannot and should not happen. This Court should see through her shroud of technical arguments and twisted facts and see this case in its simplest form.

Respondent was married to Ahmed at the time she married James Brown. In an effort to save her chance at being declared James Brown's wife, she had but one option, and that is the attempt to create a technicality on which she could win. The CCFC Order is such attempt.

It is time for this Court to brush aside this collateral attack, and address the matters head on. Respondent was married when she married James Brown. All evidence points to this one easily identifiable and simple set of facts. When this Court weighs the evidence and law on its scales, they should only tip in one direction. Lukich must apply and declare Respondent a bigamist. Any other result would be a gross miscarriage of justice and a legal fallacy based on the state of the law and facts at hand.

B. Respondent's marriage to Brown was void from the beginning.

Contrary to Respondent's arguments in her response brief, Appellants assert, in concert with the South Carolina law, that bigamous marriages are void, not voidable. South Carolina Code §20-1-80 provides:

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

S.C. Code Ann. §20-1-80.

The South Carolina Supreme Court in Wilson v. Dallas[20] referenced the Respondent-Ahmed annulment as follows:

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

Although the Respondent-Ahmed marriage was not an issue before the Court in Wilson v. Dallas, the CCFC Order with its timing and procedural protocol was taken into consideration when contemplating the legitimacy of the settlement and dissolution of James Brown's testamentary intent. The South Carolina Supreme Court was neither requested to nor did it need to opine on the legitimacy of the CCFC Order or Respondent's marital status to James Brown in order to reach a decision to invalidate the dismembering of James Brown's Will and Trust, but chose to do so.

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

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

The following provides clear reasoning why the South Carolina Supreme Court correctly questioned and refused to opine on the lower court's Lukich analysis that Respondent has

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

now adopted. It is undisputed that **at the actual time** (dated December 14, 2001) when Respondent married Mr. Brown, she was still married to Ahmed. Bigamist marriages are void. Respondent, at the time of Wilson v. Dallas, and since has never, in any court, document or deposition, provided a scintilla of support that Ahmed was married when he married Respondent. It is an indisputable fact that Respondent married Ahmed on February 17, 1997 ("Respondent-Ahmed Marriage")[21] and Respondent married James Brown on December 14, 2001.[22] In fact, Respondent further stipulated to the following:

> no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between her and Ahmed.[23]
>
> ...
>
> cannot identify a single person who can testify that Ahmed was married to another person when Tommie Rae and Ahmed participated in the 1997 marriage ceremony."[24]

Although, as identified above, Respondent stipulated that she was not aware of any "order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between her and Ahmed" or she "cannot identify a single person who can testify that Ahmed was married to another person when Tommie Rae and Ahmed participated in the 1997 marriage ceremony". Respondent's testimony in the Ahmed annulment proceeding interestingly lacked equivalent information, testimony, or evidence.

The Respondent-Ahmed marriage certificate is evidence demonstrating Respondent's marriage to Ahmed on February 17, 1997.[25] The Respondent-Ahmed

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[21] *See* Joint Stipulation of Facts, Exhibit 1. (R., Vol. I, p. 255; 265-266)
[22] Id., at ¶¶ 4 and 5. (R., Vol. I, p. 256)
[23] Id. at ¶ 6. (R., Vol. I, p. 256)
[24] Id. at ¶¶ 9-10. (R., Vol. I, p. 257)
[25] Id. at Exhibit 1. (R., Vol. I, p. 255; 265-266)

marriage license application is additional evidence that was also conveniently not presented prior to obtaining the CCFC Order. This marriage license application document[26] contains the only evidence in the form **of sworn testimony from Ahmed that he was, in fact, not married when he married** Respondent.[27] Respondent again provided convenient information as part of her annulment action, but withheld other admissible information and evidence that could have assisted the trial judge.

C. Respondent's analysis of Lukich allows for retrospective application and post mortem annulment.

Respondent's entire Lukich analysis is based on a logical fallacy. If Respondent's Lukich argument is correct, then why did Respondent even file the annulment action in 2004? Under her theory, the CCFC Order was unnecessary and irrelevant. Respondent's argument when carried to its logical conclusion is that without the CCFC Order any court in this state would find her marriage to Ahmed annulled because bigamous relationships are void *ab initio*. Therefore, based on Respondent's argument, she did not need a court to clear her capacity to marry James Brown. She could have done so with or without the CCFC Order. This is the chaotic position that this Court and

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[26] Respondent argues that this document is inadmissible hearsay as it is an application and not a public record. *See* Respondent's Brief, p. 70. This is the first time Respondent has raised this issue and as such should not be allowed. Even so, Respondent's argument is incorrect. First, Appellant argued that it was an exception to hearsay under 803(9), SCRE not 803(8) as Respondent contends. Further, it also qualifies as an exception under 803(8). As Appellant Terry Brown noted in his initial filing in this matter wherein the Texas Statute was cited, the application was filed with Texas Clerk as prescribed by the Bureau of Vital Statistics of the State Department of Health. Upon request, the license and application were provided as records which were kept as part of the process (i.e. activity of the office) for marriage licenses in Texas. 803(8), SCRE applies, but 803(9) as actually argued by Appellant is directly on point in providing a hearsay exception to this evidence.

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

the Supreme Court of South Carolina identified in Lukich. S.C. Code Ann. § 20-1-80 clearly requires entry of an order to declare a marriage void for it to be effective when it states in its last sentence that the "first marriage shall be declared void by the sentence of a competent court." This is so regardless of what type of order is entered. In this instance, it just so happened to be an entry declaring Respondent's first marriage annulled for among other grounds bigamy. The entry of an order is necessary so that third parties (i.e. James Brown) would know whether or not an individual is already married. Without such a procedure, the floodgates of litigation would open in both family courts and probate courts to determine if bigamy was committed.

Respondent attempts to twist and pervert the idea of a bigamous marriage being void *ab initio.* Appellants have never disagreed that a bigamous marriage is void *ab initio.* Neither party to a bigamous relationship has a right to enforce marital contract rights on the other because they were never married. What does have to occur is letting the world know they are no longer married because they attempted to tell the world they were married (otherwise why would annulments for bigamy even exist as a cause of action – they would be unnecessary under Respondent's argument). This case would not be in the Court of Appeals at this moment if Respondent had never obtained the CCFC Order. She would factually and legally remain married to Ahmed at the time of her marriage to James Brown and be declared a bigamist. Obtaining the CCFC Order did not change the facts that clearly make her a bigamist. Understanding this legal and factual relationship is why her argument fails.

Respondent argues that because she obtained an annulment before James Brown sued her for annulment that she is no longer a bigamist. From February 17, 1997 to April

15, 2004, in the eyes of the law, based on the facts stipulated to in this matter, and the facts presented to obtain the CCFC Order, Respondent was married to Ahmed.[28] Had James Brown sued her for annulment prior to her filing in Charleston County, this Court would have upheld any annulment granted to James Brown by a lower court on the factual and legal basis that she was married prior to and continuing through her marriage to him. There would have been no legal or factual basis annulling her marriage to Ahmed. The CCFC Order does not erase or change this result. This is Lukich. This is the chaos that is so easily identified by this Court and the South Carolina Supreme Court in the Lukich decisions. Respondent wants South Carolina to be a race annulment notice jurisdiction rather than what it is now which is an annulment notice jurisdiction. This is the point that South Carolina Supreme Court makes in its Lukich decision regarding prospective and retrospective analysis. At the time she married James Brown, she was factually and legally married to Ahmed. No other facts or law need to be examined. Respondent is a bigamist and not the wife of James Brown.

The Respondent tries to delineate between void and voidable in her argument.[29] Specifically, Respondent points to footnote 2 of this Court's opinion as controlling in the analysis in this matter.[30] However, this Court indicated that:

> the general rule applicable in situations as before us is stated in 52 Am. Jur. 2d Marriage § 57:
>
> Apart from statute, **bigamous (Respondent-Brown)** marriage does not acquire validity when the prior subsisting **(Respondent-Ahmed)** marriage is legally terminated by divorce or by the death of the first spouse. The same rule is generally followed where the prior subsisting **(Respondent-Ahmed)** marriage is annulled **after** the second **(Respondent-Brown)** marriage is contracted, even

[28] *See* Joint Stipulation of Facts, ¶¶1, 2 and 6. (R., Vol. I, pp. 255-256)
[29] *See* Respondent Brief, pp. 13-20.
[30] Id., p. 20-21.

> though the purpose of an **(Respondent-Ahmed)** annulment proceeding is to declare that no valid marriage ever took place between the parties **(Respondent-Ahmed)** or that no valid marriage relation ever existed between the parties **(Respondent-Ahmed)**. Even where the **(Respondent-Ahmed)** annulment decree expressly declares the first **(Respondent-Ahmed)** marriage null and void ab initio, it does not relate back so as to validate the second **(Respondent-Brown)** marriage. In order for the subsequent **(Respondent-Brown)** marriage to be valid, it has been held that there must be a new ceremony **following** the termination of the earlier **(Respondent-Ahmed)** marriage. (Emphasis Added.)

Lukich v. Lukich, 368 S.C. 47, 55, 627 S.E.2d 754, 758, 2006 S.C. App. LEXIS 16, *10-11 (S.C. Ct. App. 2006)

In this case, the Respondent's marriage to Ahmed was valid until she made it void with the CCFC Order declaring it void. Because Respondent could have remained married to Ahmed because there is no evidence of bigamy, she chose to annul the marriage thereby making it voidable. Without the CCFC Order her marriage would not have been declared void and Lukich would clearly apply, as Respondent has presented no facts otherwise. As a result, the distinction that Respondent attempts to make in this matter related to void versus voidable is irrelevant in the context of court obtained annulments. Interestingly enough, the South Carolina Supreme Court affirmed this Court's ruling in Lukich but did not affirm the analysis. The South Carolina Supreme Court chose to write its own opinion and analysis. This opinion was based on a strict statutory construction in the context of bigamous marriages.

Query these issues. Under Respondent's argument how would the rest of the world ever know on what grounds a marriage was voided? Respondent argues that a bigamous marriage is "automatically" void by being bigamous. How does the world (i.e third parties) know that the original relationship was a bigamous one? How would one know if a marriage was declared void for bigamy or intoxication, as the Respondent attempts to do with its hair splitting attempt to distinguish Lukich? The only way this can

occur is through an entry of a court order thereby setting a date in time when the prior marriage is dissolved for whatever reason.

Respondent's argument analyzes the bigamous relationship only from the perspective of the parties involved in the bigamous relationship and fails to address the chaos created for third parties. Appellants argument, and the correct Lukich analysis, addresses the issue from all parties perspectives including unwitting third parties who marry one of the original parties to a bigamous relationship. Appellants' analysis and the correct application of Lukich creates a consistent, logical result every time based on the point in time when all of the parties were married, which is completely in the control of the parties in the relationships (i.e. an individual can clear capacity to marry before entering into a bigamous relationship). Respondent's analysis changes based on who obtained what court order first (i.e. an individual no longer commits the crime of bigamy if he or she files in the courthouse first).

Respondent argues, that by obtaining a suspect default judgment determination with inadmissible, uncontested, self-serving, hearsay evidence as the only evidence she presented in 2004, that she made her first marriage void rather than merely voidable. She fails to come forward, in this proceeding or any other for that matter, with any admissible evidence that would actually declare her marriage to Ahmed void. This calls into question whether her marriage was in fact void or voidable based on the facts as presented to the CCFC.

Respondent's analysis requires a court to inquire into the type of bigamy that occurred (i.e was it void or voidable). This creates the opportunity for gamesmanship and chaos, as has occurred in this matter. The South Carolina Supreme Court recognized

this and took a more common sense approach. Its Lukich decision simply declared bigamy to be bigamy. It does not matter what type of bigamy occurs. Respondent knew she was previously married when she married James Brown. She should have sought an annulment prior to marrying James Brown. Instead, she chose to conceal it and try to fix the problem later. Bigamy is bigamy. Appellants' Lukich analysis is the only sensible and logical result when applied as a snapshot in time of the facts as they relate to the respective parties' marriage relationships, rather than as Respondent contends, a constantly morphing set of facts and filing dates. How can a bigamous marriage be void if it can later be revived by an annulment? Void is void.

Additionally, Respondent fails to address the argument that her CCFC Order clearly and effectively ended her marriage to James Brown. As noted in Appellants initial brief, Respondent would be estopped from challenging certain facts as entered in the CCFC Order and underlying hearing.[31] The facts contained in the CCFC Order and related transcript bind Respondent as a party to the proceeding.[32] The facts of such underlying matter indicate she was married to Ahmed prior to marrying James Brown. As such, a court of competent jurisdiction entered an order that not only annulled her marriage to Ahmed, but also confirmed facts sufficient to invoke the application of S.C. Code Ann. § 20-1-80. This resulted in confirmation with both facts and law, with the CCFC Order, that both marriages (Ahmed-Respondent and Brown-Respondent) did not exist *ab initio*. James Brown's counsel reached this conclusion as to James Brown's

[31] *See* Appellant Brief of Terry Brown, pp. 20.

[32] Appellants' have consistently argued the same is not true for them as James Brown was not a party to such initial proceeding and therefore not preclude by collateral estoppel or res judicata from challenging the same.

annulment action, negotiated the signed Consent Order, and disposed of the only marital issue remaining, which was a potential claim for common law marriage by Respondent.

IV. THE CCFC ORDER IS NOT BINDING ON JAMES BROWN OR HIS HEIRS.

Appellants have extensively addressed the binding effect of the CCFC Order in their initial briefs.[33] However, as additional response to Respondent's brief, Appellants are not arguing that Respondent had to foresee every foreseeable third person who might question the validity of her marriage to James Brown as she contends.[34] She only had to foresee one party, James J. Brown. Additionally, her claim that she would have to spend the rest of her life litigating the issue with third parties or future husbands as it relates to her relationship with Ahmed is completely unfounded.[35] As she obtained the CCFC Order on April 15, 2004, no additional action would be necessary to address claims by third parties related to her relationship with Ahmed. The only party she had issue with after her annulment with Ahmed was James Brown, which she continued to deal with an ultimately resolved in the form of the Consent Order.

V. RULE 4(d)(8), SCRCP APPLIED TO THIS MATTER NOT RULE 5(b)(1) IN ACCORDANCE WITH RULE 17, SCRFC THEREBY MAKING THE CCFC ORDER A DEFAULT JUDGMENT.

Respondent, yet again, twists the facts in effort to shroud the default judgment that was obtained by her in the CCFC Order. The idea the CCFC Order was a suspect and hastily granted order was not first raised by Appellants. The Supreme Court of South Carolina noted: "Tommie Rae's request for an annulment from Ahmed was hastily

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[33] *See* Appellant Brief of Terry Brown, pp. 20-30.
[34] *See* Respondent's Brief, p. 33.
[35] *See* Respondent's Brief, p. 33.

granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her." Wilson v. Dallas, 403 S.C. 411, 434, 2013 S.C. LEXIS 240, *35 (S.C. 2013), footnote 16.

The similarities in the procedural posture in this matter and Lukich are striking. In fact, Respondent notes that Mrs. Lukich sneaked off and obtained an annulment before Judge Frances Segars-Andrews in Charleston County while the second husband's matter was pending in Berkeley County.[36] In Lukich, "[a]n uncontested hearing was held on October 31, 2003 before Judge Frances Segars-Andrews."[37] The complaint was filed October 21, 2003, the hearing was held October 31, 2003, and the order annulling that marriage signed the same day as the hearing.[38] As in Lukich, Respondent sneaked off to the Charleston County family court in front of, ironically, the same Judge Frances Segars-Andrews and obtained an uncontested default judgment to have her first marriage annulled.[39] Respondent's hearing was held on April 15, 2004 and the order annulling her marriage signed the same day as the hearing.[40] As occurred in Lukich, this Court should find that the declaration of an annulment with Ahmed did not validate the Brown-Respondent marriage, but conclusively determined that she was married to neither Ahmed or James Brown.

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[36] *See* Respondent's Brief, p.14.
[37] Lukich v. Lukich, 368 S.C. 47, 51, 627 S.E.2d 754, 756, 2006 S.C. App. LEXIS 16, *2 (S.C. Ct. App. 2006).
[38] Lukich v. Lukich, 379 S.C. 589, 591, 666 S.E.2d 906, 906, 2008 S.C. LEXIS 284, *2 (S.C. 2008), footnote 1.
[39] *See* Joint Stipulation of Facts, Exhibits 12 and 13. (R., Vol. I, pp. 293-313)
[40] Id.

Further, Respondent claims that there is nothing suspect related to the CCFC Order in this matter and Ahmed was properly served.[41] Specifically, she claims that Rule 17, SCRFC makes rule 5(b)(1) apply to her attempted service of her **Summons and Complaint** in accordance with Schleicher v. Schleicher.[42] Upon review of Schleicher, it becomes clear that Rule 5(b)(1) allows service in the Family Court to be complete "upon mailing of all pleadings and papers **subsequent to service of the original summons and complaint**". The Schleicher case cited by Respondent specifically denotes that service of the Summons and Complaint is governed by Rule 4(d)(8), SCRCP. The Schleicher case does not state that Mr. Schleicher was never properly served the Summons and Complaint (as occurred in Ahmed-Respondent matter). It states he did not answer. This is wholly different than this matter. Respondent attempted to serve her Summons and Complaint on Ahmed, but failed.[43] In fact, Respondent noted in several affidavits that such documents were never served on Ahmed.[44] The family court ultimately ordered Ahmed served by publication, which resulted in the entry of a default judgment. The Schleicher case supports Appellants' position that Rule 4(d)(8) applies, and as argued in their initial briefs, the CCFC Order is a default judgment. The idea that this Court would validate Respondent's request to use a default judgment as a weapon against James Brown without any actual proof of the self-serving, uncontested, inadmissible hearsay testimony is patently unjust and procedurally deficient. At a minimum, discovery should continue to disprove Respondent's alleged claim of being the wife and therefore an heir

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[41] *See* Respondent's Brief, pp. 55-60.
[42] Schleicher v. Scheicher, 310 S.C. 275, 277, 423 S.E.2d 147, 148-149 (Ct. App. 1992).
[43] *See* Joint Stipulation of Facts, Exhibits 5, 6, 7, 8, 9, 10, 11, 12. (R., Vol. I, pp. 274-296)
[44] Id.

of the Estate. In reality, the correct declaration is that she is not an heir, as she is not James Brown's wife.

VI. APPELLANTS ARE NOT BOUND BY A PRIVATE SETTLEMENT AGREEMENT.

Respondent attempts to argue that Appellants are bound by the private settlement agreement that the parties executed in 2009 in this matter.[45] First, the lower court, in the order that is the subject of this appeal, did not rule that Respondent was the surviving spouse as a result of the parties signing the 2009 settlement agreement. Therefore, this issue is not properly before the Court.

Second, if the settlement agreement was such an enforceable and binding agreement, the Respondent should have filed suit on this contract years ago. The statute of limitations to enforce a contract action in South Carolina is three (3) years.[46]

Third and most importantly, the 2009 settlement agreement was struck down as illegal by the South Carolina Supreme Court in Wilson v. Dallas.[47] As a result, the settlement agreement to which Respondent refers, failed as it was illegal, lacked consideration and was rescinded thereby making the settlement agreement void ab initio and a nullity. See Crowe v. Cherokee Wonderland, Inc., 379 F.2d 51 (1967) (failure of consideration nullifies a contract); Groesbeck v. Marshall, 44 S.C. 538 (1895) (contract based on illegal consideration is null and void); Rice & Santos, Inc. v. Jones, 279 S.C. 201 (1983) (rescission occurs where the parties are returned to the status quo). Based on the foregoing, the 2009 settlement agreement is an illegal, unenforceable, and rescinded

[45] Respondent's Brief, pp. 62-65.
[46] *See* S.C. Code Ann. § 15-3-530(1).
[47] Wilson v. Dallas, 403 S.C. 411, 2013 S.C. Lexis 240 (S.C. 2013).

contract that has no binding effect on any of the parties in this matter. As such, S.C. Code § 62-3-912 cannot apply.

VII. APPELLANTS DO NOT BEAR THE BURDEN OF PROOF AS IT IS RESPONDENT WHO IS ATTEMPTING CLAIM THAT HER MARRIAGE TO JAMES BROWN IS VALID.

Appellants do not bear the burden of proof. Respondent does. This issue was addressed by Appellant in his initial brief.[48] Even if Appellants did bear the burden of proof, such burden was met when Appellants' proved, and Respondent agreed to in the Joint Stipulation of Facts, that she was legally and factually married to Javed Ahmed at the time she married James Brown.

CONCLUSION

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

This 12th day of June, 2017.

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[48] *See* Brief of Appellant Terry Brown, pp. 39-48.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown

Tommie Rae Brown, Respondent,

v.

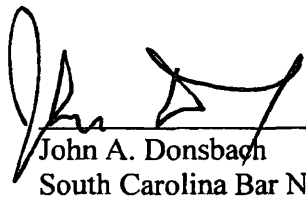
David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

June 12, 2017.



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IN THE STATE OF SOUTH CAROLINA
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FINAL BRIEF OF APPELLANT MICHAEL DEON BROWN

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Michael Deon Brown, by and through his undersigned counsel, adopts all of the final brief with citations to the record pursuant to SCACR 208(b)(6) of Appellant David C. Sojourner Jr., in his capacity as Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the Estate of James Brown Irrevokable Trust.

In the event that this Court does not allow Appellant Michael Deon Brown to adopt in full Appellant David C. Sojourner's brief, then Appellant Michael Deon Brown in the alternative hereby adopts all of the final brief previously filed by Appellant Terry Brown with citations to the record pursuant to SCACR 208(b)(6).

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IN THE STATE OF SOUTH CAROLINA
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STATEMENT OF ISSUES ON APPEAL

1. Whether factual findings in a family court order annulling a prior marriage apply to non-parties to the annulment action.

2. Whether an annulment which decrees a pre-existing marriage void *ab initio* relates back so as to give validity to a subsequent, otherwise bigamous, marriage.

STATEMENT OF THE CASE

James Joseph Brown ("Decedent") died on December 25, 2006 in Aiken County, South Carolina. Following his death, Tommie Rae Hynie Brown ("Respondent"), claiming to be Decedent's surviving spouse, brought an action in probate court seeking to set aside Decedent's last will and testament and irrevocable trust agreement based upon claims of undue influence and fraud. Respondent also asserted she was entitled to an elective share or an omitted spouse's share of Decedent's Estate. The probate court transferred Respondent's claims to the circuit court.

This Court is well-versed in the complex and lengthy procedural history of this action. (*See Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).) Since the Supreme Court's reversal and remand of the case in 2013, the former personal representatives of the Estate and trustees of the Trust, Adele J. Pope, Esquire, and Robert L. Buchanan, Esquire, were removed for cause. On October 1, 2013, Russell L. Bauknight was appointed as Personal Representative of the Estate and Trustee of the Trust and David C. Sojourner, Jr., Esquire (the "LSA") was appointed as Limited Special Administrator of the Estate and Limited Special Trustee of the Trust. The LSA's appointment is limited to defending the Estate and Trust against certain will and trust challenges, including the claims filed by Respondent.

The present dispute arose out of a motion filed by the LSA on March 13, 2014 to modify certain protective orders the lower court had issued in February and March 2008, prior to the LSA's appointment, which had the effect of shielding from discovery certain writings created by Respondent (characterized in this litigation as "Respondent's diaries"). The LSA sought to review the diaries and asked the Court to remove the

protections placed on the diaries so the LSA could use the writings in defending the Estate and Trust against Respondent's will and trust challenges.

During a hearing on the LSA's motion to modify the protective orders, on March 31, 2014, Respondent's attorneys argued against producing the diaries or further responding to discovery. Respondent's counsel stated they intended to file a motion for partial summary judgment in which Respondent would show she was Decedent's "surviving spouse" as a matter of law, without reference to any disputed fact, including whatever evidence might be contained in the diaries. (*See* March 31, 2014 Hearing Transcript, R. pp. 2455-2462.) Based upon Respondent's assertions, the lower court deferred ruling on the LSA's motion and stayed discovery pending a decision on the anticipated summary judgment motions.

Respondent filed a Motion for Summary Judgment on April 24, 2014. (*See* Respondent's Motion for Summary Judgment, R. p. 231.) In the motion, Respondent contended she was entitled to a determination that she is Decedent's surviving spouse based solely upon the legal effect of an order entered by the Charleston County Family Court on April 15, 2004, which annulled Respondent's February 1997 marriage to her first husband, Javed Ahmed ("Ahmed Annulment Order"). (R. pp. 245-248.) The Ahmed Annulment Order was issued *after* Respondent purported to marry Decedent. Respondent argued the Ahmed Annulment Order was "binding on the world" in its entirety, including Decedent and Decedent's heirs and Estate. (March 31, 2014 Hearing Transcript, R. p. 2455.)

On May 29, 2014, the Estate filed its own Motion for Summary Judgment, arguing Respondent cannot be Decedent's surviving spouse because her marriage to

Decedent was bigamous. (*See* LSA's Motion for Summary Judgment, R. pp. 250-251.) The LSA relied upon stipulated evidence that Respondent's previous marriage to Mr. Ahmed, in 1997, was not caused to be ended or annulled before Respondent's marriage to Decedent in 2001. (*Id.*) The LSA contended the Charleston County Family Court's April 2004 order granting Respondent an annulment from Mr. Ahmed cannot relate back to retroactively validate Respondent and Decedent's otherwise bigamous December 2001 marriage and that Respondent's marriage to Decedent was, therefore, void from its inception. Other parties to this action, including Daryl Brown and Terry Brown, also filed supporting and opposing memoranda. In an effort to eliminate genuine disputes of material fact, the parties entered into a Joint Stipulation of Facts. (*See* Joint Stipulation of Facts, filed September 5, 2014, R. pp. 254-350.)

The lower court heard oral argument on the parties' motions on November 24, 2014. (*See* Hearing Transcript, November 24, 2014, R. pp. 2454-2463.) On January 13, 2015, the lower court issued an order granting Respondent's Motion for Summary Judgment, finding Respondent to be Decedent's surviving spouse as a matter of law. (*See* Order, filed January 13, 2015, R. pp. 53-102.) The lower court denied the LSA's cross motion for Summary Judgment. (*Id.*) The court's order was based upon its conclusion that the Charleston County Family Court's April 15, 2004 Order, granting Respondent an annulment "ab initio" from Mr. Ahmed, was "binding on [Decedent] and his heirs and must be respected by this Court." (*See* Order at R. p. 98.)

The lower court applied the underlying factual findings from the Ahmed Annulment Order against all parties, (Order at R. pp. 60, 72-97), concluding the court could not "re-open or re-litigate the underlying findings of fact of the annulment order,

which in this case would have the same effect as disregarding the annulment order." (*Id.* at R. p. 72.) The lower court found, based on findings in the Ahmed Annulment Order alone, that Respondent's "attempted marriage to Ahmed (Marriage 1) was void ab initio and never a marriage. Therefore[,] [Respondent] had no impediment to her marriage to [Decedent], and that marriage (Marriage 2) is valid." (*Id.* at R. p. 68.) Further, the lower court held the Charleston County Family Court's declaration of annulment ("void *ab initio*") applied retroactively so as to validate Respondent and Decedent's 2001 marriage ceremony. (*See* Order at R. pp. 62-72.) Shortly thereafter, the LSA and nine other parties filed motions to reconsider.[1]

On June 30, 2015, the lower court heard oral argument on the parties' outstanding motions to reconsider. (*See* Hearing Transcript, June 30, 2015, R. pp. 2637-2733.) At the hearing, the lower court asked whether its order could be based solely upon application of the undisputed facts to the appellate court decisions in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006) ("*Lukich I*"), *modified* 379 S.C. 589, 666 S.E.2d 906 (2008) ("*Lukich II*"). (*Id.* at p. 54, lines 2-5, 10-13; p. 55, lines 7-15; p. 67, line 15 – p. 68, line 4; p. 87, line 24 – p. 88, line 9.) The parties agreed additional briefing limited solely to application of the undisputed facts of this case to the *Lukich* decisions would be useful to the court's decision.

Respondent filed a Memorandum in Opposition to the Motions to Alter, Amend,

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[1] *See* LSA's Motion to Alter, Amend and Reconsider, filed January 26, 2015 at R. pp. 825-883; Larry Brown, Venisha Brown, Deanna Brown-Thomas, and Yamma Brown's Motion to Alter or Amend Judgment and/or for Reconsideration, filed January 26, 2015 at R. pp. 884-887; Daryl Brown's Motion to Alter, Amend and Reconsider, filed January 28, 2015 at R. pp. 888-896; Jeanette Mitchell's Motion to Reconsider, Alter or Amend, filed January 28, 2015 at R. pp. 897-909; Adele J. Pope's Motion to Alter or Amend and/or Reconsider and Vacate Orders, filed January 30, 2015; Michael Deon Brown's Motion to Alter, Amend and Reconsider, filed February 2, 2015 at R. pp. 913-920; Terry Brown's Motion to Alter, Amend and Reconsider, filed February 20, 2015 at R. pp. 921-1006.

and Reconsider on June 28, 2015. The LSA and Terry Brown filed supplemental memoranda in support of their motions on July 30, 2015. All of the supplemental briefing submitted by the parties focused on applying the *Lukich* decisions to the facts of the present action. Without further oral argument, the lower court denied the parties' motions to reconsider by order dated October 26, 2015. (*See* Order, October 26, 2015, R. pp. 103-121.)

The LSA, along with other parties,[2] timely filed a Notice of Appeal on November 20, 2015.

FACTS

Respondent's first marriage occurred on February 12, 1997 when Respondent and Javed Ahmed obtained a state marriage license in Texas. (*See* Joint Stipulation of Facts at ¶ 1, R. pp. 255, Stipulation Exhibit 1, R. pp. 265-266.) Respondent and Mr. Ahmed were married on February 17, 1997 in Harris County, Texas. (*Id.* at ¶ 2, R. p. 255.) On December 10, 2001, Respondent and Decedent obtained a state marriage license in South Carolina. (*Id.* at ¶ 4, R. p. 256.) Respondent and Decedent participated in a marriage ceremony in Beech Island, South Carolina on December 14, 2001. (*Id.* at ¶ 5, R. p. 256, Stipulation Exhibit 4, R. pp. 269-270.)

Between Respondent's first, February 17, 1997, marriage to Mr. Ahmed and second, December 14, 2001, marriage to Decedent, a span of less than five years' time,[3] no order of any court ended or caused to end the marriage between Respondent and Mr.

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[2] Other parties also filed a notice of appeal, including, Deanna Brown-Thomas, Yamma Brown, and Venisha Brown on November 20, 2015; Michael Deon Brown, November 24, 2015; Terry Brown, November 24, 2015; Daryl Brown, November 24, 2015.

[3] South Carolina law applying a presumption that a spouse who has been absent for a period of five years, and whose whereabouts are unknown, is dead, is therefore inapplicable in this case. *See* S.C. Code Ann. § 20-1-50.

Ahmed. (*See* Joint Stipulation of Facts at ¶ 6, R. p. 256.) Respondent admits no other occurrence of which Respondent is aware, ended or caused to end the alleged marriage.[4] (*Id.*)

Two years after her second marriage to Decedent, Respondent filed a family court action in Charleston County, South Carolina, seeking an annulment of her first marriage to Mr. Ahmed. (*See* Joint Stipulation of Facts ¶ 7, R. p. 256; Stipulation Exhibit 5, R. pp. 271-273.) Respondent apparently made certain efforts to locate and serve Mr. Ahmed with the complaint, (*id.* at ¶ 7, R. p. 256, Stipulation Exhibit 6, R. pp. 274-279,) but Mr. Ahmed was never served personally, and Mr. Ahmed never answered or otherwise appeared. (*Id.* at ¶ 17, R. p. 257; Stipulation Exhibit 13, R. pp. 297-313.) In the annulment proceeding, Respondent asserted her marriage to Mr. Ahmed was, in part, void on the basis of bigamy, on the grounds that Mr. Ahmed was allegedly married to one or more women at the time he and Respondent wed. (*Id.* ¶ 7, R. p. 256, Stipulation Exhibit 5, R. pp. 271-273.) The family court held a final hearing on April 15, 2004 at which the only evidence was Respondent's own unopposed hearsay testimony. (*Id.* at ¶ 18, R. p. 258; Stipulation Exhibit 13, R. p. 297-313.)

The Charleston County Family Court issued an order granting Respondent and Mr. Ahmed an annulment on April 15, 2004 ("Ahmed Annulment Order"). (*See* Joint Stipulation of Facts at ¶ 11, R. p. 257; Stipulation Exhibit 12, R. pp. 293-296.) The Court based the entire order upon Respondent's unopposed verbal testimony, including hearsay testimony about Mr. Ahmed's alleged previous Pakistani marriages. (*Id.* at ¶ 18, R. p.

[4] For the purpose of the present dispute, the LSA contends the only "other occurrence" relevant to the Court's decision would be Mr. Ahmed's death. *See* S.C. Code Ann. § 20-1-80 ("All marriages contracted while either of the parties has a former wife or husband ***living*** shall be void.").

258; Stipulation Exhibit 13, R. pp. 297-313.)

To date, Respondent has admitted she can identify no documents or other tangible evidence showing Mr. Ahmed was married to another person when she and Mr. Ahmed married on February 17, 1997. (*See* Joint Stipulation of Facts at ¶ 9, R. p. 257; Stipulation Exhibits 5-13, R. pp. 271-313.) She relies solely upon her unopposed hearsay testimony which was admitted by the Charleston County Family Court and upon which the Ahmed Annulment Order was based. Similarly, Respondent can identify no person (except, Respondent claims, Mr. Ahmed and the unknown and unnamed "wives" in Pakistan "to whom [Mr. Ahmed] was allegedly married") who can testify Mr. Ahmed was married to another person when the two purported to marry in 1997. (*Id.* at ¶ 10, R. p. 257; Stipulation Exhibit 13, R. pp. 297-313.)

Decedent gave Respondent certain funds which Respondent claimed she used to pay her legal fees for the Ahmed Annulment Action. (*See* Joint Stipulation of Facts at ¶ 13, R. p. 257.) Decedent was aware the Ahmed Annulment Action existed, as Respondent's attorney sent Decedent's attorney a copy of the filed pleadings and the final order. (*Id.* at ¶¶ 13, 14, R. p. 257; Stipulation Exhibit 14, R pp. 314-328.) Decedent was not a named party to the Ahmed Annulment Action and never became a party, through intervention or otherwise. (*Id.* at ¶ 12, R. p. 257.) Decedent did not participate in the hearing or any other facet of the Ahmed Annulment Action, and was not a joint client of Respondent's attorney. (*Id.* at ¶ 12, 15, and 16, R. p. 257; Stipulation Exhibit 13, R. pp. 297-313.)

ARGUMENTS

I. RESPONDENT HAS THE BURDEN OF PROVING SHE IS DECEDENT'S SURVIVING SPOUSE.

To succeed on all three of her will and trust challenges,[5] Respondent must show she qualifies as Decedent's "surviving spouse" as a matter of law. The burden of proving surviving spouse status is on the person claiming an interest in the estate, in this case, Respondent. *See Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d.788 (1983); *Calhoun v. Calhoun*, 277 S.C. 527, 290 S.E.2d 415 (1982).

If Respondent cannot carry her burden on the threshold element that she is Decedent's surviving spouse, the Estate would be entitled to summary judgment. S.C. R. Civ. P. 56. *See Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). ("With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case.") (citation omitted); *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 2557 (1986) ("If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law."). Based on evidence in the record, or lack thereof, Respondent cannot succeed on the merits of her claims because she has failed to meet her burden of proving she and Decedent were lawfully married to each other at the time of Decedent's death.

As a fundamental tenet of South Carolina law, there is a strong presumption in

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[5] Respondent has asserted an elective share claim, pursuant to S.C. Code Ann. § 62-2-201; an omitted spouse claim, pursuant to S.C. Code Ann. § 62-2-301; and has claimed that Decedent's Will and Trust should be set aside on the basis of fraud and undue influence.

favor of marriage. *Tarleton v. Thompson*, 125 S.C. 182, 118 S.E. 421 (1923). Where there are competing marriages, our Supreme Court has set forth a burden shifting analysis for determining which marriage is valid. *Hallums v. Hallums*, 74 S.C. 407, 4 S.E. 613 (1906). This Court has applied the burden shifting inquiry, reversing a lower court for failing to apply the proper analysis. *Yarbrough v. Yarbrough*, 280 S.C. 546, 551-52, 314 S.E.2d 16, 19 (Ct. App. 1984) (finding husband did not overcome presumption that marriage to first wife was terminated by death or divorce).

Once a marriage is shown to exist, the person attacking its validity has the burden of proving invalidity. *Id.* "[W]here the evidence shows that the same person entered into a conflicting marriage, a presumption arises that the former marriage was dissolved by death or divorce. *Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18 (*citing Hallums*, supra). It is upon the party seeking to invalidate the second marriage, in this case, the LSA, to overcome this initial presumption. *See id.* ("If the law raises a presumption in favor of one party to litigation, the burden of going forward with the evidence devolves on the other party." (citing 52 Am. Jur. 2d *Marriages* § 130 (1970)).

Although Respondent has produced a certificate of marriage showing Respondent and Decedent attempted to marry on December 14, 2001, (*see* Joint Stipulation of Facts Exhibit 4, R. pp. 269-270), the stipulated facts reveal Respondent was married to another man, Javed Ahmed, less than five years earlier, on February 17, 1997, (*id.* at ¶¶ 1, 2, R. p. 255; Stipulation Exhibit 4, R. pp. 269-270.) The statutory presumption of death following a five-year period of unexplained absence is, therefore, inapplicable. *See* S.C. Code Ann. § 20-1-80. Stipulated evidence proves no order of any court or other occurrence (e.g., Mr. Ahmed's actual death) ended or caused to end that marriage, (*id.* at

¶ 14, R. p. 257.) Based on these stipulated facts, the Estate has overcome the presumption that Respondent's second marriage was valid by proving Respondent's first marriage was neither ended by Mr. Ahmed's death nor divorce.

Further evidence of the validity of Respondent's first marriage is Respondent's own act of filing an annulment action in December 2003, after her marriage to Decedent. (*See* Joint Stipulation of Facts at ¶ 7, R. p. 256.) Respondent's filing confirms that in Respondent's own mind in 2003 she was still married to Mr. Ahmed. *Compare In re Watts Estate*, 185 A.2d 781, 787 (Pa. 1962) ("It can hardly be disputed that the parties had not been divorced up until 1945 at the time decedent instituted his divorce action in Philadelphia. The fact that decedent instituted this action renders clearly unlikely and highly improbable that up until that time he had secured a divorce; we cannot attribute to the decedent a vain and useless act.").

Having overcome the presumption that Respondent's marriage to Mr. Ahmed was dissolved by death or divorce, the *Hallums* and *Yarbrough* burden shifting test makes Respondent's first marriage presumptively valid. *See Hallums*, 74 S.C. 407, 54 S.E.2d at 614. Respondent, as the challenging party, therefore must overcome this presumption with specific evidence. *See Yarbrough*, 280 S.C. at 550, 314 S.E.2d at 18 (citing 52 Am. Jur. 2d *Marriages* § 130 (1970)) ("If the law raises a presumption in favor of one party to litigation, the burden of going forward with evidence devolves on the other party.").

Respondent asserts her first marriage to Mr. Ahmed was void, but has admitted in this lawsuit she can identify no documents or other tangible evidence showing Mr. Ahmed was married to another person. (See Joint Stipulation of Facts at ¶ 9, R. p. 257); Stipulation Exhibits 5-13, R. pp. 271-313.) Similarly, Respondent can identify no person

(except, Respondent claims, Mr. Ahmed and the unknown and unnamed "wives" in Pakistan "to whom [Mr. Ahmed] was allegedly married") who can testify Mr. Ahmed was married to another person when he married Respondent in 1997. (*Id.* at ¶ 10, R. p. 257; Stipulation Exhibit 13, R. pp. 297-313.) Rather, Respondent relies solely upon her speculative allegations in her family court pleading and unopposed hearsay testimony which was admitted by the Charleston County Family Court in the Ahmed Annulment Action. Such uncorroborated, unchallenged and obvious hearsay testimony is of questionable credibility to say the least.

The purported "evidence" submitted by Respondent to overcome the LSA's Motion for Summary Judgment is insufficient. "Once the moving party carries its initial burden, opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (quotation omitted) (emphasis in original). *See also Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985) ("Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice.").

In *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984), this Court addressed the applicable standard for summary judgment when considering alleged "inferences of fact." The Court held: "It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." *Id.* at 527, 316 S.E.2d at 407. This Court explained:

> It would hardly be argued that the testimony of a witness who said he saw a wreck in South Carolina would raise a factual issue if he simultaneously admitted that he was in a hospital in Boston, Massachusetts, at the time. The judge is not required to single out some one morsel of evidence and

> attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.

Id. Here, Respondent patently asked the lower court to reach a decision in her favor by singling out morsels of speculative and unsupported hearsay evidence from an unopposed family court proceeding, none of which gives rise to a genuine issue of material fact in this case where the Estate and others have come forward with evidence to the contrary.

Respondent's complaint in the family court action alleges only "upon information and belief" that Mr. Ahmed was married to "three or more wives . . . under Pakistani law when the parties married." (Joint Stipulation of Facts at ¶ 7, R. p. 256; Stipulation Exhibit 5 at ¶ 8, R. p. 272.) Affidavits or verified pleadings asserting alleged facts "upon information and belief" are not entitled to evidentiary weight. *See Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003) (requiring supporting and opposing affidavits to "be made *on personal knowledge*," and holding "[a]llegations made upon information and belief do not meet the 'personal knowledge' requirements of Rule 56(e)," SCRCP) (emphasis in original); *see also Cottom v. Town of Seven Devils*, 30 Fed. Appx. 230, 234 (4th Cir. 2002) ("statements based solely upon information and belief do not satisfy the requirements of Rule 56," FRCP) (citations omitted).

Respondent also attempts to rely upon her unopposed hearsay testimony introduced during the family court's final hearing. (Joint Stipulation of Facts at ¶ 7, R. 256, Stipulation Exhibit 13, R. p. 297-313.) During the hearing, Respondent testified:

> Q: And he told you that he already had, what, two or three or four wives?
>
> A: He said he had three wives in Pakistan. I could not come into his house because I was not a Muslim. And he just wanted to get in the country.
>
> ...
>
> Q: So, you're asking the court to annul this marriage to the

Defendant, is that right?

A: Please.

Q: Because he was married to another woman or women, correct?

A: Correct.

Q: That's what he said?

A: Yeah.

(Stipulation Exhibit 13, p. 10, lines 11-15, p. 14, lines 16-23, R. p. 306.)

The exact same testimony has previously been held by the Supreme Court and this Court to be insufficient to overcome a plaintiff's burden of disproving a preexisting marriage in a case involving similar facts. In *Hallums*, 74 S.C. 407, 54 S.E. 613, the plaintiff first married a man named Bill Williams on December 24, 1895. *Id.* Less than five years later, in 1899, the plaintiff married Nero Hallums. *Id.* In the probate action involving Mr. Hallums' estate, the plaintiff contended she was entitled to a portion of the estate as a surviving spouse. *Id.* The estate's representatives challenged the plaintiff's claim on the basis that "her alleged intermarriage with Nero Hallums was an illegal and void marriage; she at that time, as is contended, having a living husband, to wit, Bill Williams." *Id.*

In an attempt to confirm her second marriage to Nero Hallums was valid, the plaintiff contended that at the time she allegedly married Mr. Williams, "he was then a married man, and that therefore the marriage with him was void, and that consequently she was free to make a contract of marriage with Nero Hallums." *Id.* The Court acknowledged that other than the plaintiff's uncorroborated testimony, "there is no evidence of an actual marriage of Bill Williams with another woman." *Id.* The Court concluded:

> While we have been referred to cases in which there was a presumption of a divorce or death of one of the contracting parties since the prior marriage

> in order to sustain the second marriage, we have not been able to find any cases in which there was a presumption that the first marriage was illegal at the time it was solemnized in due form. The reason that no such cases are to be found is that all presumptions are in favor of innocence.

Id., 74 S.C. 407, 54 S.E.2d at 614. The Court rejected the plaintiff's testimony that Mr. Williams was previously married to another woman, holding such testimony, without other substantiating evidence, was "insufficient to annul and make void his actual marriage with the plaintiff." *Id.*, 74 S.C. 407, 54 S.E.2d at 613.

In *Yarbrough*, 280 S.C. 546, 314 S.E.2d 16, this Court held a husband's testimony "that he never received divorce papers" from his first wife, "but was told she divorced him and remarried" was insufficient to overcome his burden of proof. *Id.* at 551-52, 314 S.E.2d at 19. "For a party having the burden of proving [his] divorce, this testimony is unpersuasive." *Id.* "It is clear [husband's] evidence fails to rebut the presumption." *Id.*

In accordance with *Yarbrough* and *Hallums*, the lower court should have required Respondent to present specific evidence proving Mr. Ahmed was previously married to another woman when he and Respondent married on February 17, 1997. Only such evidence would be sufficient to overcome her burden of proof and be enough to create a genuine issue of material fact to overcome the LSA's Motion for Summary Judgment. S.C. R. Civ. P. 56.

Because Respondent did not come forward with "specific facts showing that there is a genuine issue for trial" on the invalidity of Respondent's first marriage to Mr. Ahmed, *see Baughman*, 306 S.C. at 115, 410 S.E.2d at 545, Respondent failed to overcome the *Hallums*' presumption that Respondent's first marriage was valid. Respondent's failure to overcome the presumption of validity of her first marriage to Mr. Ahmed renders Respondent's second marriage to Decedent bigamous, and, therefore a

nullity. The Estate was entitled to summary judgment and the lower court's order should be reversed.

II. RESPONDENT CANNOT ESTABLISH HER SECOND MARRIAGE IS VALID THROUGH THE AHMED ANNULMENT ORDER.

Without any actual evidence of Mr. Ahmed's purported marriage to other women at the time of Respondent and Ahmed's marriage in 1997, Respondent's Hail Mary play is to rely upon an order of the Charleston County Family Court issued *after* Respondent's marriage to Decedent which annulled Respondent's first marriage to Mr. Ahmed. (*See* Joint Stipulation of Facts at ¶ 7, R. p. 256; Stipulation Exhibit 12, R. pp. 293-296.) For a number of reasons, the Ahmed Annulment Order is not binding on non-parties, including Decedent and the Estate, and cannot be used to retroactively validate Respondent and Decedent's otherwise bigamous marriage. The lower court erred in determining the findings of fact and conclusions of law in the Charleston County Family Court order were binding on Decedent and the Estate as the basis for its granting of summary judgment to Respondent in this case. The lower court further erred in holding the Ahmed Annulment Order retroactively applied to validate Respondent and Decedent's 2001 attempted marriage.

A. The Ahmed Annulment Order is a judgment *in rem*, which is binding only on parties.

A decree dissolving the marital status of two parties, whether by divorce or annulment, is a judgment *in rem*. *Carnie v. Carnie*, 262 S.C. 471, 167 S.E.2d 297 (1969); 4 S.C. Jur. *Action* § 5. The terms "in personam" and "in rem" are used to distinguish between actions that have as their object a personal judgment against the

defendant ("in personam") and those for the purpose of obtaining a judgment which operates only upon a specific property or status ("in rem"). *See* 4 S.C. Jur. *Action* § 5; C.J.S., *Actions* § 69; 1 Am. Jur. 2d, *Actions* §§ 39, 40.

It is commonly stated that a judgment "in rem" is "binding on all persons in the world." *See* Restatement (First) of Judgments § 73 (1942), note a. However, "[a]lthough a valid judgment in rem is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action . . . except as to persons who have appeared and actually litigated the question of the existence of the fact." *Id.* at cmt. c. *See also Rediker v. Rediker*, 221 P.2d 1, 4 (Cal. 1950) (en banc) ("As between strangers or strangers and parties, however, the decree is res judicata only in that it conclusively determines that the parties are thereafter free to remarry so far as any relation to each other is concerned. It does not establish the previous validity of their marriage against third persons who were not and had no right to be heard thereon.") (citations omitted).

In South Carolina, it is undisputed "a decree awarding simply a divorce, dissolving the marital status of the parties, is a judgment in rem, and for such purpose the jurisdiction of a nonresident may be obtained by constructive service." *Carnie*, 252 S.C. at 475, 167 S.E.2d at 299. Such a judgment is binding as to third parties as to the status of the marriage only. *See also Fitchette v. Sumter Hardwood Co.*, 145 S.C. 53, 142 S.E. 828, 833 (1928) ("Judgments in rem are considered binding on third persons, as are judgments or *decrees determining the status* or relations of individuals, as, for instance, decrees of divorce and adjudications as to the mental condition of persons, judgments of a public nature, and, for the purpose of proving title, judgments under which a sale of

land has taken place."). Though the "decree" itself is valid against third parties to establish the relationship of the parties going forward, such judgments are not permitted to be used against non-parties as to facts set forth within the decree.

Courts in other jurisdictions have fully expressed the general rule that judgments in rem are not binding against third parties beyond the status adjudicated therein. *Hunter v. Hunter*, 43 Pac. 756 (Cal. 1896); *Hendrick v. Biggar*, 103 N.E. 763 (N.Y. 1913); Restatement (First) of *Judgments* § 74(2) (1942). The United States Supreme Court has stated: "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, . . . and conversely establishing the facts is not equivalent to a judgment in rem." *Becher v. Contoure Labs.*, 279 U.S. 388, 391, 49 S.Ct. 356, 357 (1929) (citation omitted). In other words, findings of fact or conclusions of law necessarily determined by the judgment are not binding against non-parties to the action. *See Hunter v. Hunter*, 43 P. 756 (Cal. 1896) (holding judgment of divorce did not bind defendant as he "was not served with summons and was without the state, and the action was therefore strictly *in rem*").

The Oregon Supreme Court's decision in *In re Rowe's Estate*, 141 P.2d 832 (Ore. 1943), provides helpful guidance. There, the court was asked to determine whether a decedent, Edwin Rowe, died with a surviving child or whether the child was only a stepson and not entitled to inherit under Oregon law. *Id.* at 833-34. The purported "child" attempted to submit as evidence a divorce decree between his mother and her previous husband, which was filed upon a claim that the previous husband deserted and abandoned child's mother. *Id.* at 836. Child argued the findings of fact in the divorce

decree established his mother's first husband had deserted her and the finding therefore conclusively established the first husband did not have access to his mother during the period of desertion so as to permit an inference the decedent was his father. *Id.*

The Supreme Court of Oregon held:

> While the decree in a divorce suit as a decree in rem binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated, with that limitation it is subject to the usual rule that estoppels must be mutual and *is therefore not conclusive for or against any third person in reference to the facts which it necessarily affirms or denies.* Judgments in rem, as such, are not res judicata with respect to facts incidentally though necessarily determined, except as to the res adjudicat[ed]. As between strangers or between parties and strangers, a decree of divorce does not establish the previous validity of the marriage, since the res involved and adjudicated is the condition of subsequent singleness of the parties and not the valid prior existence of marital relations between them.

Id. at 836 (emphasis added). Thus, child was not permitted to rely on the findings of fact from the decree of divorce to establish that his mother's previous husband had deserted her at the time he was conceived. *Id.*

As the foregoing is applied to this case, the Ahmed Annulment Order is binding on third parties, including Decedent and the Estate, only to the extent it conclusively establishes the parties were *from the date of the decree forward* free to remarry. Any factual finding that Mr. Ahmed and Respondent were never legally married because he was previously married to other women cannot be used against third parties to the action. The lower court erred in applying the factual findings against the Estate in this case in order to determine Respondent is Decedent's surviving spouse as a matter of law.

B. Decedent was not a party to the Annulment Action and is not estopped by findings in the Annulment Order.

"Under South Carolina law, '[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.'" *Kunst v. Loree*, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013) (quoting *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

It is axiomatic that in South Carolina, as in virtually every jurisdiction, collateral estoppel only applies to parties to the previous action and their privies. *Carman v. South Carolina Alcoholic Beverage Control Com'n*, 317 S.C. 1, 451 S.E.2d 383 (1994). *See also McClain v. Pactiv Corp.*, 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004), reh'g denied, (Sept. 22, 2004) (holding collateral estoppel prevents "a party from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action"); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994) (holding relitigation of issues is "precluded as to parties and their privies in any subsequent action based upon different claim") (citation omitted).

It is stipulated Decedent was not a party to the Ahmed Annulment Action and never became a party, through intervention or otherwise. (*See* Joint Stipulation of Facts ¶¶ 12, 15, and 16, R. p. 257; Stipulation Exhibit 13, R. pp. 297-313.) Moreover, Decedent could not have become a party to the action because he lacked standing. *See Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006) (denying second

husband's motion to intervene in an annulment action, "finding he did not have standing because he was not a party to the marriage"); *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006) ("As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.") (quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996)). Decedent did not participate in the hearing or any other facet of the Ahmed Annulment Action, and was not a client of Petitioner's attorney in that Action. *Id.*

Moreover, there are insufficient facts to imply Decedent was involved sufficiently to be in privity with Respondent in the Ahmed Annulment Proceeding. It is undisputed Decedent gave Petitioner funds to pay the legal fees for the Ahmed Annulment litigation. (*See* Joint Stipulation of Facts at ¶ 13, R. p. 257.) Moreover, Decedent was aware litigation between Respondent and Mr. Ahmed was ongoing, as evidenced by his attorney's receipt of the summons and complaint and final order. (*Id.* at ¶ 14, R. p. 257; Stipulation Exhibit 14, R. pp. 314-328.) However, these facts alone are insufficient to estop Decedent or his heirs from challenging the factual findings of a lawsuit in which Decedent was not a party. "It is not sufficient [for collateral estoppel] that the [non-party] merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae." Restatement (Second) of Judgments § 39, cmt. c (1982).

In *Phoenix Bd. of Realtors v. U.S. Department of Justice*, 521 F.Supp. 828 (D.Ariz. 1981), the U.S. District Court for the District of Arizona held "[i]t is clear . . . more than the mere provision of funding for litigation is required for principals of collateral estoppel to operate against a non-party." Similarly, in *McKeown v. Wheat*, 231

F.2d 540 (5th Cir. 1956), the Fifth Circuit held "in Georgia the furnishing of counsel, the payment of counsel's fees is not sufficient" for non-party issue preclusion. *McKeown* at 544 (citing *May v. Loeb*, 196 S.E. 268, 271 (Ga. App. 1938)). "For the 'outsider' to become bound, Georgia requires that he virtually be substituted as a party openly and avowedly in the management, direction and control of the case." *Id.* For these same reasons, Decedent's one-time payment of funds to Respondent in order to enable Respondent to finance the Ahmed Annulment Action and Respondent's receipt of the pleadings and final order in the action are insufficient to render him bound by that action. There is no evidence that Decedent managed, directed, or controlled Respondent's annulment action and therefore, the evidence fails to rise to a level sufficient enough to consider him to be in "privity" with Respondent in that case.

Further, the Ahmed Annulment Order could not be used for collateral estoppel purposes because it was procured against a party in default. "Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) (citing *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998)). One area in which the application of the doctrine has been held not to apply is where the previous order was obtained by default: "In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation." *Kunst*, 404 S.C. at 654, 746 S.E.2d at 362 (citations omitted).

South Carolina appellate courts, federal courts, and other state courts have held

"default judgments cannot be used to preclude subsequent litigation under the doctrine of collateral estoppel." *Id.* at 656, 746 S.E.2d at 363 (*citing In re Springhart*, 450 B.R. 725, 727 (Bankr. S.D. Ohio 2011) ("After reviewing the doctrine of collateral estoppel or issue preclusion, as adopted in South Carolina, the court concludes that the default judgment and order awarding damages cannot be afforded preclusive effect.... First, South Carolina does not allow default judgments to have preclusive effect under the collateral estoppel doctrine because no issues were actually litigated.")); *Powell v. Lane*, 289 S.W.3d 440, 451 (Ark. 2008) (Wills, J., dissenting) (citing South Carolina as an example of state law which "adhere[s] to the general rule" that default judgments cannot be used under the doctrine of collateral estoppel)).

The record demonstrates Mr. Ahmed never filed a notice of appearance in the Charleston County Family Court action and there is no evidence he had actual knowledge of the proceedings against him. (*See* Joint Stipulation of Facts at ¶ 17, R. p. 257.) During the family court hearing, Respondent's counsel stated to the court:

> We're here today. The Defendant has not appeared. The Defendant, I guess, arguably, is in default but we're not moving to put him in default. He has notice of this -- he has been served by publication as will appear by affidavit. He was given notice of this hearing personal to [S.C. R. Fam. Ct.] 17, proper notice, as will appear by affidavit. So, we're here to proceed. Since he's not here, I am ready to proceed. I have one witness.

(*Id.* at ¶ 7, R. p. 256; Stipulation Exhibit 13 at p. 4, lines 6-13, R. p. 300.)

After brief testimony of only one witness, Respondent, the family court verbally awarded Respondent an annulment "ab initio," and entered a Final Order on the same day, April 15, 2004. (*Id.* at ¶ 11, R. p. 257; Stipulation Exhibit 12 at pp.1-2, R. pp. 293-294.) The court's order acknowledged Mr. Ahmed was "served by publication" and "notified of the final hearing" but otherwise did not appear. *Id. See* S.C. R. Fam. Ct. 17.

Because the annulment decree was obtained against Mr. Ahmed by default, its findings of fact and conclusions of law have no preclusive effect, not only against the LSA, but even against Mr. Ahmed himself.

The South Carolina Legislature has prohibited a defendant's default in a family court proceeding from constituting an admission of the allegations in the plaintiff's complaint, as it otherwise would in civil proceedings. *See* S.C. R. Fam. Ct. 2(a) ("The following SCRCP, however, shall be inapplicable [in family court proceedings]: ... [S.C. R. Civ. P.] 8(d) to the extent it provides that the failure to file a responsive pleading constitutes an admission"). Thus, South Carolina's bar against giving preclusive effect to default judgments is particularly compelling in family court proceedings.

Based on the foregoing, the lower court erred in applying the factual findings of the Ahmed Annulment Order against the Estate and using such "evidence" as its basis for awarding Respondent summary judgment in this case. The uncorroborated, speculative, and hearsay testimony submitted by Respondent in the Annulment Action is unworthy of evidentiary weight and is legally insufficient to enable Respondent to prove the threshold element of her claims, that she is Decedent's surviving spouse. Without such evidence, the Estate was entitled to summary judgment and the lower court's was in error.

C. The Supreme Court's decision in *Lukich* prevents an annulment order from applying retroactively.

In *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008) ("*Lukich I*"), the Supreme Court held without limitation that an annulment order finding a first marriage void *ab initio* does not "relate back" so as to validate a second bigamous marriage. *Id.* at 592-93, 666 S.E.2d at 907. The Court made no distinction between marriages that are annulled as voidable and those that are annulled as void and appears to apply its holding

to both in equal measure. As a result, although, as to the world, the Ahmed Annulment Order establishes the legal relationship between Respondent and Mr. Ahmed from the date of the order forward, because the annulment order was issued after Respondent's marriage to Decedent, the family court's determination cannot reach back and retroactively validate Respondent's second, otherwise bigamous marriage.

A brief summary of the *Lukich* facts demonstrates the similarities to the case at hand: In 1973, Mrs. Lukich ("Wife") married Charles Havron. *Lukich*, 38 S.C. at 50-51, 627 S.E.2d at 755-756. Like Respondent and Mr. Ahmed, Wife and Mr. Havron never lived together but never divorced. *Id.* In 1985, Wife married Mr. Lukich and the two lived together for eighteen years. *Id.* at 50, 627 S.E.2d at 755. In August 2002, after Wife suffered a debilitating stroke, the Lukiches began to experience marital difficulties. *Id.* Thereafter, Wife filed a complaint against Mr. Lukich for separate support and maintenance. *Id.* During the proceeding, Mr. Lukich learned Wife never obtained a divorce from her first husband, Mr. Havron, and on that ground alone, filed an action in September 2003 to void his marriage to Wife for her alleged bigamy. *Id.* at 50-51, 627 S.E.2d at 756. A hearing was set for November 2003. *Id.*

Shortly before the scheduled hearing, in October 2003, Wife sought to void her first marriage by filing an action for annulment from Mr. Havron. *Id.* at 51, 627 S.E.2d at 756. In her complaint, Wife alleged she and Mr. Havron were married during a night of heavy drinking and had never lived together as husband and wife. *Id.* at 51, 627 S.E.2d at 756. Mr. Havron submitted an affidavit to the family court corroborating Wife's allegations and did not contest the annulment. *Id.* After denying Mr. Lukich's motion to intervene, the family court granted Wife an annulment from Mr. Havron, declaring the

marriage "void *ab initio*." *Id.*

With an annulment from her first husband in hand, corroborated by Mr. Havron's own admissions, Wife moved to dismiss Mr. Lukich's annulment action. *Id.* at 51, 627 S.E.2d at 756. Wife asserted because her prior marriage to Mr. Havron had been annulled, Mr. Lukich could no longer prove their subsequent marriage was bigamous. *Id.* Her argument was premised on the legal position the "annulment decree rendered her marriage to Havron void *ab initio*, which creates the legal fiction that the marriage never existed." *Id.* at 52, 627 S.E.2d at 756. However, despite the corroborated and credible evidence from Havron that Wife's first marriage was void, the family court judge ruled Wife was barred from using her order of annulment from Mr. Havron as a defense to Mr. Lukich's action to void their marriage as bigamous. *Id.* Wife appealed. *Id.*

Like Wife in *Lukich*, Respondent asserts because the Ahmed Annulment Order declared Petitioner's marriage to Ahmed void "ab initio," her marriage to Decedent is valid because it fits into the exception expressed in S.C. Code Ann. § 20-1-80, titled "Bigamous Marriages shall be void: Exceptions," which provides in relevant part:

> 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 first marriage shall be declared void by the sentence of a competent court.*

Id. (emphasis added). Mrs. Lukich made this same argument, contending Section 20-1-80 created an exception for her otherwise bigamous second marriage because her first marriage had been "declared void by a competent court." Both this Court and the Supreme Court rejected Mrs. Lukich's arguments and this Court should similarly reject Respondent's arguments here.

In *Lukich I*, this Court framed the legal issue as follows:

> [W]hether an annulment which decrees a pre-existing marriage void *ab initio* can be used as a defense to an action to void a marriage as bigamous because the annulment relates back so as to give validity to a prior bigamous marriage.

368 S.C. at 53, 627 S.E.2d at 757. The Court answered its question in the negative: "[W]e find an annulment that declares a pre-existing marriage void *ab initio* does not relate back so as to give validity to a marriage that was bigamous before the annulment was granted." *Id.* The Supreme Court in *Lukich II* agreed. The Court foreclosed Mrs. Lukich's argument, holding:

> Under the statute's terms, Wife's "marriage" to Husband #2 was "void" from the inception since *at the time of that marriage* she had a living spouse and [Wife's first] marriage *had not been "declared void."*

379 S.C. at 592, 666 S.E.2d at 907 (citing S.C. Code Ann. § 20-1-80) (emphasis added). The Supreme Court's holding eliminated any doubt regarding how *Lukich* should apply to the present facts.

Section 20-1-80 of the South Carolina Code requires an order declaring the first marriage void to have been issued "*at the time of [the second] marriage.*" *Lukich II*, 379 S.C. at 592, 666 S.E.2d at 907. Therefore, because the order declaring Mrs. Lukich's first marriage void *ab initio* "had not been" issued "at the time of" her second marriage, the exception in Section 20-1-80 did not apply. Likewise, here, because the Ahmed Annulment Order declaring Petitioner's marriage to Ahmed "had not been" issued "at the time of" Petitioner's marriage to Decedent, the exception does not apply here.

> While an annulment order relates back in most senses, it does not have the ability to validate the bigamous second 'marriage.' . . . The statute speaks to the status quo at the time the 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."

Lukich II, 379 S.C. at 592-93, 666 S.E.2d at 907.

Rodman v. Rodman, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004), cited by the Supreme Court in *Lukich II*, supports the proposition that annulment orders do not relate back. In *Rodman*, this Court considered whether a family court's order annulling a marriage could relate back, and if so, whether the family court maintained jurisdiction over the parties' property distribution. If the annulment "relates back" so that the annulled marriage never existed, then the family court would not have jurisdiction over the annulled-couple's property distribution. In *Rodman*, this Court rejected such an interpretation.

In *Lukich II* the Supreme Court confirmed *Rodman*, stating:

> 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. The Supreme Court's reference to the *Rodman* holding strongly suggests the Supreme Court intended its bar to applying annulment orders retroactively applies in all cases.

CONCLUSION

It is Respondent's burden to overcome the presumption that her 1997 marriage to Mr. Ahmed was valid when she purported to marry the Decedent in 2001. She cannot meet her burden by having the Court apply the factual findings of the Ahmed Annulment Order against the Estate in this action, through an estoppel theory or otherwise.

Likewise, Respondent cannot meet her burden by having the Court apply the judgment in the Ahmed Annulment Order retroactively to validate her second, otherwise bigamous marriage to Decedent. The South Carolina's Supreme Court clearly held in

Lukich II that under S.C. Code Ann. § 20-1-80, an order annulling a first marriage, regardless of grounds, can only validate an otherwise bigamous second marriage if the annulment of a first marriage is issued prior to the second marriage. An order issued *after* the second marriage does not relate back so as to retroactively validate the second marriage. This conclusion is consistent with public policy as expressed in *Rodman.*

For the reasons stated above, this Court should determine Respondent is not Decedent's surviving spouse as a matter of law and reverse the lower court's January 26, 2015 order.

Respectfully submitted,

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June 26, 2017.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2015-002417

Tommie Rae Brown, ... Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief and Final Reply Brief of Appellant, David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and limited Special Trustee of the

James Brown Irrevocable Trust, u/a/d August 1, 2000 complies with Rule 211(b), SCACR.

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FINAL REPLY BRIEF OF APPELLANT, DAVID C. SOJOURNER, JR., IN HIS CAPACITY AS LIMITED SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES BROWN, A/K/A JAMES JOSEPH BROWN AND LIMITED SPECIAL TRUSTEE OF THE JAMES BROWN IRREVOCABLE TRUST, U/A/D AUGUST 1, 2000

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ARGUMENTS[1]

I. RESPONDENT BASES HER BRIEF ON INCORRECTLY STATED AND IRRELEVANT "FACTS" AND ASSUMPTIONS.

Hardly a page of Respondent's brief passes without a mischaracterization of the "facts" presented to the lower court or a flawed construction of the LSA's and other appellants' positions in this appeal. The purported "facts" upon which Respondent relies[2] are wholly unsupported and must be ignored by this Court pursuant to Rule 208, SCACR. Rule 208(b)(1)(D), SCACR, requires a party's statement of facts to be "relevant to the issues presented for review" and complete "with reference to the record on appeal." All purported facts that are without support in the record or which were not presented to or considered by the lower court must be disregarded.

Respondent inaccurately asserts the "facts" in the Charleston County Family Court order, granting Respondent an annulment from her first husband, Javed Ahmed ("Ahmed Annulment Order"), are binding and serve as a basis for affirming the lower court's orders in this appeal. Respondent's constant refrain that her first marriage "was never a marriage," Brief of Respondent at pp. 14-15, assumes the findings of fact and conclusions of law in the Ahmed Annulment Order are binding on Decedent, the Estate, Decedent's heirs, this Court, and indeed "all the world." *Id.* at 34. They are not.

Respondent's improper and false assumption that the "findings of fact" in the Ahmed Annulment Order are binding against anyone other than herself places material facts that are actively disputed by the Estate and Decedent's heirs at the heart of the

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[1] The LSA adopts the reply briefs of all Appellants in this matter as if set forth and incorporated herein, pursuant to Rule 208(b)(D)(6), SCACR.

[2] Appellant LSA has contemporaneously with this Brief filed a Motion to Strike regarding the wholly irrelevant and potentially prejudicial statements from Respondent's Brief. A recitation of the statements believed by the LSA to be unsupported, speculative, and irrelevant is set forth on pp. 3-4 of the LSA's Motion to Strike.

appeal rendering the lower court's award of summary judgment in Respondent's favor wholly inappropriate. *See* Rule 56(c), SCRCP (summary judgment is proper when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law").

It is likewise incorrect for Respondent to assert as "fact" that Decedent "request[ed],"[3] "asked,"[4] "desired,"[5] "support[ed], encourage[d] and insist[ed],"[6] or otherwise "gave full support"[7] in her pursuit of the Ahmed annulment. Decedent was not a party to Respondent's annulment against Mr. Ahmed. (Joint Stipulation of Facts at ¶ 12, R. p. 257.) Decedent did not intervene as a party in the annulment action. (*Id.* at ¶ 15, R. 257.) Indeed, as a legal rule, Decedent could not become a party or intervene in the case. *See Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006) (recognizing a non-party to the marriage does not have standing to intervene in an annulment action); *Joye v. Yon*, 345 S.C. 264, 276, 547 S.E.2d 888, 894 (Ct. App. 2001) ("Since Yon had no standing to challenging the granting of the annulment, it was not necessary for Joye to include him as a party to the action."). Respondent's claim that Decedent insisted she file the annulment action or otherwise "gave full support" to the action is wholly unsupported by documentary evidence or testimony. Respondent's attempt to characterize Decedent's mental thoughts or internal opinions and desires is pure speculation.

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[3] Brief of Respondent at p. 31.
[4] *Id.* at p. 55.
[5] *Id.* at p. 32.
[6] *Id.* at p. 51.
[7] *Id.* at p. 33.

There is no evidence to support Respondent's allegation that Decedent "gave full support" financially[8] to Respondent's annulment action. The only stipulated fact on this issue is that Decedent gave Respondent "the funds to pay the legal fees for the litigation" and received copies of the filed summons and complaint and filed final order. (Joint Stipulation of Facts at ¶¶ 13, 14, R. p. 257.) Respondent's assertion that Decedent "evidently agreed his interests . . . were represented by [Respondent], as he retained no attorney of his own" is wholly inaccurate and directly contradicted by the Joint Stipulation of Facts. The Joint Stipulation makes clear Decedent was not jointly represented by Respondent's counsel, Robert N. Rosen, Esquire, and had separate legal counsel. (Joint Stipulation of Facts at ¶¶ 14, 16, R. p. 257.) ("Decedent was not Robert Rosen's client in the Ahmed Annulment Action.").

Respondent's assertion as "fact" that Decedent "clearly accepted the benefits"[9] of her annulment should be rejected by this Court. As set forth in its Brief, pp. 14-27, the Estate denies Decedent accepted or became legally bound by any factual allegation or conclusion of law in the Ahmed Annulment Order. Decedent's assertion of the Ahmed Annulment Order against Respondent in Decedent's Aiken County Family Court annulment proceeding against Respondent, a party to the Ahmed Annulment Action, through offensive non-mutual collateral estoppel does not make such findings or conclusions binding on Decedent. *See* Infra at § II.

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[8] Respondent assert's Decedent's payment of legal fees "made the action possible, which suggests he had a strong interest in the subject matter of the action." Brief of Respondent at p. 32; *see also id.* at p. 52 ("Mr. Brown evidently agreed that his interests in the annulment action were represented by Mrs. Brown, as he retained no attorney of his own, filed no claim of his own, and paid Mrs. Brown's attorney.").

[9] *Id.* at p. 2, 31, 51, 52, 53.

Respondent also references alleged "facts" from her 2007 affidavit in support of her legal position in this appeal. Brief of Respondent at p. 62. Citation to alleged facts in Respondent's affidavit is inappropriate based on the circumstances and procedural posture of this case. Specifically, in March 2014, the parties were before the lower court on the Estate's motion to modify or lift certain protective orders which barred Respondent's diaries from being produced in discovery. (*See* Hearing Transcript, March 31, 2014, R. pp. 2454-2463.) At the hearing, Respondent took the following position:

> There are motions to limit the discovery in this case. You know, seven years ago, [on December 26, 2007], I filed a motion for summary judgment [and filed a supporting affidavit of Tommie Rae Brown]. And my position then and my position now is the same; she's either married to James Brown or she isn't. And that's a decision for you to make and maybe ultimately for the Supreme Court to make. **Whether she's married or not really depends on the law and not the facts. It doesn't really matter what anybody says.**

(*Id.* at p. 54, lines 3-12 (emphasis added), R. p. 2455; *see also* pp. 54-56, R. pp. 2455-2457.) As a result of Respondent's arguments, the lower court stayed all discovery in the case pending a decision on the anticipated summary judgment motions. In accordance with the lower court's order, the parties have not pursued written discovery, taken depositions, or gathered affidavits from parties or other potential witnesses since March 31, 2014.[10]

The vast majority of "evidence" Respondent asserts in support of her position in this appeal has not been stipulated by the parties or cross-examined by the Estate or any other party. Respondent succeeded in having the lower court bar the parties' access to her diaries, limit the scope of discovery, and preclude access to taking her deposition in this

[10] Cross motions for summary judgment were filed in April and June of 2014. (Respondent's Motion for Summary Judgment, filed April 28, 2014 at R. pp. 231-249; LSA's Motion for Summary Judgment, June 2, 2014 at R. pp. 250-253.)

case. In summary, Respondent has bound the Estate and other parties' hands from rebutting the alleged "facts" she asserts in support of her claims.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In reviewing a grant of summary judgment motion, the [appellate court] applies the same standard as the trial court . . . ." *Id.* at 69, 580 S.E.2d at 438. (citing *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991)). When determining whether the lower court's grant of summary judgment was appropriate, "the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Id.* at 69, 580 S.E.2d at 439 (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545).

Respondent's improper assertion of this large quantity of material and disputed evidence makes clear the lower court's orders granting summary judgment in Respondent's favor were premature and inappropriate. She asserts in her brief that this Court can use evidence of her marriage ceremony to Decedent alone as a "presumption" she is Decedent's surviving spouse and the LSA can only rebut this presumption with "strong evidence." Brief of Respondent at p. 67, 68-69, 72. Respondent claims Appellants can only overcome this presumption "by *disproving every reasonable possibility*." *Id.* at p. 67. Respondent boldly asserts she is entitled to win because "Appellants cannot disprove every reasonable probability that Mrs. Brown is the surviving spouse of Mr. Brown." *Id.* at p. 68.

Our Supreme Court recognizes "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to

complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citation omitted); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (summary judgment is "an extreme remedy to be cautiously invoked"); *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975) (summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues"). To the extent the lower court's orders are based, even in part, on disputed material facts, summary judgment was premature and inappropriate.

The lower court strictly ruled upon the parties' cross motions for summary judgment on the stipulated facts and application of the law.[11] Before issuing its final ruling, on October 26, 2015, the lower court specifically ruled:

> Let me make myself clear: I only consider stipulations of facts. And you know how I reached my conclusion. And you say that I can still look at those stipulations of fact and, Judge, if you will just look at *Lukich*, you will realize that you were wrong. And I'm going to do that, I promise you. And if I agree with you, I'm going to change it.

(R. p. 2719, lines 1-8.)

> I'm limiting this reconsideration to the arguments on *Lukich*.... [I]t's strictly on the *Lukich* issue, recognizing the facts as stipulated, narrowing it just to that. That's where I'm going with it.

(R. p. 2724, lines 1-7.)

The Court allowed Petitioner to file her motion and granted a stay of discovery, but ruled if Petitioner's motion turned upon any contested facts "the summary judgment

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[11] *See* the lower court's statements in (Hearing Transcript, June 30, 2015 at R. p. 2697, lines 17-24) ("I was trying to get -- and I did, I thought -- a stipulation that everybody from here on out who had a dog in the fight, so to speak, would agree to the stipulations of facts so that when it got to the Supreme Court or the Court of Appeals would at least have an agreed-upon set of facts to apply it to *Lukich* or whatever else they want to apply it to."); (R. p. 2690, lines 2-5, 10-13; R. p. 2691, lines 7-15) ("I'm going to limit it just to that little narrow issue [on the appellate courts' decisions in *Lukich*] and disregard all this other stuff. And when I say other stuff, I mean issues involved.").

goes out the window." (R. p. 2696.) "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." (R. p. 2697.) This Court cannot and should not affirm based on disputed, material facts submitted by Respondent in her Brief.

In addition, numerous alleged "facts" are simply Respondent's counsel's interpretation of legal documents and are therefore inappropriate. For example, Respondent improperly asserts as "facts," her own counsel's interpretation of Trust language regarding management costs to be paid to the Trust's fiduciary representatives. *See* Brief of Respondent at p. 5. As pointed out in Appellant Terry Brown's Initial Reply Brief, at pp. 8-9, Respondent's interpretation of these documents is factually incorrect and arguably only injected for bias against Appellants, particularly the Estate. As a second example, Respondent improperly asserts as "facts," her own counsel's interpretation of the conclusions of law in the Ahmed Annulment Order r. Brief of Respondent at p. 4 (stating the order "h[eld] [Respondent] had no impediment to her marriage to [Decedent]").

Finally, Respondent recounts as relevant "facts," certain occurrences which were not, and could not have been, presented to the lower court for its consideration on the cross motions for summary judgment involved in this appeal. Notably, Respondent references a Settlement Agreement and Release entered into by the Estate and certain heirs of Decedent on November 17, 2015. *See* Respondent's Brief at p. 5, footnote 4. This settlement was executed more than ten months after the lower court issued its first order granting Respondent summary judgment. (*See* Order, January 13, 2015, R. pp. 53-

102.) The settlement was executed almost a month after the lower court denied the LSA's motion to reconsider. (*See* Order, October 26, 2015, R. pp. 103-121.)

The settlement agreement and the Joint Motion to Authorize Settlement, filed December 7, 2015, are wholly irrelevant to the subject appeal and their inclusion in the Record on Appeal would prejudice the Estate. *See* Rule 208(b)(1)(D), SCACR ("A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal...."); Rule 209(b), SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal."); Rule 210(c), SCACR ("The Record shall not ... include matter which was not presented to the lower court or tribunal.").

Respondent acknowledges there is no need for additional discovery because "all of the *material* factual issues in this action are resolved by the Joint Stipulation." Brief of Respondent at p. 60. For these reasons, any other alleged "facts" cited by Respondent are irrelevant to the issues in this appeal because they were expressly not considered by the lower court in issuing its orders on appeal. Respondent respectfully requests this Court consider the issues on appeal in light of only the stipulated facts.

II. RESPONDENT CANNOT ESTABLISH HER SECOND MARRIAGE IS VALID THROUGH THE AHMED ANNULMENT ORDER.

Respondent contends Appellants, including the LSA, are attempting to obtain a "posthumous annulment" of Decedent's marriage to Respondent. Brief of Respondent at p. 4, 16. The LSA is attempting to do no such thing. Rather, the Estate is seeking to have the lower court rule upon the status of Respondent's purported marriage to Decedent. *See* LSA's Brief at pp. 7-13. This action determines whether Respondent is

an heir of the Estate of James Brown as the decedent's "surviving spouse." *Id.* at p. 7.

As stated in the LSA's Brief, pp. 14-26, the findings of fact and conclusions of law in the Ahmed Annulment Order are not binding on Decedent, the Estate, and are entitled to no weight in this case. The LSA is not "attacking" the order. *See* Brief of Respondent at p. 4, 10; *see also* pp. 10-12, 46-47. The LSA is merely challenging the effect of the order based on its timing and collateral effect on Decedent and the Estate, an issue injected into this case by Respondent herself, who seeks to use the order to prove she is Decedent's surviving spouse.

Respondent argues the probate court has no jurisdiction over annulments. As stated by Appellant Terry Brown in his Initial Reply Brief, the lower court, exercising jurisdiction of the Probate Court, has jurisdiction to determine the heirs of an estate. S.C. Code Ann. § 62-1-302(a)(1). Appellant Brown's arguments on this point, Initial Reply Brief of Appellant Terry Brown, pp. 2-3, are hereby expressly incorporated by reference.

It is clear that when faced with a claim by a purported spouse, whether for an elective share under Section 62-2-201, or an omitted spouse share, under section 62-2-301, as here, the probate court has the jurisdiction and obligation to assess and rule upon the validity of the claim at issue. Part and parcel of that ruling is a judicial determination whether the clamant was validly married to the decedent on the date of death. In *Lovett v. Lovett*, 329 S.C. 426, 494 S.E.2d 823 (Ct. App. 1997), this Court recognized the lower court's jurisdiction to make a surviving spouse determination.

In that case, Ms. Lovett, the decedent's alleged surviving spouse, appealed a probate court order invalidating a life estate left to her under Mr. Lovett's will, and denying Ms. Lovett an elective share of the estate. *Id.* at p. 429, 494 S.E.2d at 825. Ms.

Lovett "had been married eight times prior to her marriage to Lovett. Although her second through fourth marriages ended in either divorce or annulment, there is no record of a divorce or annulment for her first, fifth, sixth, seventh, or eighth marriage." *Id.* On appeal, this Court affirmed the probate court's denial of Ms. Lovett's statutory elective share, upholding the "probate judge's ruling [Ms. Lovett's] marriage to [Mr.] Lovett was invalid." *Id.* at 429-43, 494 S.E.2d at 825. The Court held Ms. Lovett "was not [Mr.] Lovett's surviving spouse." *Id.*

This Court's ruling in *Lovett* confirms the probate court has jurisdiction to determine marital status in the context of probating an estate and that power does not usurp the family court's jurisdiction to grant divorces and annulments. *Contra* Brief of Respondent at p.4. In *Lovett*, the court declared Ms. Lovett's purported marriage to Mr. Lovett was not valid because she remained married to another person on the date of their marriage ceremony. *Id.* at p. 432, 494 S.E.2d at 826. Thus, the probate court is permitted to review evidence submitted by the parties and determine a party's alleged status as the decedent's surviving spouse. The notion our probate courts do not possess jurisdiction to "decide the validity of the marriage" in determining claims for elective share or omitted spouse claims is erroneous. *See* Brief of Respondent at pp. 4, 10 at footnote 10.

The LSA has already addressed Respondent's argument that the Estate is estopped by the Ahmed Annulment Order. *See* LSA's Brief at pp. 14-26. Decedent was not a party or in privity with Respondent in her annulment action and thusly Respondent's argument fails. However, Respondent's Brief reflects a fundamental

misunderstanding of the mechanics of offensive non-mutual collateral estoppel,[12] and the LSA believes it is important to clarify.

The doctrine of non-mutual offensive collateral estoppel was adopted in this State by this court in *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984), and was confirmed as the law of this State by our Supreme Court in *South Carolina Prop. and Cas. Ins. Guar. Ass'n v. Wal–Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991). Under the doctrine of offensive non-mutual collateral estoppel, a party may be prevented from relitigating issues actually determined in a prior action so long as the party estopped had a full and fair opportunity to litigate the issue in the first action and there are no circumstances which justify affording him an opportunity to retry the issue. *Beall*, 281 S.C. 363, 315 S.E.2d 186; *Roberts v. Recovery Bur., Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct.App.1994) (citing *McPherson v. South Carolina Dept. of Highways and Pub. Transp.*, 297 S.C. 303, 376 S.E.2d 780 (Ct.App.1989)).

Respondent contends Decedent is bound by the Ahmed Annulment Order through collateral estoppel because he "provide[d] essential support for the litigation." Brief of Respondent at p. 49. Respondent cites to *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912), for the proposition that "[b]y supporting his parents in [a] custody case, . . . the father became bound by the result." Brief of Respondent at p. 49. In *Tillman*, the claims at issue, involving custody, originally belonged to the father. The parties to the action were the father's parents, to whom the father assigned his custodial rights, and mother. *Id.* at 93 S.C. 281, 76 S.E. at 559. In addition to the claims at issue belonging originally to the father, he "submitted an affidavit . . . insisting on the claim of [his parents], to whom he had solemnly conveyed all of his rights . . . ." *Id.* The Supreme Court held: "It

[12] *See* Brief of Respondent at pp. 46-55.

is clear that by this action he became bound by the decree rendered in the formal proceeding."

Other than making a payment to Respondent's counsel for her legal fees and receiving filed copies of the initial pleadings and final order, (*see* Joint Stipulation at R. p. 257, ¶¶ 13, 14.) There is no evidence in the record to imply or establish that Decedent did anything to otherwise inject himself in, control, or participate in the annulment action. More importantly, unlike the father in *Tillman*, Decedent had no "rights" in Respondent's annulment action. Unlike Decedent, who had no standing to be a party in the Ahmed Annulment Action, the father in *Tillman* had standing to be a party in the proceeding involving his son's parentage *because he was the father of the child involved.* In sum, Respondent's attempt to analogize this case to the facts in *Tillman* fails. *See* Brief of Respondent at p. 50.

Respondent also cites *Piney Oil & Gas Co. v. Scott*, 79 S.W.3d 394 (Ky. 1934), which, according to Respondent "held that paying part of another party's attorney's fees is sufficient to establish privity." Brief of Respondent at p. 51. A significant difference between the Kentucky Court of Appeals' decision in *Piney Oil* and South Carolina law is the definition of "privy." Notably, Kentucky law, at least in 1934 at the time of the *Piney Oil* case, defined "privity" narrowly, as an "acquirer[] of interest" from a party. 79 S.W.2d at 396. South Carolina law applies "privity" more broadly, including within its scope "one so identified in interest with another that he represents the same legal right." *H.G. Hall Const. Co., Inc.*, 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984).

It is without dispute that had the *Piney Oil* case arisen in South Carolina, the non-party in the case would be considered in "privity" with the party to the original action as

they both had the same interest: quieting title to the mineral rights conveyed by a common grantorIn addition to this clear ground for privity, the Kentucky court held, in its equitable discretion, that the non-party was further bound because he "paid for Scott's legal fees" and "participated in that action." The court expressly recognized the first action was a "test suit." *Piney Oil* at 396.

There is little South Carolina case law on the issue of collateral estoppel of a non-party on the ground the non-party paid the prior party's legal fees. However, neither *Tillman*, a South Carolina case, nor *Piney Oil*, from Kentucky, support Respondent's extreme proposition that Decedent's one-time payment of Respondent's legal fees collaterally estopped him, and now estops his Estate, to the findings of fact and conclusions of law in the Ahmed Annulment Order. There is no evidence to support Respondent's implication that Decedent had a "full and fair opportunity to previously litigate the issue," by his mere payment of legal fees as is required for application of collateral estoppel against a non-party.

In addition, "[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied." *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009). "Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Id.* Unfairness would result from Respondent's collateral use of the Ahmed Annulment Order against Decedent, a party who was legally barred from "litigating" the issue in the Ahmed Annulment Action directly. *See Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006) (recognizing a non-party to the marriage does not have standing to intervene in an annulment action); *Joye v. Yon*, 345

S.C. 264, 276, 547 S.E.2d 888, 894 (Ct. App. 2001) ("Since Yon had no standing to challenging the granting of the annulment, it was not necessary for Joye to include him as a party to the action."). For these reasons, Respondent cannot collaterally bind Decedent or the LSA to the Ahmed Annulment Order granting Respondent an annulment from her first husband, Javed Ahmed.

III. RESPONDENT CANNOT ESTABLISH HER SECOND MARRIAGE IS VALID THROUGH JUDICIAL ESTOPPEL.

For the reasons set forth in the LSA's Brief, pp. 7-13, Respondent has the burden of proving she is decedent's surviving spouse. Respondent must come forward with "specific facts showing there is a genuine issue for trial" proving her first marriage to Mr. Ahmed was invalid in order to overcome the legal presumption that her first marriage is valid and renders her second attempted marriage to Decedent bigamous and invalid. *See* Brief of LSA at p. 14. The LSA relies, in part, upon *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), a case Respondent fails to address as to Respondent's burden of proof in this case. Respondent cannot and should not be permitted to establish her 1997 marriage to Mr. Ahmed was invalid (and, thus, her 2001 marriage to Decedent was valid) through the Ahmed Annulment Order, issued in 2004. *See* LSA's Brief at pp. 14-26.

In her Brief, Respondent attempts to establish her marriage to Decedent was valid through use of the 2008 Compromise Agreement. As this Court is well aware, the 2008 Compromise Agreement was overturned in full by the South Carolina Supreme Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). Nevertheless, Respondent attempts to use both language in the Compromise Agreement as well as legal arguments made in support of the Compromise Agreement to judicially estop the Estate from

opposing Respondent's position in this appeal. For the following reasons, Respondent's arguments on this issue should be flatly rejected.

A. Respondent cannot establish her second marriage is valid through the 2008 Compromise Agreement.

Respondent asserts the Court and parties to this appeal are bound by a "binding private . . . agreement," a 2008 Compromise Agreement, which conceded for purposes of settlement Respondent was Decedent's surviving spouse. Brief of Respondent at p. 6. The 2008 Compromise Agreement states, *inter alia*:

> 6. This agreement is a private and binding settlement agreement among the parties hereto. Although the parties may ask the Court to approve this agreement, this agreement remains binding among the parties and applies to personal representatives and trustees even if not approved by the Court.

(2008 Compromise Agreement at R. p. 2741, ¶ 6.)[13] Respondent claims this agreement is enforceable "despite the lack of any court approval," based on its own terms. Brief of Respondent at p. 6.

The *Wilson v. Dallas* decision, issued by the South Carolina Supreme Court on May 8, 2013, does far more than fail to approve the 2008 Compromise Agreement, as Respondent asserts. Rather, the Supreme Court itself characterized the effect of its decision as "invalidating the compromise agreement" as well as "invalidating the circuit court's approval of the compromise agreement." 403 S.C. at 449, 450, 743 S.E.2d at 767, 768. Accordingly, the entire agreement, including the provision regarding Respondent's marital status, is invalidated by the Supreme Court's decision and is therefore

[13] The LSA's incorporation of the 2008 Compromise Agreement is included in this Brief and designated for inclusion in the Record on Appeal for the sole purpose of rebutting Respondent's claims that the Estate is bound by language of the Compromise Agreement in this matter. The LSA in no way contends that this documents, or any alleged facts contained therein, were considered by the lower court in addressing the cross motions for summary judgment now at issue in this appeal

unenforceable.

Even if this provision were enforceable following a Supreme Court decision "invalidating" it, the provision could only mean the *entire* agreement is binding, not just one morsel of the entire agreement. No party has sought to enforce the entire agreement, or even a part of the agreement, through a separate breach of contract action, following issuance of the *Wilson v. Dallas* decision rendered by the Court more than three years ago. The obvious reason no one has done so is that by seeking to enforce the purported "private binding agreement," the parties would have to completely dismantle Decedent's estate plan. Doing so would clearly violate the purpose and effect of the Supreme Court's ruling in *Wilson v. Dallas.*

Furthermore, despite Respondent's contention to the contrary, the Estate is not bound by the Compromise Agreement because the Estate was not a party to the agreement. By indicating generically that "*Appellants* entered into a binding private settlement agreement," Respondent's Brief at p. 6, 63 (emphasis added), Respondent misrepresents the "Estate" was a party. Russell L. Bauknight, former Limited Special Administrator and Limited Special Trustee, who, as of October 1, 2013, serves as Personal Representative of the Estate and Trustee of the Trust, supported the 2008 Compromise Agreement.

At the time of the settlement, Bauknight was serving "for the limited purpose of providing input and recommendations to the court regarding the compromise agreement." *Wilson v. Dallas*, 403 S.C. at 420, 743 S.E.2d at 751. (Hearing Transcript, January 30, 2009,[14] R. p. 1127, lines 6-25; R. p. 1146, lines 7-18 (Court: "I appointed him to report to

[14] The LSA's incorporation of the January 30, 2009 hearing transcript is included in this Brief and designated for inclusion in the Record on Appeal for the sole purpose of rebutting

this Court his opinion as to the fairness of the agreement").)[15] In contrast, "[t]he circuit court ordered [Adele Pope and Robert Buchanan] to continue [during the settlement approval proceedings] serving in their fiduciary capacities [as the Estate's Personal Representatives and Trustees] . . . ." *Id.* Neither Mr. Buchanan nor Ms. Pope executed the 2008 Compromise Agreement. In fact, Buchanan and Pope, as "Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust" *appealed* the trial court's decision approving the 2008 Compromise Agreement, resulting in the *Wilson v. Dallas* decision.

Respondent contends the LSA should be estopped from taking a contrary position to Mr. Bauknight's during the settlement negotiations and approval process because the LSA is purportedly "acting for Mr. Bauknight in these litigated matters." Brief of Respondent at p. 64. Respondent's assertion could not be further from the truth.

On October 1 and 10, 2014, following removal of Buchanan, Pope, and Bauknight by the Supreme Court's decision in *Wilson v. Dallas*, the Circuit Court and Probate Court appointed the LSA to serve solely, specifically, and exclusively to defend the Trust and the Estate against the Will and Trust Challenges. The appointment orders make clear the LSA is to act separate and independent of Mr. Bauknight:

> This interim appointment is made with the requirement that Mr. Sojourner, in his limited capacity, shall remain independent from Mr. Bauknight, [and] shall act with sole and absolute authority in his limited capacity....

Respondent's claims that the Estate is judicially estopped in this matter by prior arguments allegedly made "by the Estate." The LSA in no way contends that these documents, or any alleged facts contained therein, were considered by the lower court in addressing the cross motions for summary judgment now at issue in this appeal.

[15] Bauknight himself testified that "I certainly found that the [order of appointment] was very, very narrow in scope [and therefore] [I] tried to limit my work to exactly what the order told me to do." (Hearing Transcript, January 30, 2009 at R. p. 1187, lines 8-14.)

B. The Estate is not "judicially estopped" by arguments made by Russell L. Bauknight in support of the 2008 Compromise Agreement.

Respondent asserts the Estate is judicially estopped by "position[s] they asserted before the South Carolina Supreme Court" in the *Wilson v. Dallas* appeal. Brief of Respondent at pp. 6, 64-65. To say the Estate is bound only by Russell Bauknight's actions in support of the 2008 Compromise Agreement is disingenuous and misleading for the reasons stated above. *Supra* at § III(A). Respondent completely fails to reference Buchanan and Pope's role in the settlement negotiation and approval process.

Throughout the settlement hearings, the Estate, through Buchanan and Pope, its appointed Personal Representatives and Trustees, actively fought the settlement in general and the 2008 Compromise Agreement in particular. (*See* Hearing Transcript, January 30, 2009, R. at p. 1108, lines 13-17; p. 1242, line 24 – p. 1243, line 6; p. 1246, line 18 – p. 1247, line 6; Hearing Transcript, March 4, 2009, R. p. 1345, line 22 – p. 1346, line 9.) During the settlement negotiations, hearings before the lower court, and through appeal to the Supreme Court, Buchanan and Pope, on behalf of the Estate, filed motions, made arguments, and presented testimony opposing the 2008 Compromise Agreement, asserting there was not enough evidence to determine Respondent was Decedent's surviving spouse. *See id.*

In particular, Buchanan and Pope asserted *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008), barred use of the Ahmed Annulment Order to retroactively validate Petitioner's bigamous marriage to Decedent. (*See* Hearing Transcript (March 4, 2009) R. at page 1349, lines 8-23; Hearing Transcript (March 5, 2009) at page 1540, lines 4-23, page 1543, lines 7-13, page 1585, line 25 – page 1586, line 4.) The LSA asserts the exact same arguments in the subject appeal. The lower court heard and considered Pope and

Buchanan's positions in opposition to approval of the settlement agreement, clearly believing they held fiduciary positions with relation to the Estate and Trust. (Hearing Transcripts (January 30, R. pp. 1088-1280; March 4-6, R. pp. 1281-1868; March 25-26, R. pp. 1869-2250, April 6, 2009, R. pp. 2251-2453.)

On May 8, 2013, the South Carolina Supreme Court issued its final ruling in the *Wilson v. Dallas* decision. The Court accepted Buchanan and Pope's position in the appeal and invalidated the lower court's approval of the 2008 Compromise Agreement. *Id.* at 450, 743 S.E.2d at 768. The Court also "void[ed] the lower court's appointment of Bauknight as Limited Special Administrator and Limited Special Trustee, indicating his support of the 2008 Compromise Agreement was not in the best interests of the Estate or Trust. *Id.* at 449, 743 S.E.2d at 766. The Supreme Court characterized the effect of its decision as "invalidating the compromise agreement" *and* "invalidating the circuit court's approval of the compromise agreement." *Id.* at 449, 450, 743 S.E.2d at 767, 768. The Court remanded the case with instructions to appoint new fiduciaries to oversee the probate cases in accordance with the provisions of Decedent's estate plan.

It was following the Supreme Court's remand that the LSA was appointed. The Appointment Orders require the LSA to defend the Estate and Trust against all Will and Trust challenges. Any ruling by this Court finding the LSA to be bound by previous arguments or positions in *Wilson v. Dallas* would contradict both the lower court's Appointment Orders and the Supreme Court's *Wilson v. Dallas* final decision.

IV. *WILSON V. DALLAS* DOES NOT AFFIRM RESPONDENT'S INTERPRETATION OF *LUKICH.*

Respondent incorrectly implies the South Carolina Supreme Court agrees with her interpretation of the *Lukich*[16] decisions. In her Brief, Respondent claims:

> As to Mrs. Brown's status as surviving spouse, *Wilson v. Dallas* noted the language in the trial court's order that the *Lukich* case supported the validity of Mrs. Brown's marriage to Mr. Brown. *Wilson v. Dallas* did not reverse that conclusion although the Supreme Court had the opportunity to do so. Had the Supreme Court believed Mrs. Brown was not Mr. Brown's wife under *Lukich*, it could have easily have said so. If the effect of *Lukich* was that Mrs. Brown was not Mr. Brown's wife, this would have been the most compelling point that the Supreme Court could have made to invalidate the settlement agreement. Apparently, the Supreme Court understood that, not only does *Lukich* not invalidate the marriage of Mrs. Brown and Mr. Brown, it confirms the validity of that marriage.

Brief of Respondent at p. 9 (footnote omitted). In a footnote, Respondent admits the Supreme Court "expressly declined to comment on the *Lukich* issue." *Id.* (citing *Wilson v. Dallas*, 403 S.C. 411, 434 n. 16, 743 S.E.2d 746, 759 n. 16).

Respondent's logic is flawed in that it fails to consider Rule 220 of the *South Carolina Rules of Appellate Procedure.* That Rule proclaims an appellate court "need not address a point which is manifestly without merit." Rule 220(b), SCACR. This provision has been cited for the ground that an appellate court need not address points unnecessary to the decision of the appeal. *Shah v. Palmetto Health Alliance*, 2012-UP-475, 2012 WL 10862486 (Ct. App. Aug. 1, 2012). "[T]he appellate court will find it unnecessary to address all the grounds appealed where one requires affirmance." *Anderson v. S.C. Dept. of Highways and Public Transp.*, 322 S.C. 417, 472 S.E.2d 253 (1996) (citing *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984)). It is a uniformly recognized principle of judicial procedure "that a court should usually

[16] *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); *aff'd* 379 S.C. 589, 666 S.E.2d 906 (2008).

refrain from deciding unnecessary questions." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000); *see also Bagwell v. State*, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014). It is recognized as a "firm" judicial "policy" to decline to reach issues when it is not necessary to resolve a case. *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002). Because *Wilson v. Dallas* completely invalidated the 2008 Compromise Agreement as being unsupported by sufficient evidence, it would have been surplusage for the Court to address the *Lukich* question.

To adopt or even consider Respondent's argument that the Supreme Court implicitly supports Respondent's interpretation on *Lukich* because it "expressly declined to comment," Respondent's Brief at p. 9 n. 9, would contradict this Court's own Rules and overturn clear judicial policy and practice.

V. THE SUPREME COURT'S DECISION IN *JOYE V. YON* GOVERNS THE COURT'S RULING.

Respondent tries to support her position on appeal by citing language from this Court's decision in *Joye v. Yon*, 345 S.C. 264, 547 S.E.2d 888 (Ct. App. 2001). *See* Respondent's Brief at pp. 35-38. While the language Respondent quotes does not support her position, it is unnecessary to explain why, because this Court's decision was reversed by the Supreme Court after appeal. *See Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003). More significantly, the Supreme Court's decision in *Joye* holds a family court order annulling a wife's marriage as bigamous only applies prospectively, and *does not relate back to the date of the bigamous marriage. Id.* at 457, 586 S.E.2d at 134. The Supreme Court's holding therefore directly directly supports the LSA's position here.

In *Joye*, Husband and Wife were married in 1970. *Id.* at 454, 586 S.E.2d at 132.

After being married for 26 years, the couple divorced in 1996 and Husband was ordered to pay Wife monthly alimony. *Id.* In March 1999 Wife remarried to Vance, but soon discovered Vance had never divorced his former spouse and filed for an annulment. *Id.* In September 1999, the family court granted Wife an annulment on the grounds of bigamy, ruling her March 1999 marriage to Vance was void *ab initio*. *Id.*

Following Wife's remarriage to Vance, her first husband had ceased paying alimony because in South Carolina a payor spouse's alimony obligation terminates upon the payee spouse's remarriage. 355 S.C. at 454, 586 S.E.2d at 133 (citing S.C. Code Ann. § 20-3-130(B)(1) (Supp. 2002)). Following her annulment, Wife filed a contempt action against Husband for his failure to pay alimony, arguing because her marriage to Vance was void *ab initio* her former Husband's alimony obligation never terminated. *Id.* The family court agreed and ordered Husband to make the alimony payments "both retroactively and prospectively." *Id.*

This Court affirmed the family court's order, ruling Husband's obligation to pay alimony never terminated on the grounds that a second bigamous marriage is void from its inception and is perceived as never having existed. *Id.* at 274, 547 S.E.2d at 893. This Court ruled the annulment order applied retroactively against Husband, even though he was not a party to the annulment action. *Id.* Both Court holdings, which were overturned on appeal, reflect Petitioner's position in this appeal, which should likewise be rejected.

The following portion of the Supreme Court's holding directly rejects Respondent's position and governs this Court's ruling:

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

355 S.C. at 457, 586 S.E.2d at 134 (emphasis added). In other words, Husband would owe no alimony for the 6 months between the time Wife and Vance married and the time their marriage was annulled, even though the order of annulment contained a ruling the marriage was bigamous and, therefore, void *ab initio*. The Supreme Court's ruling in *Joye* establishes a family court decree voiding *ab initio* a bigamous marriage *does not apply retroactively to a non-party to that family court action.* That holding directly contradicts and therefore forecloses Respondent's position in this appeal. It establishes the Ahmed Annulment Order does not apply retroactively to completely invalidate Respondent's marriage to Javed Ahmed and cannot retroactively validate Respondent's marriage to Decedent.

CONCLUSION

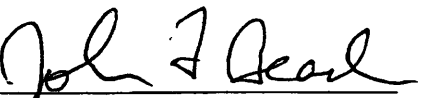
The Estate's position in this appeal is clear: Respondent bears the burden of proving she is Decedent's surviving spouse in order to succeed on all three of her will and trust challenges, including elective share, pursuant to S.C. Code Ann. § 62-2-201, omitted spouse, pursuant to S.C. Code Ann. § 62-2-301, and that Decedent's Will and Trust should be set aside on the basis of fraud and undue influence. The burden of proof is particularly relevant in this case because existing case law mandates the burden shift between the parties. The applicable burden of proof, established by *Hallums v. Hallums*, 74 S.C. 407, 54 S.E.2d 613 (1906), governs the outcome in this case and requires Respondent to come forward with evidence to rebut the existing presumption in the Estate's favor that her first marriage was valid.

Respondent has produced no evidence to establish her first marriage's invalidity. While Respondent frequently references language from her own self-serving affidavit,

filed in 2007, as well as various other court documents, including the Ahmed Annulment Order, the 2008 Compromise Agreement which was invalidated, and legal arguments made in the *Wilson v. Dallas* appeal of the 2008 Compromise Agreement, the only uncontested facts, and indeed the only facts considered by the lower court, are set forth in the Joint Stipulation. In the complete absence of evidence showing her first marriage was invalid, Respondent is left to hide behind legal technicalities which are inapplicable in this case. To the extent Respondent attempts to create a reasonable inference to support her position in this appeal, it should be disregarded. *See Companion Prop. And Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) ("Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom.") (citation omitted)..

Respondent's legal position is hyper technical and convoluted. It has been recognized that appellate courts should not be called upon to "'grope in the dark' to ascertain the precise point at issue," *Brady v. Brady*, 222 S.C. 242, 245, 72 S.E.2d 193 194 (1952). For the reasons set forth above as well as in the LSA's Brief, this Court should determine Respondent is not Decedent's surviving spouse as a matter of law, and reverse the rulings in the lower court's January 13, 2015 and October 26, 2015 orders which granted summary judgment in favor of Respondent.

Respectfully submitted,



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June 26, 2017.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2015-002417

Tommie Rae Brown,.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown and Daryl Brown are the ..... Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief and Final Reply Brief of Appellant, David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and limited Special Trustee of the

James Brown Irrevocable Trust, u/a/d August 1, 2000 complies with Rule 211(b), SCACR.

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Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are the.....Appellants.

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STATEMENT OF ISSUES ON APPEAL

The issue sub judice is whether Mrs. Brown[1] is the surviving spouse of James Brown for purposes of her elective share and omitted spouse's claims ("spousal claims"). Mrs. Brown asserted her spousal claims against the Estate of James Brown; consequently, the determination of her status as a surviving spouse is defined by the South Carolina Probate Code, more specifically S.C. Code Ann. § 62-2-802.

STATEMENT OF THE CASE

Mr. and Mrs. James Brown were married in a traditional ceremonial marriage in Aiken County, South Carolina on December 14, 2001, as evidenced by a marriage license and certificate issued by the Aiken County Probate Court. (ROA VOL. I, p. 256 at ¶¶ 4-5, p. 269) Their son, J B , was born on 2001. (ROA VOL. I, p. 255 at ¶ 3, pp. 267-8) Mrs. Brown had previously attempted to marry Javed Ahmed in Texas in 1997 (ROA VOL. I, p. 255 at ¶¶ 1-2, pp. 265-6); however, he was married at the time. (ROA VOL. I, pp. 293-6) With funds provided for that purpose by Mr. Brown, Mrs. Brown hired Robert Rosen, who, in December 2003, brought an action on her behalf to obtain an annulment from Ahmed. (ROA VOL. I, p. 257 at ¶ 13) In January 2004, soon after Mr. Brown was arrested in a domestic violence dispute, Mr. Brown brought an action in the Aiken County Family Court to obtain an annulment from Mrs. Brown. (ROA VOL. I, p. 258 at ¶ 19) On April 15, 2004, the Charleston County Family Court issued a final, unappealed order ruling, inter alia, that Ahmed was already married at the

[1] The Briefs of Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, and Venisha Brown (but not the LSA's brief) refer condescendingly to Mrs. Brown as "Hynie," her maiden name. Counsel for Mrs. Brown has continuously requested throughout the course of this litigation that opposing counsel be civil and respectful to Mrs. Brown, the wife of James Brown and the mother of James Brown's son, and use her proper legal name, but so far to no avail.

time of the attempted marriage to Mrs. Brown in 1997 and that the putative Brown-Ahmed marriage was void *ab initio* for bigamy. (ROA VOL. I, p. 257 at ¶ 11, pp. 293-6) The family court therefore annulled the putative marriage between Ahmed and Mrs. Brown on the ground of Ahmed's bigamy and other grounds. The annulment order has never been appealed.

Three weeks later, Mr. Brown amended his complaint in the Aiken County case, stating therein that "[t]he Charleston County Family Court granted the Defendant an annulment on April 15, 2004. (A copy of this Order is attached hereto and incorporated by reference)."[2] He argued the "[t]he Charleston County Family Court made Findings of Facts," that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court," and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action."[3] Mr. Brown clearly accepted the benefits of the Charleston County Family Court order when he utilized the order to advance his own position in the Aiken County action.

In July 2004, Mr. and Mrs. Brown reconciled, and they signed a consent order dismissing Mr. Brown's annulment action against Mrs. Brown, as well as her counterclaim for divorce and support, effective August 16, 2004. (ROA VOL. I, p. 258 at ¶ 19, pp. 349-50) Neither Mr. Brown nor Mrs. Brown thereafter sought to terminate or annul their marriage through the date of his death on December 25, 2006.

For purposes of this summary judgment action, the parties signed a Joint Stipulation establishing certain facts. (ROA VOL. I, pp. 254-351) Although the

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[2] (ROA VOL. I, p. 258 at ¶ 19, p. 334)

[3] (ROA VOL. I, p. 334 at ¶¶ 8, 10, 11)

Stipulation resolves all of the *material issues* of fact before the trial court regarding the validity of Mrs. Brown's marriage to Mr. Brown, none of these facts was necessary for the trial court's ruling on Mrs. Brown's Motion for Summary Judgment. The ruling was a matter of law based solely on appropriate judicial notice of South Carolina court records, to which the parties stipulated. The trial court agreed with Mrs. Brown and granted her motion for summary judgment that she is Mr. Brown's surviving spouse. The opposing parties now appeal.

Mrs. Brown stresses that this appeal presents only the limited question of whether she is the surviving spouse of Mr. Brown. Other matters involving her spousal claims have not yet been addressed, such as whether or not there is a valid prenuptial agreement between Mrs. and Mr. Brown. The surviving spouse issue is important as it, first and foremost, relates to the status of the Brown's minor child, J. B as well as to Mrs. Brown's social security, retirement funds, health insurance, and other benefits regardless of her rights in the estate.

ARGUMENTS

I. INTRODUCTION

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

For purposes of this action, the South Carolina Probate Code sets forth the requirements to determine whether Mrs. Brown is the surviving spouse of Mr. Brown.

The determination is made at the time of Mr. Brown's death. S.C. Code Ann. § 62-2-802(a) provides that, because Mr. and Mrs. Brown engaged in a ceremonial marriage evidenced by a valid South Carolina marriage license, Mrs. Brown is the surviving spouse because she was not divorced from Mr. Brown nor had their marriage been annulled at the time of his death.

Appellants want to dispute the validity of Mrs. Brown's marriage to Mr. Brown by attacking the valid unappealed family court order holding that Mrs. Brown had no impediment to her marriage to Mr. Brown. The family court held that Mrs. Brown was never married to Ahmed because of Ahmed's bigamy. However, the trial court, addressing a probate matter, has no subject matter jurisdiction to relitigate that family court order. Only the family court has exclusive subject matter jurisdiction over annulments; neither a probate court nor a circuit court has subject matter jurisdiction over annulments. Thus, the family court order stands.

Even if the trial court had subject matter jurisdiction to relitigate the Brown-Ahmed annulment, Appellants lack standing to do so. Mr. Brown lacked standing to do so. Any rights of Appellants are derivative from Mr. Brown, so they similarly lack standing to relitigate the Brown-Ahmed annulment.

After a quarrel with Mrs. Brown, Mr. Brown availed himself of the one method to invalidate his marriage to Mrs. Brown: he brought his own annulment action. However, he dismissed that action and never again sought to invalidate his marriage to Mrs. Brown. Consequently, Mr. Brown died knowing he was married to Mrs. Brown. Even if Appellants had standing to do what Mr. Brown chose not to do – invalidate his marriage to Mrs. Brown – it is too late. One cannot obtain a posthumous annulment.

Nevertheless, Appellants want to undo what Mr. Brown did.

The Limited Special Administrator ("LSA") appeals, apparently, to protect Mr. Brown's purported 2000 will and trust. The LSA does so despite the fact that the purported 2000 will and trust were executed before Mr. Brown's marriage to Mrs. Brown and the birth of their son. The LSA is trying to protect a will and trust that are subject to claims of undue influence by the three discredited men[4] who controlled Mr. Brown while he was alive and who would benefit under those documents by being entitled to receive *fifty percent* of the *gross income, plus trustees' fees*, from his assets instead of these monies going to charity. Perhaps most importantly, the LSA does so to protect a purported trust that was irrevocable and not only gave these three men the right to *fifty percent* of the gross income from Mr. Brown's trust assets *while he was still alive*, but gave them *total discretion* to determine whether Mr. Brown would receive even one penny from those *assets while he was alive*. That Mr. Brown would willingly cede such total control over his assets while alive is incredible. The LSA ignores these obvious problems in a tunnel-visioned attempt to assert the dubious validity of the will and trust by attempting to undo what Mr. Brown wanted: his marriage to Mrs. Brown.

Failing to relitigate the validity of the family court order confirming that the putative Brown-Ahmed marriage was void *ab initio* for bigamy, Appellants attempt to pervert existing South Carolina statutory and case law by misinterpreting the opinions of this Court and the Supreme Court in the *Lukich* cases. Contrary to Appellants' position, *Lukich* and every other South Carolina case, in accordance with the requirement of S.C.

[4] One of these men was found to have lied under oath to the court. Another is under house arrest for stealing from Mr. Brown. The other is deceased. *See Wilson v. Dallas*, 403 S.C. 411, 420, 743 S.E.2d 746, 751 n.2 (2013).

Code Ann. § 20-1-80, holds that a bigamous marriage is void *ab initio* and never a marriage. Consequently, the putative Brown-Ahmed marriage was never valid, and Mrs. Brown had no impediment to her marriage to Mr. Brown, which remained valid up to the time of his death.

As noted by the trial court's order, Appellants entered into a binding private settlement agreement in which they agreed that Mrs. Brown was the surviving spouse of Mr. Brown – a position they asserted before the South Carolina Supreme Court.[5] The agreement provided that the settlement was binding despite the lack of any court approval. S.C. Code Ann. § 62-3-912 recognizes the binding nature of such a private settlement agreement, even without court approval. Although the Supreme Court in *Wilson v. Dallas*[6] overturned the trial court's approval of the settlement agreement for lack of sufficient evidence, the opinion did not address the alternative issue of the binding private nature of the settlement agreement.

II. SURVIVING SPOUSE STATUS IS DETERMINED UNDER THE SOUTH CAROLINA PROBATE CODE.

The issue before the court is whether Mrs. Brown is the surviving spouse of Mr. Brown. "Surviving spouse" is a defined term under S.C. Code Ann. § 62-2-802(a), which provides that:

> An individual who is *divorced* from the decedent or whose marriage to the decedent has been *annulled* is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separate maintenance that does not terminate the status of husband and wife is not a divorce for purposes of this section.

[5] (ROA VOL. I, p. 18 at ¶ 3) (stating "Tommie Rae was the legal wife of James Brown, during his lifetime and at the time of his death, and qualifies as his surviving spouse.").

[6] 403 S.C. 411, 420, 743 S.E.2d 746 (2013).

(emphasis added).

Mr. and Mrs. Brown had a valid marriage license and certificate evidencing their ceremonial marriage. Thus, for Mrs. Brown not to be Mr. Brown's surviving spouse under section 62-2-802, it must be determined that Mr. and Mrs. Brown were either divorced or that their marriage was annulled by the time of his death. Mrs. Brown's status as the surviving spouse is determined as of the time of Mr. Brown's death. Mr. and Mrs. Brown were never divorced and their marriage was never annulled. Consequently, she is the surviving spouse as defined in the South Carolina Probate Code.

In order for a divorce or annulment to preclude someone from being the surviving spouse of a decedent, the South Carolina Probate Code requires a *signed order* of divorce *or annulment filed* with the clerk of court. S.C. Code Ann. § 62-2-802(c). Under South Carolina law, that signed order must be filed with the court before the decedent's death. *Hatchell-Freeman v. Freeman*, 340 S.C. 552, 532 S.E.2d 299 (Ct. App. 2000); *Bayne v. Bass*, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990); Roy T. Stuckey, *Marital Litigation in South Carolina* § 1.E (3d ed. 2006). There is no such thing as a postmortem annulment. *See generally id.*

Because Mrs. Brown presented a valid marriage certificate and court records prove that the marriage of Mr. and Mrs. Brown was never terminated by divorce and never annulled, Mrs. Brown qualifies as Mr. Brown's surviving spouse.

Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), did not rule on Mrs. Brown's status as surviving spouse. Instead, in concluding that the trial court lacked

evidence to determine that the settlement agreement was just and reasonable,[7] the Supreme Court suggested that there were two principal obstacles in the way of Mrs. Brown's spousal claims, neither of them being the issue before this Court, that she was not in fact the surviving spouse of Mr. Brown. First, as to Mrs. Brown's elective share claim, the Supreme Court assumed that Mrs. Brown executed a valid prenuptial agreement waiving all rights to Mr. Brown's property or any statutory claims against his estate, and observed that "[a] valid prenuptial agreement would normally preclude any right to an elective share." *Id.* at 440, 743 S.E.2d at 762. The Court seemed to presume that the alleged prenuptial agreement was valid even though that issue has not yet been determined. Second, as to Mrs. Brown's omitted spouse claim, the Supreme Court noted that Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after providing for the education of his grandchildren. *Id.* at 441, 743 S.E.2d at 762. Similarly, his intent on that issue has yet to be determined in the trial court.

In short, were this Court to affirm the lower court, it gives Mrs. Brown nothing from the Estate. It only means she was, in fact, Mr. Brown's wife, which of course, is an extremely important ruling for her and her son. The issue of any waiver of the elective share is not a matter for this summary judgment, which addresses only the validity of the marriage with respect to Mrs. Brown's status as surviving spouse.

As to Mrs. Brown's status as surviving spouse, *Wilson v. Dallas* noted the

[7] The practical result of the *Wilson* decision was to deprive the charitable trust of the extremely valuable contribution of certain federal termination rights by Mrs. Brown and the Brown children, as the agreement had provided for, as well as to continue the extremely expensive estate litigation, at the ultimate expense of the charitable trust.

language in the trial court's order that the *Lukich* case supported the validity of Mrs. Brown's marriage to Mr. Brown. *Wilson v. Dallas* did not reverse that conclusion although the Supreme Court had the opportunity to do so.[8] Had the Supreme Court believed Mrs. Brown was not Mr. Brown's wife under *Lukich*, it could easily have said so. If the effect of *Lukich* was that Mrs. Brown was not Mr. Brown's wife, this would have been the most compelling point that the Supreme Court could have made to invalidate the settlement agreement. Apparently, the Supreme Court understood that, not only does *Lukich* not invalidate the marriage of Mrs. Brown and Mr. Brown, it confirms the validity of that marriage.

The resolution of the surviving spouse issue under S.C. Code Ann. § 62-2-802 is clear and simple. Consequently, Appellants have been forced to resort to two arguments about the validity of the marriage of Mr. and Mrs. Brown, neither of which is correct. They attempt to attack the validity of the Brown-Ahmed annulment order, and they attempt to turn the *Lukich* decisions upside down.

III. APPELLANTS LACK SUBJECT MATTER JURISDICTION AND DERIVATIVE STANDING TO ATTACK THE FINAL ORDER OF THE SOUTH CAROLINA FAMILY COURT RULING THAT MRS. BROWN WAS NEVER MARRIED TO AHMED.

Appellants attack the validity of the family court order obtained by Mrs. Brown in 2004 holding that, because her putative marriage to Javed Ahmed was bigamous, it was

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

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

403 S.C. at 434 n.16.

void *ab initio*. Despite the fact that Mr. Brown declined to seek an annulment after dismissing his family court action, Appellants would like the trial court to re-try the Brown-Ahmed annulment case and presumably reach a different conclusion so they can argue that Mrs. Brown had an impediment to her marriage to Mr. Brown. That, of course, is not possible for a number of reasons.

A. Only the Family Court Has Subject Matter Jurisdiction over Annulments

The trial court has no subject matter jurisdiction to relitigate that family court order. Only the family court has jurisdiction over annulments. S.C. Code Ann. § 63-3-530(A)(6). This has been the law in South Carolina for a very long time. *See, e,g., White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984); *Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004) (*Rodman* and *Splawn* affirm that equitable apportionment can occur after annulment, but that is authorized by S.C. Code Ann. § 20-3-620(A), which allows property division in "other marital litigation" which would certainly include annulments.). Neither the probate court nor the circuit court has jurisdiction over annulments.[9]

The Final Judgment annulling Mrs. Brown's marriage to Ahmed was rendered in the Family Court. (ROA VOL. I, p. 257 at ¶ 11, pp. 293-6)

"The family court has exclusive jurisdiction . . . to hear and determine actions for

[9] The spousal claims in this case were removed from the probate court to the circuit court. Thus, the trial court could properly rule, as it did, on summary judgment that Mrs. Brown is the surviving spouse under the South Carolina Probate Code, S.C. Code Ann. § 62-2-802, because the Brown-Brown marriage was not annulled or terminated by divorce, and the trial court did not have subject matter jurisdiction to otherwise contradict the validity of the Brown-Brown marriage or the Brown-Ahmed annulment. *See also* S.C. Code Ann. § 62-1-302(c) (giving the probate court concurrent jurisdiction only to *interpret* marital agreements — *not decide the validity of the marriage* — because the interpretation of a marital agreement, such as a prenuptial agreement or a postnuptial agreement, may impact rights in an estate. That section also gives the probate court concurrent jurisdiction to hear issues related to common law marriage, but that issue is not relevant here because Mrs. Brown relies on her ceremonial marriage.)

the annulment of marriage." S.C. Code Ann. § 63-3-530(A)(6). Because the jurisdiction of the family court is exclusive, the court of common pleas has no jurisdiction over annulments. The trial court agreed. "To allow [Appellants] to challenge Mrs. Brown's annulment from Ahmed in this court would subvert the exclusive authority granted to the family court by the South Carolina General Assembly." (ROA VOL. I, p. 76) "[T]he General Assembly prohibited all other courts from going behind the family court's annulment orders." (ROA VOL. I, p. 76)

Thus, for purposes of determining surviving spouse status for this probate case, the trial court has to assume the validity of the annulment order because the trial court lacks subject matter jurisdiction. Appellants have not been able to explain the trail back to the family court to relitigate the Brown-Ahmed annulment because there is none. Only Mrs. Brown and Ahmed could have done so, and neither did.

B. Appellants Lack Derivative Standing to Contest the Family Court Order

Even if subject matter jurisdiction did not preclude the circuit court from relitigating the Brown-Ahmed annulment, Appellants lack standing to do so.[10] Mr. Brown himself certainly could not do so. As noted in this Court's decision in *Lukich v. Lukich*, 368 S.C. 47, 51, 627 S.E.2d 754, 756 (Ct. App. 2006), *aff'd*, 379 S.C. 589, 666 S.E.2d 906 (2008), Mr. Brown would not have had standing to intervene in the Brown-Ahmed annulment case. Any rights Appellants have are derivative from Mr. Brown and can certainly be no greater than the rights he had while alive.[11] In any event, Mr. Brown

[10] In addition to Appellants lack of subject matter jurisdiction to challenge the family court's order, there are several other reasons Appellants are bound by the annulment order. *See infra* Parts III.B, V, VI, IX.

[11] Heirs are generally in privity with their ancestors. *Thompson v. Hudgens*, 159 S.E. 807, 812 (S.C. 1931). Consequently, heirs are barred from asserting claims that their ancestors would have been barred from

never attempted to collaterally attack the Brown-Ahmed annulment order. Indeed he relied on it himself.[12]

Mr. Brown availed himself of the one method he had available to him: he brought his own annulment action against Mrs. Brown to invalidate the Brown-Brown marriage.[13] Mrs. Brown counterclaimed for divorce. They mutually dismissed the action.[14] (ROA VOL. I, p. 258 at ¶ 19, pp. 349-50) Obviously, Mr. Brown knew the one method to invalidate his marriage to Mrs. Brown was to seek an annulment – because he sought one – yet, after the consent dismissal, he never brought such an action again. Even if Appellants had standing to pursue an annulment, it is too late.

James Brown's estate and James Brown's heirs all claim through him, and they are successors in interest to whatever rights he had. If he was bound by the result of the annulment action, his estate and heirs are likewise bound.

IV. *LUKICH* DOES NOT INVALIDATE THE MARRIAGE OF MR. AND MRS. BROWN; *LUKICH* CONFIRMS THE VALIDITY OF THAT MARRIAGE.

A. Introduction

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asserting. *Watson v. Watson*, 174 S.E. 33, 36 (1934). In *Watson*, the decedent was barred from attacking a divorce; the Court held that those in privity with him, such as his children, were likewise barred. These rulings are obvious because heirs and devisees of a decedent cannot acquire any greater rights through the decedent than the decedent had himself. *See also Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) ("As a result, Decedent's heirs are likewise barred from asserting claims that Decedent himself would have been barred from asserting. See Watson, 172 S.C. at 370-71, 174 S.E. at 36.").* Similarly, a personal representative's relationship with the decedent exemplifies the classic case of privity with the decedent; it would be illogical for a personal representative, representing the decedent, to have greater rights through the decedent than the decedent had himself.

[12] *See infra* Parts V, VI.

[13] The only way to invalidate a marriage in South Carolina is by an annulment action. *See* Stuckey, *supra* at 3.A.

[14] Appellants, especially Terry Brown, take the absurd position that the dismissal of Mr. Brown's annulment action somehow granted him an annulment. *See, e.g.*, Appellant Terry Brown's Br. 35-36. Nor can Appellants credibly argue that, upon dismissing his annulment action, Mr. Brown was relying on *Appellants'* incorrect interpretation of the *Lukich* case, discussed *infra,* to form a belief that he was never married to Mrs. Brown, *because Lukich had yet to be decided.*

Mrs. Brown had no impediment to her marriage to Mr. Brown because her previous attempted marriage to Ahmed was void *ab initio* for *bigamy*, as held in the unappealed order of the family court. (ROA VOL. I, p. 257 at ¶ 11, pp. 293-6) Under the applicable South Carolina statute, S.C. Code Ann. § 20-1-80, and *all precedent*, Mrs. Brown's putative marriage to Ahmed was never valid. Mrs. Brown was unmarried when she married Mr. Brown in a proper ceremonial marriage.

Yet, Appellants propose that this Court accept Appellants' preposterous version of longstanding South Carolina law. Their position would completely overturn existing law. Appellants' argument is that the order annulling the putative Brown-Ahmed marriage as bigamous does not relate back – does not treat that putative marriage as void *ab initio* – and is prospective only. Thus, according to Appellants, Mrs. Brown was married when she married Mr. Brown, with that impediment rendering the Brown-Brown marriage invalid as bigamous. Appellants argue that *Lukich* holds that a bigamous marriage is valid unless and until a court order annuls it, and that such an order of annulment does not render the marriage void *ab initio*, but operates only prospectively – from the time of the order.

The Court of Appeals and Supreme Court opinions in *Lukich* do no such thing. Rather, both *Lukich* opinions follow the required statutory treatment of a bigamous marriage as void *ab initio* – never a marriage – as has *every* South Carolina case addressing the effect of a bigamous marriage. The South Carolina appellate courts have always held, as did the *Lukich* court, that *bigamous marriages* are void, rather than merely voidable. S.C. Code Ann. § 20-1-80 has always required that a *bigamous marriage* is void, not merely voidable. To hold otherwise would contravene clear

legislative intent. It would be contrary to strong public policy to recognize a bigamous marriage as *ever* being valid. That strong public policy is further evidenced by the South Carolina statute that criminalizes bigamy. *See State v. Sellars*, 140 S.C. 66, 134 S.E. 873 (1926). Yet, according to Appellants, a bigamous marriage is *valid* unless and until a court order annuls it, and the annulment order is prospective only, thereby allowing a bigamous marriage to legally exist until annulled. No court has adopted Appellants' position.

Lukich deals with two *annulled* marriages. Marriage #1 was annulled after Wife entered into putative Marriage #2. During the divorce from Husband #2, Wife sneaked off to a different family court behind Husband #2's back and obtained an annulment from Husband #1 on the grounds of intoxication. (Unlike *Lukich*, Mr. Brown was not only aware of his wife's annulment, he paid for it. (ROA VOL. I, p. 242, p. 257 at ¶ 13)) An annulment for reasons of *intoxication* is voidable – that is, it is valid unless and until the parties have that marriage annulled. The Court of Appeals and the Supreme Court both ruled that the annulment for intoxication – a voidable marriage – did not relate back to the date of Marriage #1 for purposes of determining whether Wife had an impediment – bigamy – to putative Marriage #2. *Both appellate courts thus ruled that Marriage #2 was void ab initio – never valid – because of bigamy.* Thus, *Lukich* is just the latest in the seamless line of cases holding that bigamous marriages are void and never valid.

Either through misunderstanding or misstatement, Appellants refuse to recognize that this Court and the Supreme Court held in *Lukich* that the bigamous marriage – in that case, Marriage #2 – was void *ab initio*, and they refuse to recognize that the order of marriages in *Lukich* was different than the order of marriages in this case. In *Lukich*, it

was Marriage #2 that was bigamous and void because the annulment of Marriage #1 was merely voidable. In this case, however, it is putative Marriage #1 (Brown-Ahmed) that was bigamous and thus void – never a marriage. Because putative Marriage #1 was never a marriage, it was not an impediment to Marriage #2 (Brown-Brown).

Appellants argue that, despite the statute requiring a bigamous marriage to be void and every prior case so holding, *Lukich* overturned that rule and all precedent while citing the very cases that upheld that rule.

Even if Appellants' view of *Lukich* were accurate, which it is not, their argument would still fail. They contend that *Lukich* requires an order to annul a marriage, that a marriage is valid unless and until an annulment order is obtained. Appellants own "logic," when applied to the Brown-Brown marriage, would require this Court to find that Mrs. Brown is Mr. Brown's surviving spouse. Under their own theory, the Brown-Ahmed marriage was not annulled until after the Brown-Brown marriage, and the annulment was prospective only. Thus, according to Appellants, the Brown-Brown marriage was bigamous because Mrs. Brown had an impediment to that marriage. But, using Appellants' theory, the Brown-Brown "bigamous" marriage would nevertheless be valid until Mr. Brown obtained an annulment order, which he never did, and it is now too late to obtain one. Thus, under Appellants' theory of *Lukich*, the Brown-Brown marriage is valid because no annulment thereof was ever obtained and it is too late to obtain one. One cannot commence and obtain a posthumous annulment in South Carolina. *See generally* Stuckey, *supra*, at 1.E.

Examining the impact of *Lukich* on South Carolina jurisprudence first requires an examination of South Carolina law prior to *Lukich*.

B. The Bigamy Statute

The South Carolina General Assembly has clearly spoken through S.C. Code Ann. § 20-1-80 that a bigamous marriage is "void" — i.e., never a marriage and never valid from the beginning.[15] This section reads as follows:

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

A void marriage is treated differently from a voidable marriage. A voidable marriage can be valid unless and until a court rules that such a marriage is invalid, but a void marriage is never valid for any purpose.

The South Carolina General Assembly understands the difference between void and voidable. For example, S.C. Code Ann. § 62-3-713, governing self-dealing transactions by a personal representative, provides that such a transaction is "voidable" and can be invalidated at the request of an interested person.

"An annulment declares that a marriage never occurred because of some defect. Defective marriages may be either void or voidable. In a void marriage, the circumstances are such that the marriage could never have come into being. A voidable marriage is recognized under the law as a valid marriage until an action is brought to

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[15] For more than a century, that statute has provided that bigamous marriages are void. This is consistent with the public policy against bigamous marriages. For example, entering into a bigamous marriage is a crime. Note, however, that *State v. Sellars*, 140 S.C. 66,134 S.E. 873 (1926), recognizes, as do all the other bigamy cases, that a bigamous marriage is void *ab initio*, so that a void first marriage is not an impediment to a valid second marriage, and thus the second marriage is not bigamous and not a crime. This is the Brown-Brown marriage situation.

prove it invalid." Stuckey, *supra*, at 3.A. A bigamous marriage is void.[16] *Id.*

Consequently, when the General Assembly uses the term "void" in the bigamy statute, the meaning is clear: a bigamous marriage is void *ab initio* and never valid.

C. Case Precedent: A Bigamous Marriage Is Void *Ab Initio* and Never a Marriage

The annulment order in this case was granted on the most serious and substantial of all grounds for rendering a marriage void: bigamy. It is against public policy and a crime to commit bigamy. A long line of South Carolina cases, including *Lukich*, holds that a bigamous marriage is not a marriage at all, at any point in time. In fact, every South Carolina case considering the issue has concluded that a bigamous marriage is void *ab initio*, and thus never a marriage:

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

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

"A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable." *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) (emphasis added).

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[16] In fact, "a void [bigamous] marriage technically needs no judicial action to declare that it is void." *Id.*

"There could not have been a valid marriage between the appellant, Maggie (Craft) Blizzard, and William Blizzard, as William Blizzard had a lawful living wife at the time of the claimed marriage." *Ex parte Blizzard*, 185 S.C. 131, 193 S.E. 633, 634 (1937).

"When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, *no common-law marriage may be formed*, regardless whether mutual assent is present." *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) (emphasis added); *see also Splawn*, 311 S.C. at 425, 429 S.E.2d at 806; 52 Am. Jur. 2d *Marriage* § 57 ("A marriage that occurs while one party is still legally married to another is void from its inception and cannot be retroactively validated by estoppel, by mutual agreement, or by the parties' conduct in holding themselves out as husband and wife.").[17]

This is hardly surprising because the courts are required to follow the mandate from the legislature that bigamous marriages are void *ab initio*.

D. *Lukich v. Lukich*

Both the Court of Appeals and Supreme Court decisions in *Lukich*[18] are in accord with S.C. Code Ann. § 20-1-80, case precedent, and Mrs. Brown's position. *Lukich* held that a *bigamous* marriage is void *ab initio*. *Lukich* also held that another marriage,

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[17] Every South Carolina case, as required by § 20-1-80, has concluded that the status of someone entering into a bigamous marriage is that of never having been married. It is Mrs. Brown's status that is critical here. At the time she married Mr. Brown, she had no impediment to their marriage because she had never been married before. Appellants cite several cases that deal with ancillary matters, but all of these cases follow the required rule about status: someone having entered into a bigamous marriage was never married. To the extent these cases also deal with ancillary matters, they are inapposite. *See Splawn v. Splawn*, 311 S.C. 423, 429 S.E.2d 805 (1993) (bigamous marriage void *ab initio* but court had to deal with ancillary equitable apportionment of property issues); *Rodman v. Rodman*, 361 S.C. 291, 604 S.E.2d 399 (Ct. App. 2004) (similar, citing *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984)); *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003) (second marriage bigamous and void *ab initio* — court had to decide impact on first husband's obligation to pay alimony, which had ostensibly ended if second marriage was valid, which it was not).

[18] 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006); 379 S.C. 589, 666 S.E.2d 906 (2008).

annulled for *intoxication rather than bigamy*, could be treated as voidable. As explained above, *Lukich* involved the annulment of two marriages: one void *ab initio* for bigamy and another voidable for intoxication.[19] Wife sought alimony during a divorce from her second husband (Marriage #2). During the divorce proceeding, the second husband learned that the woman had previously been married (Marriage #1) and had never obtained a divorce or an annulment from the first husband. During the divorce case itself, which was pending in one county, the wife quickly obtained an annulment for Marriage #1, without her husband's knowledge and in another venue, on the ground of intoxication.[20] Both appellate courts concluded that Marriage #1 was voidable and refused to apply the annulment of Marriage #1 retroactively so that her status would allow her to enter Marriage #2. Marriage #1 in *Lukich* was properly voidable, rather than void, because the annulment was based on intoxication rather than bigamy. Clearly the second husband was not required to pay alimony. If *Lukich* had not treated Marriage #2 as void *ab initio*, the Court would have had to conclude that the husband of Marriage #2

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[19] It is highly significant, however, that the annulment of the wife's first marriage in *Lukich* was based upon intoxication. A ceremony performed while the parties are intoxicated is not completely ineffective to create a marriage. The marriage is only voidable, not void. *See Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (1903) ("Intoxication at the time of entering into the marriage contract will not render the marriage void, but only voidable."); *Henley v. Foster*, 220 Ala. 420, 422, 125 So. 662, 664 (1930) ("A nullity decree may be and is properly granted . . . upon a voidable marriage, one subject to ratification, but not ratified, as in the case of drunkenness[.]"). Once the parties return to sobriety, they are free to waive the defect and have a legally recognized marriage. Heavily intoxicated people have the right to seek an annulment of their marriage, but they are not required to exercise that right.
A bigamous marriage, by contrast, is one of the least valid relationships possible. It is not a marriage at all, for any purpose known to the law. The defect cannot be waived or ratified; the law positively forbids the recognition of any form of marriage where one party to the marriage ceremony is already married to someone else.

[20] "[S]he and Havron were married during a night of heavy drinking, [and] had never lived together as husband and wife[.]" *Lukich*, 368 S.C. at 51, 627 S.E.2d at 756.

would have owed alimony.[21]

In short, a marriage entered into by intoxicated persons is not invalid until the parties decide to attack the marriage and not to waive the defect. Therefore, it is logical that a voidable marriage was invalid only prospectively from the date of the annulment. A void marriage, however, is different. A void marriage is never a valid marriage. The parties are not permitted to waive the defect.

In contrast to Mrs. Brown's situation, Mrs. Lukich's *first* husband was *not* already married when he married Mrs. Lukich, and consequently there was no impediment under the bigamy statute for this first husband to enter a marriage with Mrs. Lukich. Therefore, it was Mrs. Lukich's *second* marriage, to Mr. Lukich, that was void unless this second marriage fit under one of the three exceptions in the bigamy statute.

This Court expressly stated that its holding as to the intoxication annulment was limited to the facts of the marriage and would not apply to bigamous marriages *such as this very case, where Mrs. Brown's first marriage was void and not merely voidable*:

> We note that our holding is limited to the facts of the case at bar, e.g. the situation where the annulled marriage would be valid but for an annulment decree declaring the marriage *ab initio*. Our holding is not meant to affect a party who enters into one of the three types of marriages that never have legal validity in South Carolina, namely marriages that are void *ab initio* by operation of statute: (1) bigamous marriages, S.C. Code Ann. § 20-1-80 (Supp. 2004); (2) same sex marriages, S.C. Code Ann. § 20-1-15 (Supp. 2004); and (3) marriages of minors under the age of 16, S.C. Code Ann. § 20-1-100 (Supp. 2004).

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

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[21] The holding in *Lukich* as to Marriage #1 makes perfect sense, as a voidable marriage is invalid only if it is attacked. The parties to a voidable marriage always have the option of waiving the defect and ratifying the marriage. The annulment of Marriage #1 in *Lukich* was granted on the ground of intoxication. Intoxication is one of the classic grounds that render a marriage voidable, but not void. *See* 52 Am. Jur. 2d *Marriage* § 23; *Abel v. Waters*, 373 So. 2d 1125, 1128 (Ala. Civ. App.), *writ denied*, 373 So. 2d 1129 (Ala. 1979); *Barber v. People*, 203 Ill. 543, 546, 68 N.E. 93, 94 (1903).

The Supreme Court in its *Lukich* opinion did not overturn the obvious rule recognized by the Court of Appeals in its *Lukich* opinion. In fact, the Supreme Court opinion confirms that bigamous marriages are void *ab initio* and are never a marriage at all. 379 S.C. at 593; 666 S.E.2d at 907. The Supreme Court opinion in *Lukich* also cites precedential authority for the same principle:

> *See e.g.*, *Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) ('A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable.'); *Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947) ('[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage . . . .').

Id. at 592-93, 666 S.E.2d at 907.

Contrary to Appellants' argument, *Lukich* does not change, but is instead consistent with, S.C. Code Ann. § 20-1-80 and all South Carolina case precedent: a bigamous marriage (Marriage #2 in *Lukich*) is void *ab initio* and never a marriage.

In their summary judgment arguments, Appellants, in particular Terry Brown, cited the following language from the Supreme Court opinion in *Lukich* as somehow changing the treatment of bigamous marriages in this state: "Under the statute's terms, Wife's 'marriage' to Husband #2 was 'void' from the inception since at the time of that marriage she had a living spouse and that marriage had not been 'declared void.' § 20-1-80." *Lukich*, 373 S.C. at 592, 666 S.E.2d at 907.

The words "*and that*," Appellants argued, indicate that regardless of whether a marriage is void or voidable, one has an impediment to marriage and must obtain an annulment before remarriage. Contrary to Appellants' contention, however, the words "and that" do not refer to the bigamous marriage (Marriage #2 in *Lukich*); the words "and

that" clearly refer to the intoxication marriage (Marriage #1 in *Lukich*). Thus, *Lukich* cannot be read to change a substantive statutory rule of law: *Lukich* does not hold that a bigamous marriage is void only from the date of the annulment order. This would render a bigamous marriage voidable rather than void. *Lukich* does no such thing. Rather, *Lukich* confirms that a bigamous marriage is void *ab initio* and never a marriage.

Appellants, especially Terry Brown, misstate and misplace the order of the marriages, trying to shoehorn the first marriage in *Lukich* into Mr. Brown and Mrs. Brown's marriage situation, but that shoe does not fit. The *Lukich* courts clearly distinguish a marriage void for bigamy – the second marriage in *Lukich* – from a marriage voidable for intoxication – the first marriage in *Lukich*. Terry Brown attempts to equate the putative first marriage of Mrs. Brown to Ahmed with the first marriage in *Lukich*, based simply on the order of marriages. *But it is the type of annulment that creates the critical distinction between Lukich and this case, not the order of marriages.* A bigamous marriage – the first putative marriage in this case and the second marriage in *Lukich* – is always void *ab initio* and never a marriage.

Appellants' misreading of *Lukich* would necessarily include both the Court of Appeals and the Supreme Court favorably citing the statute requiring and the cases holding that bigamous marriages are void and thus never valid, yet according to Appellants somehow overturning and contravening them without expressly saying so. For example, this Court in *Lukich* cited the following cases:

> Section 20-1-80 of the South Carolina Code Annotated sets forth the principle that "[a]ll marriages contracted while either of the parties has a former wife or husband living shall be void." This statute codifies the overriding public policy of this state against bigamy. *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) (holding the public

> policy of not recognizing bigamous marriages overrides the public policy supporting the finality of judgments). A person who is married cannot enter into a valid marriage by participating in a marriage ceremony with a new person. *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable.").

368 S.C. at 52, 627 S.E.2d at 756. The Supreme Court opinion in *Lukich* quoted the following cases:

> While an annulment order relates back in most senses, it does not have the ability to validate the *bigamous second 'marriage.'* Since there was no marriage under the plain terms of the statute when the ceremony between Wife and Husband # 2 was performed in 1985, there was nothing to be 'revived' by the annulment order in 2003. *See e.g., Day v. Day*, 216 S.C. 334, 58 S.E.2d 83 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable"); *Howell v. Littlefield*, 211 S.C. 462, 46 S.E.2d 47 (1947) ("[Husband's] existing marriage . . . incapacitated him . . . to contract another marriage . . . ."). The statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20–1–80 would lead to uncertainty and chaos.

379 S.C. at 592-93, 666 S.E.2d at 907 (emphasis added).[22]

Appellants argue that the *Lukich* courts, without expressly saying so, somehow overruled the very cases they cited favorably for the proposition that bigamous marriages are void *ab initio* and contravened the bigamy statute that the *Lukich* courts cited. Of course, the *Lukich* courts did no such thing, but instead ruled consistently with the bigamy statute and all South Carolina precedent by holding that a bigamous marriage is

[22] The italicized language clearly refers to the bigamous marriage as the second marriage in *Lukich*. The first marriage, annulled for intoxication, was voidable and, because voidable marriage annulments may be prospective only, did not alter the wife's status as already being married when she attempted to enter into a bigamous marriage with her putative second husband. Unlike Mrs. Lukich, it was Mrs. Brown's first putative marriage that was void *ab initio* for bigamy, so that she had a status of "not married" when she entered into her valid marriage with Mr. Brown because she had no impediment.

never a marriage.[23] If Appellants were correct that *Lukich* created a new rule, then the *Lukich* court would instead have held that the second husband owed alimony until an annulment order for Marriage #2 was obtained.

Were this Court to give only prospective effect to the annulment in this case, it would be holding that a bigamous marriage was not invalid from its inception. *Rather, it would be holding that a bigamous marriage was valid from the date of its inception until the date of the annulment. There is no precedent for such a holding.* South Carolina law precludes giving any effect whatsoever to a bigamous marriage. Because a court cannot give any effect to a bigamous marriage, it is required to hold that the bigamous marriage was never a marriage.[24]

Lukich is consistent with *Hallums v. Hallums*, 74 S.C. 407, 54 S.E. 613 (1906), which held that bigamous marriages are void *ab initio*, in accord with all other cases considering the issue. The LSA argued that *Hallums* was exactly on point and reached a different result. The LSA missed a critical factual distinction between *Hallums* and the current case: in *Hallums*, there was never a court determination that the first marriage (Marriage #1) was bigamous and, in fact, the court found that the Marriage #1 was not bigamous. By contrast, in the current case, there is a valid annulment order finding that

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[23] In fact, a later decision cites both *Day* and *Lukich* in the same sentence for the proposition that bigamous marriages are void *ab initio*, without any suggestion that the latter overrules the former. *See Hill v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 405 S.C. 423, 426, 747 S.E.2d 791, 792-93 (2013).

[24] Terry Brown argues against following the bigamy statute and all precedent. He wants this Court to create a new rule that a bigamous marriage is effective until a court order finds it invalid. His proposed new rule would result in chaos for relationships and related rights and certainly violate the strong public policy against bigamy. Even if the Court would adopt his theory and create new law, the new rule could not apply to the marriage of Mr. and Mrs. Brown, but would have to be applied prospectively only. *See Boan v. Watson*, 281 S.C. 516, 316 S.E.2d 401 (S.C. 1984); *Wilson v. Jones*, 281 S.C. 230, 314 S.E.2d 341 (S.C. 1984).

the first marriage was bigamous.

The Hallums paradigm actually supports Mrs. Brown's position. If the *Hallums* court had determined that Marriage #1 was bigamous, then the *Hallums* opinion indicates that the second marriage (Marriage #2) would have been valid because there would have been no impediment to the wife entering into the second marriage (Marriage #2) with the decedent.

In *Hallums*, a woman attempted to get a distributive share from the decedent's estate, claiming to be his surviving spouse. However, the estate contended that she was already married when she attempted to marry the decedent, and thus had an impediment to the attempted marriage to the decedent. The woman then contended that her attempted first marriage was invalid because her putative first husband was already married when they attempted to get married. So far, the LSA is correct: absent the critical distinction missed by the LSA's analysis, the *Hallums* paradigm is the same as the paradigm in the current case because in *Hallums*, the woman argues that she had no impediment to marrying the decedent (Marriage #2) because she was never married to her first husband (Marriage #1) as the first husband himself was already married.

Mrs. Brown argues that she had no impediment to marrying the decedent (Marriage #2) because she was never married to her first husband (Marriage #1) as the first husband himself was already married. The *critical* difference between the two cases is that in *Hallums*, the woman *did not* have a separate annulment order invalidating Marriage #1 void *ab initio* and did not get one because the court concluded her first marriage was not bigamous. In the current case, Mrs. Brown *does* have an annulment order invalidating Marriage #1. In *Hallums*, the court was asked to consider the validity

of both Marriage #1 and Marriage 2 at the same time. The *Hallums* court determined that Marriage #1 was valid because there was insufficient evidence that the husband in Marriage #1 was already married: consequently, Marriage #1 in *Hallums* was not bigamous and therefore was valid. Thus, the woman in *Hallums* had an impediment to Marriage #2. That is the critical factual difference between the facts in *Hallums* and the current case. In the current case, Marriage #1 was determined by a court to be bigamous and thus never valid. In the current case, Mrs. Brown thus had no impediment to Marriage #2 (her valid marriage to Mr. Brown). Thus, *Hallums* supports Mrs. Brown's position.

The LSA in particular also misreads *Hallums* as to another issue. He asserts that *Hallums* is read to determine that Mrs. Brown's testimony in the family court was insufficient to prove that Ahmed was already married. But unlike the present case, the court in *Hallums* looked at the first marriage after the decedent's death because: (1) there was no pre-existing annulment order from a court with exclusive jurisdiction over annulments, as there is today; (2) this was prior to the family court having exclusive jurisdiction over annulments – in fact, this was prior to the existence of family courts in South Carolina; and (3) this was prior to § 62-2-802 defining surviving spouse for estate purposes and case law precluding postmortem annulments.

In the present case, unlike *Hallums*, the trial court is not deciding as a matter of first instance whether Mrs. Brown's purported ceremonial marriage to Ahmed was void for bigamy. That issue has already been decided; there is a final judgment holding that no valid marriage ever existed.

In other words, *Hallums* is distinguishable because the court was adjudicating the validity of both marriages. Here, the Court is not adjudicating the validity of both marriages, because a court has already ruled that the marriage between Mrs. Brown and Ahmed is void for bigamy. The LSA conflates the involvement of the family court and the trial court into one fact-finding endeavor. But the LSA misses the point: the family court has already ruled, and the trial court has to abide by its finding that the Brown-Ahmed putative marriage was void as bigamous. It is not for the trial court in the present case to decide the strength of Mrs. Brown's testimony in the family court: the family court was the proper court to make that determination, and did so.[25]

Contrary to Appellants' arguments, the result is not any different merely because South Carolina law permits division of property after a bigamous marriage. *E.g.*, *White v. White*, 283 S.C. 348, 323 S.E.2d 521 (1984). South Carolina law has been clear for generations that a bigamous marriage "is not a marriage at all" for any purpose, at any point in time. *Day*, 216 S.C. at 338, 58 S.E.2d at 85. The mere fact that the General Assembly chose to permit division of property in an annulment action does not overturn years of South Carolina case law holding that bigamous marriages are entirely void. The General Assembly has simply chosen to allow division of property acquired in a relationship which was not a marriage.[26] The fact that a legislature chooses to allow

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[25] The LSA similarly cites *Yarbrough* for the same proposition he cites *Hallums*, and he is similarly incorrect.

[26] See S.C. Code Ann. § 20-3-620(A), allowing property division in "other marital litigation" which would certainly include annulments. This choice is not unusual. For example, New Jersey and Vermont allow equitable distribution following civil unions, *see* N.J. Stat. Ann. § 2A:34-23; *DeLeonardis v. Page*, 2010 VT 52, 188 Vt. 94, 998 A.2d 1072 (2010), and two states even allow equitable distribution after a relationship in which two people live together in a romantic relationship with no legal relationship whatsoever. *See Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984); *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984).

equitable distribution after a relationship therefore does not necessarily mean that the relationship is a marriage. Equitable distribution is available upon annulment in South Carolina, but that does not mean that the General Assembly intended to disavow long-standing South Carolina case law holding that a bigamous marriage is void from its inception.

Some Appellants argue that the Court of Appeals in *Lukich* intended to hold that an annulment cannot retroactively invalidate a marriage, and therefore must prospectively validate the marriage, based upon material in a quotation from *American Jurisprudence 2d.* (*See* Appellant Terry Brown's Br. 10-11.) It would be remarkable if the Court of Appeals intended that language to be controlling, as this court expressly stated in footnote 2 that its holding did not apply to marriages that were void *ab initio*.[27]

Moreover, other language in *American Jurisprudence 2d* expressly adopts Mrs. Brown's position:

> A person who has entered into a marriage that is void, as distinguished from one that is merely voidable, may thereafter legally enter into another marriage *without taking any steps to have the first marriage dissolved.* However, where a prior marriage is voidable, a second marriage generally cannot be entered into until the prior marriage has been legally dissolved.

52 Am. Jur. 2d, *supra*, § 58 (emphasis added). This language reaches the exact same result as footnote 2. The earlier marriage is never valid if the marriage is void *ab initio*, but is invalid only prospectively if the marriage is only voidable. A bigamous marriage, of course, is void *ab initio*.

Appellants further claim that the public policy against bigamous marriages somehow supports their position. But it is Appellants, not Mrs. Brown, who ask this

[27] *See Lukich v. Lukich*, 368 S.C. 47, 55, 627 S.E.2d 754, 758 n. 2 (Ct. App. 2006).

Court to hold that Mrs. Brown's bigamous marriage to Ahmed is valid only prospectively, and therefore to become the first court ever in the history of South Carolina to give any legal effect at all to a bigamous marriage. Moreover, Appellants' position is that the policy against bigamy would be gravely violated if this Court gives any effect at all to the marriage between Mrs. Brown and Mr. Brown, but they contend that the policy against bigamy is not violated at all if the Court gives legal effect to the bigamous marriage between Mrs. Brown and Ahmed. Appellants' position, of course, is completely inconsistent: they want the Court to find the Brown-Ahmed bigamous marriage merely voidable while finding the "bigamous" marriage – as they see it – between Mr. and Mrs. Brown to be void *ab initio*. They are flailing to get the result they want even though that result requires disparate treatment of bigamous marriages.

For the reasons stated above, that annulment should bind all third parties; otherwise the court will be faced with endless actions to rule upon the validity of a marriage every time its validity is at issue as against a different third party. The bigamous nature of Mrs. Brown's first purported marriage is established in binding fashion by a final family court judgment.

V. THE BROWN-AHMED ANNULMENT ORDER IS BINDING ON ALL THIRD PARTIES.

In addition to Appellants being bound derivatively because Mr. Brown could not contest the Brown-Ahmed annulment order, as discussed above at Part III.B., Appellants are also bound by the order for other reasons that would bind all third parties.

Appellants agreed at the hearing on their motion to reconsider that the "*Lukich*

issue" was dispositive, without the need to attempt to attack the family court order.[28]

The background of why the Brown-Ahmed annulment action was brought is not material, but it is misstated in the briefs of Appellants, so Mrs. Brown will address the issue.[29] Discussion of the annulment began during the marriage between Mr. Brown and Mrs. Brown, when David Cannon, an associate of Mr. Brown who is currently under house arrest for stealing from Mr. Brown, expressed doubt over the validity of the Brown-Brown marriage.[30] (ROA VOL. I, p. 122, ¶ 4) Specifically, Mr. Cannon expressed a belief that the marriage was bigamous because Mrs. Brown was previously married to Javed Ahmed. Mrs. Brown has never denied the attempted marriage to Ahmed, but the marriage was void because Ahmed had several previous wives in Pakistan, from whom he had not been divorced. (ROA VOL. I, p. 122, ¶ 7) "James and I both wanted our marriage to be legal and so James told me to have the marriage [to Ahmed] annulled." (ROA VOL. I, p. 122) Because Mrs. Brown lacked the funds to file the action, it is stipulated that Mr. Brown gave her money to pay the necessary legal fees. (ROA VOL. I, p. 122, ¶ 13, p. 257)

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[28] Order Re Respondent's & Amici Curiae's Motions to Alter, Amend or Reconsider Order Re Petitioner's Motion for Summary Judgment and the Limited Special Administrator's Motion for Summary Judgment, p. 2 (filed Oct. 26, 2015) ("At the hearing on Respondents' Motion to Alter, Amend or Reconsider held on June 30, 2015, Appellants argued that *Lukich* was dispositive of this matter and agreed that this Court's determination of the impact of *Lukich* on this case would be determinative.").

[29] Appellants also misstate the reason Mrs. Brown sought this summary judgment. Appellants claim that the summary judgment was a result of the LSA's motion to modify protective orders. However, Mrs. Brown first asked for this summary judgment in 2007, years before the LSA was even appointed.

[30] The concern of Mr. Cannon, along with his co-conspirators Mr. Dallas and Mr. Bradley, is understandable. Mrs. Brown's marriage to Mr. Brown gave her spousal rights in his estate, which would disrupt the putative will and trust purportedly executed before that marriage. The putative will and trust, if valid, would give Mr. Cannon et al. fifty percent of gross income, plus trustee fees, along with the complete discretion to decide whether Mr. Brown would receive any distributions at all from the trust while he was alive.

The purpose of the annulment action was to address the doubts raised by Mr. Cannon. Mrs. Brown has always believed that her marriage to Ahmed was void and that her marriage to Mr. Brown was valid. (ROA VOL. I, p. 122, ¶ 7) There was a difference of opinion on that subject between Mr. Cannon and Mrs. Brown, and Mrs. Brown brought the annulment action, with Mr. Brown paying Mrs. Brown's attorney's fees, to have that difference resolved authoritatively. Mr. and Mrs. Brown desired, as any reasonable person in that situation would, to resolve those doubts.

Mrs. Brown's Summons and Complaint against Ahmed were filed on December 15, 2003. Mr. Brown was later arrested on a domestic violence charge involving Mrs. Brown on January 28, 2004, and Mr. Brown's attorney brought an annulment action against Mrs. Brown in Aiken County.[31] Over three months later (and three weeks after the Charleston County Family Court filed its Final Order), Mr. Brown amended his complaint. In his Amended Complaint for Annulment, Mr. Brown said "[t]he Charleston County Family Court granted the Defendant an annulment on April 15, 2004. (A copy of this Order is attached hereto and incorporated by reference)."[32] He argued that "[t]he Charleston County Family Court made Findings of Facts," that the "Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court," and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action."[33] Mr. Brown clearly accepted the benefits of the Charleston County Family Court when he utilized the Order to advance his own position in the Aiken County action.

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[31] (ROA VOL. I, p. 123, ¶ 11)

[32] (ROA VOL. I, p. 258 at ¶ 19, p. 334)

[33] (ROA VOL. I, p. 258 at ¶ 19, p. 334)

Unlike the *Lukich* case, Mr. Brown was no mere bystander to the Brown-Ahmed annulment litigation. He paid the attorney's fees which made the action possible,[34] which suggests he had a strong interest in the subject matter of the action. Indeed, he had just as much interest in determining the legal status of his marriage to Mrs. Brown as she did. He was sent copies of both the initial complaint and the final judgment. (ROA VOL. I, p. 257 at ¶ 14, pp. 314-28)

Had Mr. Brown not wanted Mrs. Brown to be his wife, his own annulment action gave him a perfect chance to obtain that result. But he did not press the action; instead, he reconciled with Mrs. Brown and dismissed the action. (ROA VOL. I, p. 258 at ¶ 19, pp. 349-50 ("The parties have resolved their differences and are currently residing together.")) Mr. and Mrs. Brown then continued to reside together as husband and wife until Mr. Brown's death.

As a condition of the settlement of Mr. Brown's annulment action, Mrs. Brown agreed to "waive any claim of a common law marriage" to Mr. Brown. (ROA VOL. I, p. 349) Contrary to arguments made by Appellant Terry Brown, this statement was clearly not a waiver of Mrs. Brown's right to claim a statutory marriage to Mr. Brown. If such a waiver had been intended, it could easily have been expressed simply by removing two words – "common law" – from the above language. Also, if Mr. Brown had truly intended not to be married to Mrs. Brown, surely he would have pursued his annulment action to its conclusion. Instead, he reconciled with Mrs. Brown and agreed to dismiss his annulment action, which prevented Mrs. Brown only from claiming a *common law* marriage.

[34] (ROA VOL. I, p. 257 at ¶ 13, 122)

The public policy of stability of marriage requires that a method exists for determining *authoritatively* the validity of a marriage which has been questioned: to seek an annulment of a marriage. Mrs. Brown used that method, with the full support of Mr. Brown. She presented the issue to the family court. That court determined that Mrs. Brown's prior marriage was void from its inception.

The position taken by Appellants in this case is that there was no way for Mrs. Brown to determine authoritatively whether her marriage to Mr. Brown was valid or invalid. No matter how many judges found the marriage valid (and the Brown-Ahmed putative marriage invalid), Appellants insist that Mrs. Brown was required to foresee every possible third party who might possibly ever question the validity of the marriage, and join those persons as parties to the annulment action.[35] Appellants argue that, if Mrs. Brown failed to name any third person—and she could not possibly foresee every third party who would ever question the marriage in the future—that third party was not bound by the annulment. The practical result would be that Mrs. Brown would spend the rest of her life in court, continually defending the annulment against yet another collateral attack filed by a person not joined as a party to the original action. *For example, if Mrs. Brown remarries and divorces in the future, her next husband (under Appellants' legal theory that they are not bound by the annulment), can claim she is still married to Ahmed.*

Of course, a critical flaw in Appellants' argument is that, as with Mr. Brown, none of Appellants could have been parties to the annulment action because they are obviously not parties to the marriage. Yet they effectively want to be parties now. Mrs.

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[35] Which, of course, would not have been allowed in the family court action. *See, e.g.*, this Court's recognition in its *Lukich* opinion of the family court judge's refusal to let "Husband #2" intervene in the wife' annulment action against Husband #1 because "Husband #2" was not a party to the marriage.

Brown respectfully submits, and the trial court found, that she is not required to spend the rest of her life relitigating the merits of the annulment action. *The annulment is binding on the world just as divorce decrees are.* That action was a final resolution of the status of the marriage between Mrs. Brown and Ahmed, and it binds all third parties. If this is not the law, it will be impossible to ever obtain an authoritative determination of the validity of a questioned marriage.

Mrs. Brown relies initially upon S.C. Code Ann. § 20-1-80, which 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, *no[r] to any person who shall be divorced or whose first marriage shall be declared void by the sentence of a competent court.*

(emphasis and bracketed correction added). This statute means just what it says: a bigamous marriage is void and, moreover, a second marriage is not void for bigamy if a first marriage "shall be declared void by the sentence of a competent court." *Id.* That is exactly what happened in this case. The statute makes no reference to who was or was not a party to the annulment action. It makes no reference to whether the first marriage was declared void before or after the date of the second marriage. The statute states, simply and directly, that a bigamous marriage is void and that a marriage is not void for bigamy if a prior marriage has been declared void. There is no question that a court has declared the marriage between Mrs. Brown and Ahmed was void on the ground of Ahmed's bigamy. Indeed the Final Order granting the annulment is stipulated by Appellants. (ROA VOL. I, p. 257 at ¶ 11, pp. 293-6)

The effect of S.C. Code Ann. § 20-1-80 is to make annulments binding upon all

third parties. This is the strong general rule nationwide. "[*A*]*nnulment decrees are binding upon non-parties* as well as parties respecting the validity of the marriages involved." 1 Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 3.6 (2d ed. 1987) (emphasis added). Professor Clark continues:

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

Id.

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

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

annulment was binding upon the first husband even though he was not a party to the action:

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

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

Mrs. Brown recognizes that *Joye* was reversed as to *the effect* of a bigamous remarriage, but as to a prior obligation for *alimony*. The Court of Appeals held that alimony always terminates upon a voidable remarriage and never terminates upon a void remarriage. The South Carolina Supreme Court rejected the absolute void/voidable distinction, holding instead that the effect of an annulled remarriage upon a previous alimony obligation should be determined under a case-by-case approach. *Joye v. Yon*, 355 S.C. 452, 586 S.E.2d 131 (2003).

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

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

> When the validity of a marriage shall be denied or doubted by either of the parties, the other may institute a suit for affirming the marriage and, upon due proof of the validity thereof, it shall be decreed to be valid and *such decree shall be conclusive upon all persons concerned.*

S.C. Code Ann. § 20-1-520 (emphasis added). Since "all persons concerned" are bound by a court determination that a marriage is valid, "all persons concerned" should likewise be deemed bound by a court's finding that a marriage is invalid—that is, by a decree of annulment. Indeed, the decree of annulment is in substance a holding which affirmed the

validity of Mrs. Brown's marriage to Mr. Brown. Under § 20-1-520, such an affirmation is binding upon third parties.

Other states have held that annulments cannot be collaterally attacked by those who are not parties to the action. *See Johnson Cnty. Nat'l Bank & Trust Co. v. Bach*, 189 Kan. 291, 369 P.2d 231 (1962) (holding that an annulment could not be questioned by third parties). Specifically, that court held that:

> The appellees [the other beneficiaries of the trust] argue that whatever the effect of the Arizona decree annulling the appellant's remarriage may have been as against the parties thereto, it cannot affect the rights of third parties whose rights had previously vested upon the occurrence of the vesting condition; that is, the appellant's remarriage.
>
> The argument of the appellees throughout their brief fails to distinguish between a marriage which is voidable, such as a marriage induced by fraud where one of the parties has an option to continue the marriage or to set it aside, and a marriage which is absolutely void, such as here a bigamous marriage. *No decree is necessary to declare a bigamous marriage void.*[36] Under the law applicable to this case it was impossible for the appellant to marry Emerson. There being no marriage, other than the inefficacious marriage ceremony in Wyoming, the condition precedent to the vesting of rights in third persons did not occur. Under these circumstances the rights of third persons could not have been affected by the Arizona decree of annulment.

Id. at 298-99, 369 P.2d at 236 (emphasis added).

Just as the Arizona decree in *Bach* was conclusive on the validity of the alleged marriage in that case, so is the annulment in this case likewise dispositive. The annulment can be attacked only in a prior direct attack filed by the parties to the action—Mrs. Brown and Ahmed. *See also Michelli v. Michelli*, 527 So.2d 359, 361 (La. Ct. App. 1988) (annulment cannot be attacked).

A New York court generalized the fundamental principle of law which underlies

[36] *Bach* serves as additional authority that a bigamous marriage is void, even without a court determination. *See* Stuckey, *supra*, at 3.A.

the above cases:

> It is ancient law that a judgment *in rem* is res judicata as to all the world with regard to the res or status that is determined therein. In a matrimonial action the condition of marriage or non-marriage is involved. An essential issue is, therefore, one of status—or, put another way, there is a marital res subject to *in rem* jurisdiction. As a consequence, in ordinary circumstances a judgment determining marital status is binding on the whole world, and it is not confined in effect to the immediate parties to the action in which the judgment determining status was rendered.

Presbrey v. Presbrey, 6 A.D.2d 477, 480, 179 N.Y.S.2d 788, 792 (1958) (emphasis added), *aff'd*; 8 N.Y.2d 797, 168 N.E.2d 135, 201 N.Y.S.2d 807 (1960); *see also Luke v. Hill*, 137 Ga. 159, 73 S.E. 345, 346 (1911) ("So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers[.]")

The Restatement (Second) of Judgments states the general rule as follows:

> *A status determination is ordinarily binding on non-parties* because it effects a transformation of the legal status of the person involved which others have no legal authority to challenge. In this respect it is similar to status changes that parties are free to make without adjudicative proceedings, such as entry into marriage, renunciation of citizenship, or voluntary surrender of one's property to a conservator or trustee.

Restatement (Second) of Judgments § 31 cmt. f (Westlaw Mar. 2016 Update) (emphasis added); *see also id.* § 31 cmt. a ("Proceedings for the determination of status include divorce and annulment actions.").

The Restatement (First) of Judgments states the same rule: "In a proceeding *in rem* with respect to a status *the judgment is conclusive upon all persons* as to the existence of the status." Restatement (First) of Judgments § 74(1) (Westlaw Mar. 2016 Update) (emphasis added).

Indeed, even some of Appellants recognize that the annulment is binding on third persons on the question of status. (*See* Appellant Sojourner's Br. 16 ("Such a judgment is

binding as to third persons as to the status of the marriage only.").)

Appellants' position is that this case somehow does not involve an issue of status. However, it clearly does. The entire question being litigated is whether Mrs. Brown had a valid marriage to Ahmed such that she could not then have a valid marriage to Mr. Brown. This is obviously a question of status.

Appellants also try to argue that *findings of fact* contained in a judgment regarding status are not binding on third parties. But Mrs. Brown does not assert the findings of fact from the family court order, but merely the family court's order as to the status of her putative marriage to Ahmed: that is was void *ab initio*. In response to Appellants' argument about the binding effect of findings of fact, if the findings of fact contained in a judgment are not binding, the conclusions of law which are based upon those findings cannot possibly be binding either, so this is effectively just another way of saying that a *judgment* of status does not bind *any* third parties—a rule which is not supported by the law. If accepted, such a rule would effectively mean that annulments are never final.

In support of their position, Appellants cite Restatement (First) of Judgments § 74(2), which provides: "[a] judgment in such a proceeding will not *bind anyone personally* unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact." (emphasis added). This provision comes immediately after section 74(1), quoted above, which states a general rule that judgments of status are binding on all third parties. It is therefore a limited exception to a broad general rule. If section 74(2) means that factual findings never bind any third party, then

a judgment of status itself never binds any third party and section 74(2) has completely swallowed section 74(1).

The trial court held that section 74(2) applies only to factual findings on matters collateral to status. (ROA VOL. I, p. 92) This holding is consistent with section 74(2), which states that a judgment does not "bind anyone personally" unless the court has jurisdiction over him. That is, a judgment *in rem* cannot have the binding effect of a judgment *in personam* unless the court has personal jurisdiction over the defendant. But a judgment which cannot be binding *in personam* can still be binding *in rem*. The status change itself is clearly an in rem action. As regards the issue of status itself, the judgment binds everyone. But as to issues *other than status*, which may require *in personam* jurisdiction, the judgment is not binding.

Comment b to section 74 sheds considerable light upon the relationship between section 74(1) and section 74(2). That comment states:

> *Personal liabilities.* 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 will not bind anyone personally over whom the court does not have jurisdiction. The court cannot impose a personal liability upon a person who is not subject to the power of the court. *The question of the power of the court to impose a personal liability in a proceeding in rem to affect a status arises most frequently in a suit for divorce with respect to a judgment for alimony.*

Restatement (First) of Judgments § 74 cmt. b (emphasis added).

The emphasized last sentence gives a direct example of the distinction between section 74(1) and section 74(2). The drafters had in mind the well-known rule that a divorce binds everyone as to the validity of the divorce itself. But when the issue is not the existence of a status, but rather personal *liability* for alimony, the judgment does not

even bind the named defendant unless the court had personal jurisdiction over him. *See Estin v. Estin*, 334 U.S. 541, 548-49 (1948); *Kreiger v. Kreiger*, 334 U.S. 555 (1948) (companion case to *Estin* reaching the same result); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

Section 74(2), therefore, is aimed only at issues other than the status change itself. Section 74(2) says that on issues collateral to status, the judgment is binding only on persons who appear and over whom the court has jurisdiction. Likewise, factual findings in a status change judgment cannot be binding on issues other than status because those issues require personal jurisdiction and not merely *in rem* jurisdiction.

This rule is good and logical policy. *In rem* jurisdiction allows the court to adjudicate only the question of status. It cannot be used as a jurisdictional piggyback to allow the court to decide issues other than the question of status, which are not properly a basis for *in rem* jurisdiction. The effect of section 74(2) is that *in rem* judgments bind third parties only as to issues that are proper subjects for *in rem* jurisdiction, such as status. An *in rem* judgment cannot be used to bind third parties on an issue that is not subject to personal jurisdiction.

But Appellants seek to give a broader effect to section 74(2). They argue that, under section 74(2), the factual findings in an *in rem* judgment do not bind third parties *even on the central issue of the status change itself.* That argument is a step too far. If the factual findings do not bind third parties on issues of status, the third parties are necessarily not bound by the entire judgment, and section 74(1) is pointless. If section 74(1) is to have any effect at all, an *in rem* judgment must be functionally binding on all issues regarding the status change itself. The judgment is not functionally binding unless

both its factual findings and its conclusions of law are binding. To say that the latter is binding, but the former is not, is to reject the entire premise of section 74(1).

The Oregon case cited by Appellants, *In re Rowe's Estate*, 172 Or. 293, 141 P.2d 832 (1943), is distinguishable on several grounds. To begin with, the case involved a decree of divorce, not a decree of annulment. A decree annulling a bigamous marriage has a much broader preclusive effect because it determines that no marriage ever existed. A divorce decree, by contrast, merely terminates a marriage.

More importantly, the issue in *Rowe's Estate* was whether a finding of desertion in the divorce decree conclusively established lack of access for purpose of paternity. The fact at issue was therefore not the status of marriage itself, but rather a fact collateral to status. Here the issue is purely one of status: if the decree annulled Mrs. Brown's marriage to Ahmed, then her marriage to Mr. Brown was not bigamous. The *Rowe's Estate* court expressly held that the divorce was binding on issues of status. "[T]he decree in a divorce suit as a decree *in rem* binds the whole world as to the status of the parties, to the extent that their status is the res adjudicated[.]" *Id.* at 302, 141 P.2d at 836. The status of Mrs. Brown's marriage to Ahmed is exactly the matter adjudicated by the present decree of annulment.

The Court should likewise reject the strange argument made by Deanna Brown et al. that giving preclusive effect to a prior judgment would somehow violate the rule against hearsay evidence.[37] To begin with, no hearsay objection along these lines was made in the trial court. "An appellant must make a specific objection to the admission of evidence to preserve the issue for appeal." *Abba Equip., Inc. v. Thomason*, 335 S.C. 477,

[37] *See* Appellants Deanna Brown, et al.'s Br. 17-18.

486, 517 S.E.2d 235, 240 (Ct. App. 1999). "[A]bsent a contemporaneous objection identifying the particular comments complained of and the basis for the objection, Janssen has waived its right to complain about this issue on appeal." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 190 (2015). Because this issue was not preserved in the trial court, it cannot be raised upon appeal.

Assuming that the issue was preserved, Appellants' argument is apparently that the entire doctrines of res judicata and collateral estoppel, followed by the courts for centuries, must now be overturned. This is not the law. When the court gives preclusive effect to a prior judgment, it does not merely treat the judgment as admissible evidence; rather, it holds that the judgment itself is legally binding on the issues resolved therein. If the judgment itself is somehow hearsay, then no prior judgment can ever be binding on any issue.

Appellants rely on *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993). But other courts have held that *Nipper* does not apply when the issue is res judicata or collateral estoppel:

> The plaintiff argues that a judicial finding in one case is inadmissible hearsay when proffered as evidence in another action. *See Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir.1993); *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 141 F.Supp.2d 320, 323 (E.D.N.Y.2001).
>
> That proposition is fine as far as it goes. However, *the cases cited by Torah Soft do not address the possibility that judicial findings in the earlier case may have preclusive effects in the latter.* In *Blue Cross*, for example, there was no issue of *res judicata* or collateral estoppel because the proffered judicial finding concerned the credibility of an expert witness in a prior, unrelated case, a finding that could not now bind parties who had played no role in the earlier litigation. 141 F. Supp. 2d at 322. Similarly, in *Nipper*, although the parties were the same in both the first and second cases, the actions involved different transactions, *and the court did not engage in an analysis of preclusion* but simply found that the hearsay exception for public records does not apply to judicial findings of

fact. 7 F.3d at 416-18.

Torah Soft Ltd. v. Drosnin, No. 00 CIV. 0676 (JCF), 2003 WL 22024074, at *1 (S.D.N.Y. Aug. 28, 2003) (emphasis added).

Nipper therefore did not intend to hold that the hearsay rule overturns the settled doctrines of res judicata and collateral estoppel. Indeed, there is no suggestion in *Nipper* that the prior judgment at issue had any preclusive effect at all upon persons who were not parties. Here, Mrs. Brown's entire argument is that the prior judgment does have preclusive effect because annulments always bind third parties as a matter of law and because this specific annulment binds Mr. Brown and his heirs. *Nipper* applies only when prior judgments are used *as evidence*, not where they are used *for their preclusive effect*. Otherwise, years of case law under res judicata and collateral estoppel will be overturned.

Mrs. Brown is not arguing that Appellants are bound by the findings of fact in the judgment annulling her marriage to Ahmed; she is arguing that Appellants are bound by the conclusion of law that the marriage between Mrs. Brown and Ahmed was void *ab initio* for Ahmed's bigamy. A conclusion of law is not evidence and cannot constitute hearsay. Indeed, appellants themselves cite numerous cases in their briefs and argue that the court is bound by the conclusions of law reached in those cases. If conclusions of law are inadmissible hearsay, the entire system of legal precedent is invalid. The court should reject Appellants' attempt to use the law of hearsay to overrule the doctrines of res judicata and collateral estoppel.

The court should therefore hold that the judgment annulling the marriage between Mrs. Brown and Ahmed is conclusive against all third parties on the central issue of

whether that marriage was or was not bigamous. If this is not the law, then Mrs. Brown is required to prove the merits of her annulment all over again every time the issue arose against a different third party. Mrs. Brown should not be required to do that. Once annulled, a marriage is invalid against all persons, regardless of whether they were parties to the annulment action.

A critical flaw in Appellants' position that an annulment order is not binding on third parties stems from subject matter jurisdiction. In South Carolina, only family courts have jurisdiction over annulments.[38] Appellants, eager to retry a final family court order, have no standing in family court. Probate and circuit courts have no subject matter jurisdiction over annulments. This matter is *res judicata*. Appellants propose to allow the circuit court, sitting in probate, without jurisdiction over annulments, to retry the case (which is the effect of their not being bound by the family court order). How else could the circuit court decide whether Appellants are bound? The choice would be either to effectively relitigate the case or disregard a final family court order without determining why it should be disregarded. As anxious as Appellants are to change history, they have not explained the jurisdictional path to accomplish that.

VI. EVEN IF THE ANNULMENT AT ISSUE DOES NOT BIND APPELLANTS DERIVATIVELY AND THIRD PARTIES GENERALLY, IT BINDS APPELLANTS IN THIS CASE.

As discussed above at Section V., judgments of annulments bind all third parties on the central question of the status of the marriage. If this is not true, the public policy of stability of marriage will be thrown into chaos. This Court should adopt the view expressed by Professor Clark in his definitive treatise *The Law of Domestic Relations in*

[38] *See supra* Part III.A. *See also* S.C. Code Ann. § 63-3-530 (A)(6).

the United States § 3.6 (2d ed. 1987).

Assuming for the sake of argument that annulments do not bind third parties generally, Mrs. Brown submits that the annulment in this case is binding upon these specific Appellants. The elements of collateral estoppel are as follows:

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

Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). There is no question here that the validity of the marriage between Mrs. Brown and Ahmed was necessarily determined in the annulment action. Determining the validity of the marriage was the entire purpose of the annulment action. A finding that the marriage was invalid was obviously necessary to support a judgment annulling the marriage.

The annulment was also actually litigated. While Ahmed did not appear, South Carolina law places upon the court a solemn duty to approach all annulment cases with careful skepticism, and grant an annulment only in the presence of strong supporting evidence:

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

> marriage contract by collusion, default, or coercive pressure exerted upon either or both of the parties.

Fogel v. McDonald, 159 S.C. 506, 512, 157 S.E. 830, 833 (1931) (emphasis added).

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

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

It is axiomatic that the state has a strong interest in preserving marriages. The effect of *Fogel* is to make the state a third party to every annulment, and to charge the judge with a duty to review the evidence carefully. An annulment case is therefore never a default judgment, in the normal sense of a judgment entered routinely and automatically simply because the defendant fails to respond. The court was required to review the evidence carefully, and not simply assume that the annulment should be granted because no one opposed it.

In addition, counsel for Mrs. Brown expressly asked the court *not* to issue a default judgment, but rather to comply with its legal duty to examine the sufficiency of the evidence:

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

(ROA VOL. I, p. 256 at ¶ 8, p. 300, lines 7-12 (emphasis added).) Counsel did this because it was not in Mrs. Brown's interest to obtain an annulment which was not binding

on anyone who did not appear. The entire purpose of the annulment action was to resolve the uncertainty over the state of Mrs. Brown's marriage in a manner which would bind third parties, so that the uncertainty would cease to be an issue in Mr. Brown and Mrs. Brown's life.

The court in the annulment action accepted Mrs. Brown's request. It did not issue a default judgment, but rather examined the evidence presented and found it sufficient to meet Mrs. Brown's burden of proof. The annulment was therefore actually litigated.

When the requirements of collateral estoppel are met, the judgment is binding at least on the parties to the action. But the preclusive effect of a judgment is not limited to named parties. It also applies to persons who provide essential support for the litigation. For example, in *Tillman v. Tillman*, 93 S.C. 281, 76 S.E. 559 (1912), a father executed a deed giving custody of his children to his parents. A custody action then followed between the father's parents and the mother, in which the mother prevailed. The court held that the father was bound by the judgment:

> It is true that [the father] was not a formal party to that proceeding, but he submitted an affidavit therein making no claim on his own behalf, but insisting on the claim of his father and mother, to whom he had solemnly conveyed all his rights of custody. *It is clear that by this action he became bound by the decree rendered in the former proceeding.*

Id. at 284, 76 S.E. at 559 (emphasis added). By supporting his parents in the custody case, therefore, the father became bound by the result.

More generally, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties *and their privies* in any subsequent action based upon a different claim." *Richburg v.*

Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986) (emphasis added). "The term 'privy' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *H.G. Hall Constr. Co. v. J.E.P. Enters.*, 283 S.C. 196, 204, 321 S.E.2d 267, 271 (Ct. App. 1984). Courts in other states have identified at least three types of privity:

> People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.

Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 653 (Tex. 1996).

> A privy is defined as: 1) a non-party who has succeeded to a party's interest in property (a successor in interest); 2) a non-party who controlled the original suit; or 3) a non-party whose interests were adequately represented by a party in the original suit (through "virtual" or "adequate" representation).

Doyle v. Smith, 202 P.3d 856, 866, 2009 OK CIV APP 5, ¶ 48 (Okla. Civ. App. 2008) (quoting *Asahi Glass Co. v. Toledo Eng'g Co.*, 505 F. Supp. 2d 423, 434 (N.D. Ohio 2007)).

In the present case, it is stipulated that Mr. Brown paid Mrs. Brown's attorney's fees in the annulment action. (ROA VOL. I, p. 257 at ¶ 13) It is further stipulated that James Brown was informed separately of the results of the action. (ROA VOL. I, p. 257 at ¶ 14, pp. 314-28) *These facts establish, at a minimum, that James Brown supported the annulment action to at least the same extent that the father supported his parents' action in Tillman.* He did not assert a claim of his own; he supported Mrs. Brown's claim by paying the attorney's fees necessary for her to make it.

In addition, paying a party's attorney's fees constitutes, as a matter of both law and

common sense, supporting an action in the sense that that term was used in the above cases. Mr. Brown evidently agreed that his interests in the annulment action were represented by Mrs. Brown, and paid Mrs. Brown's attorney.

Courts in other states have held that a party who pays another party's attorney's fees is bound by the result of the litigation. In *Piney Oil & Gas Co. v. Scott*, 258 Ky. 51, 79 S.W.2d 394 (1934), the Kentucky Supreme Court held that paying part of another party's attorney's fees is sufficient to establish privity. *Piney Oil* holds that a nonparty is bound by a judgment if the nonparty even *contributed* to a party's attorney's fees. Here, Mr. Brown did not pay only part of Mrs. Brown's attorney's fees; he paid her *entire* attorney's fees.

Appellants cite case law from other states holding that those who pay the attorney's fees of a party are not bound by the result of litigation. But *Piney Oil* shows, at a minimum, that nationwide case law on this subject is divided. Moreover, South Carolina has held in *Tillman* that those who support an action or consent to an action are bound by the result, even if they are not named parties. South Carolina law is therefore similar to Kentucky law as set forth in *Piney Oil*, and not similar to the law set forth in the cases cited by Appellants.

The result reached by *Tillman* and *Piney Oil* is good public policy and equitable in this case. The preclusive effect of litigation should not be strictly limited to those who are named as parties. *When a person supports, encourages, and insists upon litigation, and most importantly pays for litigation, the person should be bound by the result of the litigation he or she has fostered.* To do otherwise would allow persons of means to litigate through agents, gathering the fruits of victories, and avoiding losses on grounds

that only the named parties are bound by the judgment.

Appellants cannot avoid collateral estoppel on the ground that the annulment was a default judgment. For the reasons stated above, there is no such thing as a default judgment in an annulment case, as the court is required to make an independent determination of the sufficiency of the evidence. *E.g.*, *Davis*, 236 S.C. at 284, 113 S.E.2d at 823. That is especially true here, where counsel for Mrs. Brown expressly stated at the annulment hearing that "we're not moving to put [the defendant] in default." (ROA VOL. I, p. 256 at ¶ 8, p. 300, line 8)

In addition to paying Mrs. Brown's attorney's fees, Mr. Brown also accepted substantial benefits of the judgment during his lifetime. The evidence is uncontested that Mr. Brown was aware at all times of Mrs. Brown's annulment action and that he paid Mrs. Brown's attorney's fees. The effect of the annulment was to resolve uncertainty as the validity of a marriage to which both spouses were parties, and Mr. Brown therefore benefited as much from the judgment as Mrs. Brown did.

Further, as set forth above, Mr. Brown later filed an annulment action in Aiken County against Mrs. Brown and said that "the Findings of Facts of the Charleston Family Courts are binding on [the Aiken County Family] Court" (ROA VOL. I, p. 258 at ¶ 19, p. 334) and that "[Mrs. Brown] is collaterally and judicially estopped from denying the allegations in this action." (ROA VOL. I, p. 334 at ¶ 11) *Mr. Brown clearly accepted the benefits of the Charleston County Family Court Order when he utilized the Order to advance his own position in the Aiken County action.* This is the essence of estoppel. Mrs. Brown counterclaimed for a divorce, and the parties ultimately entered into a Consent Order of Dismissal. (ROA VOL. I, p. 258 at ¶ 19, p. 349)

A party who has accepted the benefits of a judgment, or even a substantial part of the benefits, is estopped from later contesting the validity of that judgment. The equitable justification for this rule has been stated in various ways. For instance, a "litigant cannot treat a judgment as both right and wrong." *Dorai v. Dorai*, No. 01-12-00308-CV, 2013 WL 1694866, 2013 Tex. App. Lexis 4812 (Apr. 18, 2013). "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. The rule is based on the principle that 'the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other.'" *Satchmed Plaza Owners Ass'n v. UWMC Hosp. Corp.*, 167 Cal. App. 4th 1034, 1041, 84 Cal. Rptr. 3d 585, 590 (2008). "The acceptance of the benefits of the judgment is inconsistent with a claim that the judgment is erroneous. More importantly, in the circumstances here present, it is inequitable and unjust to permit plaintiff to accept the benefits and attack the judgment on appeal." *Tassie v. Tassie*, 357 A.2d 10, 15, 140 N.J. Super. 517, 525-26, (App. Div. 1976). "The general rule is that when a litigant voluntarily accepts the benefits of an order or judgment, [the litigant] cannot take an appeal to reverse the judgment. This is because the right to proceed on a judgment and enjoy its fruits, and to attack it on appeal, are totally inconsistent positions." *George v. George*, 991 S.W.2d 679, 680-81 (Mo. Ct. App. 1999).

The acceptance of the benefits doctrine has been in effect in South Carolina for well over a century at least, as evidenced by *Whaley v. Lawton*, 57 S.C. 256, 35 S.E. 558 (1900). In that case the trial court issued an order granting the plaintiff leave to amend his complaint after it had initially sustained the defendant's demurrer, and granted the

defendant leave to answer the amended complaint. The defendant answered the amended complaint but then appealed the order allowing the amendment. At oral argument before the Supreme Court of South Carolina, the plaintiff asserted for the first time that the defendant had waived his right to appeal by accepting the benefit of the appealed order, namely, the leave to file an answer to the amended complaint. The Supreme Court agreed that "it is quite true that a party, by accepting the benefit of an order, waives his right to appeal from such order," but held the rule had no application in the case because the defendant had received no "benefit" from the order. *Id.* at 562.

The rule was still in effect 70 years later when the Supreme Court of South Carolina decided *Edwards v. Edwards*, 254 S.C. 466, 176 S.E.2d 123 (1970), and held that a party who accepts the benefits of even a *void* judgment is estopped from attacking it. There the husband had appealed an order finding him in contempt for refusing to convey certain real estate to the wife as required by their divorce decree. The husband's defense was that the divorce decree was void, arguing that "while the Juvenile and Domestic Relations Court of Spartanburg had jurisdiction to grant divorces and alimony, it had no authority to order the transfer of his property to his wife as an incident to such jurisdiction." *Id.* at 469, 176 S.E.2d at 124. It appears there may have been some merit in the husband's argument but the Supreme Court stated that it need not reach that issue and in fact "may assume the correctness of the appellant's position." *Id. It held that because the husband had accepted benefits granted to him by the divorce decree he was estopped to challenge its validity, even if the court that issued it lacked subject-matter jurisdiction*: "Since he proposed the transfer of the property and has accepted the benefits accruing to him therefrom, he is now estopped to assert the invalidity of the judgment."

Id. at 470, 176 S.E.2d at 125; *see also Schleicher v. Schleicher*, 310 S.C. 275, 423 S.E.2d 147 (Ct. App. 1992).

In the present case, Mr. Brown accepted, during his lifetime, the full benefit of the annulment judgment. Because he did these things, Mr. Brown was bound by the annulment judgment during his lifetime, even if annulments are not binding against all third parties generally.

The LSA in particular argues that a default judgment in family court cannot have preclusive effect. Under his theory, every family court default order can be re-litigated by those who were not parties to the marriage. Although the family court order in the Brown-Ahmed annulment was not a default order, it would be binding on Appellants even if it were.

VII. THE ANNULMENT IS NEITHER FRAUDULENT NOR PROCEDURALLY INVALID.

Appellant Terry Brown accuses Mrs. Brown's counsel and Mrs. Brown of fraud. (Appellant Terry Brown's Br. 41-48.) Not one shred of evidence supports this baseless and outrageous allegation. Mr. Brown paid for Mrs. Brown's attorney's fees. She retained Robert N. Rosen, an attorney who practices in Charleston, South Carolina. In order to save legal fees, the suit was brought in the Charleston County Family Court which has, as all family courts have, statewide jurisdiction. This is not a "suspicious jurisdiction" as argued by Appellants.

Appellants also raise a series of alleged procedural problems with the annulment. These alleged procedural problems have no effect upon the validity of the judgment. Although Appellants have no standing and there is no subject matter jurisdiction to do so, the family court order is nonetheless valid despite the alleged procedural problems.

To begin with, Appellants claim that Ahmed was not properly served with process by publication. The Court need not reach the merits of this objection, as Appellants lack standing to raise it. The court in the annulment action issued an Order of Publication, which expressly found that Mrs. Brown "has made a diligent effort to locate the Defendant, Javed Ahmed, or some current address for the Defendant, and it appears to the satisfaction of this Court that the current address and whereabouts of the Defendant are unknown[.]" (ROA VOL. I, p. 256 at ¶ 7, p. 281) Under South Carolina law, an order allowing service by publication cannot be attacked collaterally:

> An order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 (Supp. 1999) when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him. § 15-9-710(3). *When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.*

Wachovia Bank of S.C. v. Player, 341 S.C. 424, 428-29, 535 S.E.2d 128, 130 (2000) (emphasis added). Appellants allege no admissible evidence of fraud or collusion. The order authorizing service by publication therefore cannot be attacked. The trial court correctly so held. (ROA VOL. I, p. 61)

Even if the order authorizing service by publication can be attacked, it can be attacked only by the defendant who was allegedly improperly served. *See Howell v. Atl. Coast Line R.R.*, 79 S.C. 493, 60 S.E. 1114, 1114 (1908) (summarily dismissing objection by one party to validity of service upon another); *Koven v. Saberdyne Sys.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (Ct. App. 1980) ("[Q]uestions regarding service of process are personal to the person upon whom service was made and cannot be urged by another[.]"); *Superior Outdoor Adver. Co. v. State Highway Comm'n of Mo.*, 641 S.W.2d 480, 483

(Mo. Ct. App. 1982) ("[T]he issue of defective service of process may be raised only by the one on whom the attempted service was made[.]"); *cf. Brown v. Wilson*, 45 S.C. 519, 23 S.E. 630, 633 (1896) ("[T]he appellant cannot assign for error matters that do not prejudice him, but affect other parties, who are not before the court.").

The rule applies specifically to service by publication. "Without deciding whether the certificate of publication would be sufficient, if called in question by someone who was injuriously affected thereby, we think a sufficient answer to appellants' contention in this regard is that, whatever error may have been committed in respect to the certificate of publication, it does not injure appellants, and they cannot complain of it." *Donham v. Joyce*, 257 Ill. 112, 117, 100 N.E. 524, 525-26 (1912).

Any error in serving Ahmed by publication can therefore be raised only by Ahmed, and not by Appellants in this action.

Assuming for argument's sake that the Court can reach the merits of this issue, the Order of Publication is based upon an affidavit by a licensed private investigator, Ronald Pannell. (ROA VOL. I, p. 256 at ¶ 7, pp. 274-5) Pannell stated that he conducted searches in several national databases and found only a Texas address for Ahmed. (ROA VOL. I, p. 274) He further stated that he had run a full skip trace report on Ahmed. (ROA VOL. I, p. 274) While Appellant Terry Brown's brief questions the integrity of everyone involved, in fact the service by publication was handled in accordance with South Carolina law. Indeed, Mrs. Brown had every reason to find Ahmed.

Based on Pannell's affidavit, the Order of Publication expressly found that "the Plaintiff has made a diligent effort to locate the Defendant, Javed Ahmed[.]" (ROA VOL. I, p. 256 at ¶ 7, p. 281) Assuming that the Order of Publication can be attacked,

and the trial court properly found that it cannot, *see Wachovia Bank*, 341 S.C. 424, 535 S.E.2d 128, Pannell's affidavit was sufficient evidence that "the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State." S.C. Code Ann. § 15-9-710. The statute requires only evidence that the defendant cannot be found "within the State" (*id.*); it does not require evidence that the defendant cannot be found in another state or country. Pannell nevertheless erred on the side of caution and searched several national databases. He was not required to search for Ahmed in Pakistan.

Notice was properly sent to Ahmed's last known residence. That residence was 1440 Ella Boulevard #314 in Houston, Texas, as used consistently on almost all documents from the annulment. An apartment number of #1314 appears in Mrs. Brown's affidavit. (ROA VOL. I, p. 256 at ¶ 7, p. 280) Mrs. Brown stated that the last known address she had was 14403 Ella Boulevard #1314, "but in an effort to locate the Defendant in order to personally serve him . . . I hired a licensed private investigator in the state of Texas, Ronald Pannell, who located a subsequent address, also in Houston, Texas, where the Defendant had apparently resided since the time I knew of his whereabouts." (ROA VOL. I, p. 280) An affidavit by the licensed private investigator states that he found an apartment number of #314 after "conduct[ing] several searches in numerous national databases[.]" (ROA VOL. I, p. 256 at ¶ 7, pp. 274-5) The correct address was clearly #314, and that is where notice was sent.

The fact that the notice published stated a hearing date of March 26, 2004 is not a defect. The hearing was set for March 26, but was continued. A copy of the order continuing the hearing is found as an attachment to the Affidavit of Marcia F. Jones,

(ROA VOL. I, p. 285), and the following page shows that notice was properly sent to Ahmed. It is not necessary to serve again a defendant who was properly served by publication, merely because the trial was continued. Notice of a hearing in Family Court is governed by Rule 17, SCRFC. Appellant Terry Brown argues that service was invalid under Rule 4(d)(8), SCRCP. The Court of Appeals has made it clear that Rule 17 clearly governs in this case:

> Rule 2(a) of the South Carolina Rules of Family Court makes applicable certain rules of the South Carolina Rules of Civil Procedure. Among them is Rule 5(b)(1), SCRCP, which provides in part: "Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." When Rule 5(b)(1), SCRCP, and Rule 17, SCRFC, are read together, as they must be, the only reasonable conclusion that can be drawn is that service of the notice of the time and date of the merits hearing became effective when Mrs. Schleicher's attorney mailed the notice to Mr. Schleicher "at his last known address, by certified mail, return receipt requested" and not at the time Mr. Schleicher actually received the notice. *See* 66 C.J.S. *Notice* § 18e, at 664 (1950) ("By force of statute . . . , service may be effective when the notice is properly mailed, regardless of its receipt by the addressee; in such case the risk of miscarriage or failure to deliver is on the addressee."); 58 Am.Jur.2d *Notice* § 34, at 596 (1989) ("Where service of notice by registered mail is authorized, service is effective when the notice is properly addressed, registered, and mailed. . . .")
>
> Had a rule other than the one adopted here been intended, an express provision adopting the different rule would have been made a part of Rule 17(a), SCRFC. *See, e.g.*, Rule 4(d)(8), SCRCP ("Service [of a summons and complaint] is effective upon the date of delivery as shown on the return receipt."); *Jacobson v. Sternberg*, 305 S.C. 337, 338, 408 S.E.2d 245, 246 (1991) (noting that under Rule 4(d)(8), SCRCP, "the return receipt establishes acceptance of process"); see also 82 C.J.S. *Statutes* § 328, at 635 (1953) ("[A]s a general rule the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted.").

Schleicher v. Schleicher, 310 S.C. 275, 277, 423 S.E.2d 147, 148-49 (Ct. App. 1992). The Court of Appeals thus clearly dispensed with any application of Rule 4(d)(8) suggested by Terry Brown. In the present case, the notice was mailed to Ahmed's last

known address by certified mail, return receipt requested. Moreover, the licensed private investigator determined that Ahmed's last known address was in Texas, which shows he was not in South Carolina, thus establishing literal compliance with the statute.

Any error on service of process could have been raised only by Ahmed, and cannot be raised even by him over ten years after the event. *See Peoples Bank of Beaufort, S.C. v. Exchange Realty, Inc.*, 273 S.C. 537, 257 S.E.2d 733 (1979). Further, Appellant Terry Brown's discussion of North Carolina case law is obviously of no consequence as this case is in South Carolina.

Contrary to Appellant Terry Brown's argument, there was no need to serve Ahmed with process under Rule 4(d)(8), SCRCP or the provisions of the Hague Convention on Service of Process Abroad, 20 U.S.T. 361, T.I.A.S. No. 6638 (1965). Ahmed was not served by certified mail in Pakistan; he was served by publication. Because Ahmed was not served in Pakistan, the Hague Convention did not apply.

VIII. NO NEED FOR DISCOVERY.

Finally, Appellants protest that it was unfair to deny them discovery in this action. First, all parties agreed to the Stipulation of Facts. Appellants have a right to take discovery on *material contested issues*, but they do not have a right to conduct discovery on issues which are immaterial. Mrs. Brown contends, and the trial court found, that all of the *material* factual issues in this action are resolved by the Joint Stipulation. "Under the well-settled rule, facts not appearing in the record as agreed upon, and referred to only in an exception, will not be considered on appeal." *Jackson v. Jackson*, 256 S.C. 127, 129, 181 S.E.2d 266, 267-68 (1971). "Because the notes do not constitute a part of the record on appeal, they cannot be considered." *Robert Harmon & Bore, Inc. v.*

Jenkins, 282 S.C. 189, 196, 318 S.E.2d 371, 375 (Ct. App. 1984).

The only possible purpose Appellants have to seek additional discovery is to relitigate the family court annulment order. Although the trial court's order stands on matters of law only, Mrs. Brown repeats again the key facts, all stipulated, which support the trial court's decision to grant summary judgment. Annulment judgments must be binding on third parties, or there will be no such thing as a final judgment of annulment. Every time a marriage is annulled, it will be annulled only as to the persons who were parties to the annulment. Persons who obtain annulments will have to spend the rest of their lives in court, forever defending the annulment against a collateral attack from yet another person who was not a party to the original action. Litigants will never be able to rely upon the finality of annulment and assume that the annulled marriage is truly dead. The courts will face endless series of collateral attacks upon annulments, raising the same issues over and over again.

Mrs. Brown respectfully submits that there is such a thing as a final judgment of annulment. When the court grants an annulment, the court's judgment is binding as against all third parties. This result is not unfair, because the trial court when it grants an annulment is required by law to rule on the sufficiency of the evidence. Because the trial court is required to rule upon the evidence, there is no such thing as a default judgment of annulment.

The question of whether annulments bind third parties is a question of law, not a question of fact. No fact learned by Appellants in discovery could have any effect upon how this issue is resolved. Discovery is therefore immaterial to this action as it is based on the law and stipulated and uncontested facts.

Even if annulments do not bind third parties, they surely bind persons who offered essential support for the litigation and sought to enforce the annulment order in another court. Mrs. Brown stated by affidavit, and there are no contesting affidavits on this point, that she brought the action with Mr. Brown paying her attorney's fees. (ROA VOL. I, p. 122) It is not unfair for Mr. Brown to be bound by an annulment for which he paid. If Mr. Brown is bound, Appellants are likewise bound, as they claim through him, and their rights cannot be greater than his rights.

The uncontested facts show that the annulment is binding upon third parties in general, and upon these Appellants in particular. Further discovery would have addressed only immaterial issues. The material points necessary to decide this case were all set forth in the Joint Stipulation of Facts.

IX. APPELLANTS ARE ESTOPPED FROM ATTACKING THE VALIDITY OF THE BROWNS' MARRIAGE BECAUSE THEY ENTERED INTO A BINDING PRIVATE SETTLEMENT AGREEMENT DECLARING MRS. BROWN TO BE THE SURVIVING SPOUSE.

Although the trial court order mentioned the private settlement agreement, this argument was not specifically ruled upon by the trial court, which accepted other arguments in Mrs. Brown's favor. While Mrs. Brown did not file a Notice of Appeal, she is permitted to raise alternate grounds for sustaining the trial court's decision. "An appellate court may affirm the circuit court's ruling using any sustaining grounds that are both raised by the respondent's brief and found within the record." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 490, 593 S.E.2d 480, 483 (Ct. App. 2004). "We can affirm a judgment on any ground appearing in the record," even if no exception was taken. *City*

of Aiken v. Cole, 289 S.C. 239, 242-43, 345 S.E.2d 760, 762 (Ct. App. 1986).[39]

Appellants were among the parties who agreed to and accepted a settlement agreement that expressly provided that Mrs. Brown is the surviving spouse regardless of whether the agreement was approved by a court. The settlement agreement provided that it was a binding private agreement, regardless of court approval, and provided that it bound personal representatives and trustees, as allowed by law.[40] The settlement agreement expressly provided that the provision recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.[41] (*See* ROA VOL. VII, p. 2734-7, pp. 2742, 2748-49) Appellants cannot now take a contrary position. Having accepted through his conduct the terms of the settlement agreement, including the provision recognizing the validity of the Browns' marriage regardless of court approval of the validity of the settlement agreement, Mr. Bauknight cannot now disavow that provision and contest the validity of the marriage. Nor can Mr. Sojourner, who is acting for Mr. Bauknight in these litigated matters. Moreover, as allowed by South Carolina law, the binding private settlement agreement provides that its provisions

[39] This argument was expressly raised in the trial court. (*See* ROA VOL. I, p. 54-5 ("Mrs. Brown and other parties to the estate litigation participated in mediation which resulted in a private settlement agreement. In the settlement agreement, Mrs. Brown was recognized by all parties thereto as the surviving spouse of Mr. Brown. The settlement agreement provided that it was a binding private agreement, regardless of court approval . . . . [and] expressly provided that the provision recognizing Mrs. Brown as the surviving spouse survived regardless of whether the agreement was approved by a court.")).

[40] S.C. Code Ann. § 62-3-912 allows successors to enter into a binding private settlement agreement that binds the parties thereto, as well as personal representatives (except to the extent a nonparty's interest could be affected), even without court approval.

[41] The settlement agreement includes a severability provision that continues the binding effect on those provisions not found invalid. (ROA VOL. VII, p. 2748) Although the South Carolina Supreme Court ruled that the trial court's approval of the settlement agreement needed additional evidence that the settlement was just and reasonable, that opinion did not address the binding private settlement agreement issue, nor did it address the issue of the parties' recognition of the validity of family status, including Mrs. Brown's status as surviving spouse. Consequently, under both the binding private settlement agreement analysis and the severability clause, the provision confirming Mrs. Brown's status as Mr. Brown's surviving spouse remains binding.

are binding on personal representatives and trustees. S.C. Code Ann. § 62-3-912 (allowing binding private settlement agreements without court approval); *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

Throughout the appellate process, Mr. Bauknight administered the Estate in accordance with the provisions of the settlement agreement, as approved by the lower court. In full compliance with his fiduciary duties, Mr. Bauknight retained counsel to uphold the validity of the settlement agreement. Moreover, on his behalf, Mr. Bauknight's counsel signed the Respondents' brief to the Supreme Court in *Wilson v. Dallas*. On behalf of the other parties to the settlement agreement, including the remaining Appellants, their counsel signed the Respondents' brief to the Supreme Court.[42] *The Respondents' brief asserted that the court's order that approved the settlement agreement was correct.* Both the Respondents' brief and the court's order that approved the settlement agreement stated that Mrs. Brown was the surviving spouse and that the *Lukich* case, discussed above, supported that conclusion.[43] At oral argument before the Supreme Court, counsel retained by Mr. Bauknight presented on their behalf the settling parties' position to uphold the court's order which approved the settlement agreement, and the argument by Mr. Bauknight's counsel included the correct assertion that *Lukich* supports the validity of Mrs. Brown's marriage to Mr. Brown.[44] Thus, the

[42] The Attorney General's Office also signed the Respondents' brief.

[43] (*See* ROA VOL. I, p. 196-7)

[44] *See* Oral Argument at 42:40, Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (No. 27227) (disc filed seperately with Record on Appeal), where Mr. Wilkins argued that

> [a]s far as Mrs. Brown is concerned, she certainly had a serious claim as an omitted spouse, and certainly a slam dunk claim as an elective share. . . . In *Lukich*, marriage number one, there was no impediment to that marriage, so when marriage number two came along, she had to reach back to have that marriage number one, that was a good marriage, annulled. . . . Had . . . [Mrs. Brown's marriage to Ahmed] not been annulled, the second marriage [to

settling parties, including Appellants, correctly contended in the Supreme Court that the *Lukich* case, discussed above, supported and asserted the position that Mrs. Brown had *no* impediment to her marriage to Mr. Brown.

X. AS THE PARTIES ATTACKING MR. BROWN'S MOST RECENT MARRIAGE, APPELLANTS BEAR THE BURDEN OF PROOF IN THIS ACTION.

Although Mrs. Brown would prevail even if she had the burden of proof, the burden of proof is on Appellants.

A. When the Same Person is Married Twice, There Is an Extremely Strong Presumption that the Most Recent Marriage is Valid

Appellants object that the marriage certificate presented by Mrs. Brown is invalid because they contend Mrs. Brown was previously married to another man, Javed Ahmed, from whom she was never divorced. In support of this allegation, they have presented a marriage certificate, dated February 12, 1997, between Mrs. Brown and Ahmed. (ROA VOL. I, p. 255 at ¶ 1, p. 265)

"Where the evidence shows that the same person entered into a conflicting marriage, a presumption arises that the former marriage was dissolved by death or divorce." *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). Mrs. Brown's putative marriage to Ahmed is a former marriage. There is accordingly a presumption that the former marriage was dissolved. Appellants, as the parties arguing that the prior marriage was not dissolved, bear the burden of rebutting the

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> Mr. Brown] still would have been a good marriage, because the first marriage, by itself standing alone, was invalid because [Ahmed] had been married at least twice. . . . You can't get married to someone who's already married, and that's what happened with Mrs. Brown. So that first marriage in Texas was null from the very beginning. . . . [T]he [Family Court] recognized that the [marriage to Ahmed] was invalid, from the beginning.

Further, acting on behalf of the charitable beneficiaries, the Attorney General's office also made a presentation at oral argument before the Supreme Court to uphold this Court's order that, inter alia, approved the settlement agreement.

presumption. "The party attacking the validity of a marriage bears the burden of proof." *E.D.M. v. T.A.M.*, 307 S.C. 471, 475, 415 S.E.2d 812, 815 (1992).[45]

The presumption in favor of the validity of the most recent marriage is extremely strong, and it can be rebutted only with strong evidence. Our Supreme Court has said *"[t]his is especially true in a case involving legitimacy.* The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy. *When there is enough to create a foundation for the presumption of marriage, it can be repelled by only the most cogent and satisfactory evidence."* *Jeanes v. Jeanes*, 255 S.C. 161, 166-67, 177 S.E.2d 537, 539 (1970) (quoting *In re Estate of Foels*, 146 Misc. 428, 430, 263

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[45] Texas, the state where the purported Brown-Ahmed marriage occurred, imposes a very strict burden upon those who argue that a person's most recent marriage is invalid:

> The presumption in favor of the validity of a marriage which, as in this case, has been duly shown to have been contracted is one of the strongest, if, indeed, not the strongest, known to law. "The presumption is, in itself, evidence, and may even outweigh positive evidence to the contrary. The strength of the presumption increases with the lapse of time, acknowledgments by the parties to the marriage, and the birth of children; and the fact that the legitimacy of a child may be involved is a factor in sustaining the validity of the marriage." 55 C.J.S., *Marriage*, § 43, pages 892-893. It is well that the presumption should be so regarded, for it is grounded upon a sound public policy which favors morality, innocence, marriage, and legitimacy rather than immorality, guilt, concubinage, and bastardy. *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S.W. 560; *Holman v. Holman*, Tex. Com. App., 288 S.W. 413; *Carter v. Green*, Tex. Civ. App., 64 S.W.2d 1069, error refused; *Hudspeth v. Hudspeth*, Tex. Civ. App., 198 S.W.2d 768, error refused, n. r. e.; 35 Amer. Jur., *Marriage*, § 191 et seq. Many cases from various jurisdictions supporting the rule that marriage, once being shown, is presumed to be valid are collated in annotations in 34 A.L.R. 464, 77 A.L.R. 729, and 14 A.L.R.2d 7.

Tex. Emp'rs Ins. Ass'n v. Elder, 155 Tex. 27, 30, 282 S.W.2d 371, 373 (1955). The South Carolina and Texas position is the general rule nationwide:

> In case of conflicting marriages of the same spouse, [1] the presumption of validity operates in favor of the second marriage, and the party attacking the second marriage has the burden of proving its invalidity and of showing a valid prior marriage; and [2] where a valid prior marriage is shown, it is presumed to have been dissolved by divorce or death so that the attacking party has the burden of adducing evidence to the contrary.
>
> In the case of conflicting marriages of the same spouse, the presumption of validity operates in favor of the second marriage, which presumption continues to operate until evidence is adduced that the spouse of the first marriage is living. Accordingly, the party attacking the validity of such second marriage has the burden of proving such invalidity, even though it involves the proving of a negative; and the burden of showing a valid prior marriage is on the party asserting it.

55 C.J.S. *Marriage* § 55 (Westlaw June 2016 Update) (bracketed numbers added) (footnotes omitted).

N.Y.S. 327, 329 (N.Y. Sup. Ct. 1933) (emphasis added).[46] This presumption can only be overcome "by disproving every reasonable possibility." *Jeanes*, 255 S.C. at 167, 177 S.E.2d at 540 (quoting *In Re Estate of Foels*, 146 Misc. at 430, 263 N.Y.S. at 329).[47]

It is undisputed that Mr. and Mrs. Brown are the biological parents of J B .[48] Thus, there is a strong presumption that their marriage is valid. To declare their marriage invalid would impact the status of J B . In any event, Appellants cannot disprove every reasonable probability that Mrs. Brown is the surviving spouse of Mr. Brown.

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[46] In *Smith v. Goldsmith*, 223 Ala. 155, 162, 134 So. 651, 657 (1931), the Supreme Court of Alabama recognized the validity of a marriage contracted in Tennessee which otherwise would have been declared invalid if contracted within Alabama. The Court said:

> [W]e think much greater harm is likely to arise by declaring such marriages invalid than by adhering to the construction generally given to such statutes. As was said in the Estate of Wood, [*137 Cal. 129, 60 P. 900*]: 'An opposite conclusion to that declared by the court would nullify hundreds of marriages, *place the stamp of illegitimacy upon scores of children*, and change the source of title to great property interests. Unless the law plainly points to that end, such a conclusion should not be declared, and as the court views the law, it is not plainly to that end, but plainly to the contrary.'

Id. (emphasis added). *See also Newburgh v. Arrigo*, 88 N.J. 529, 536, 443 A.2d 1031, 1034 (1982):

> Where marital partners have engaged in prior marriages, *a strong presumption supports the validity of their prior divorces and the last marriage. Kazin v. Kazin*, 81 N.J. 85, 96 (1979). Reasons for the presumption are readily apparent. *The presumption reflects a belief that parties would not willingly commit bigamy or illegitimize their children. Sparks v. Ross*, 72 N.J. Eq. 762, 765 (Ch. 1907), *aff'd*, 75 N.J. Eq. 550 (E. & A. 1909). The presumptive validity of the latest of multiple ceremonial marriages comports with the expectation of marital partners and lends stability to human affairs.

(emphasis added).

[47] *See also Newburgh*, 88 N.J. at 538, 443 A.2d at 1035 ("One attacking the validity of the most recent of multiple marriages is under a heavy burden to establish its invalidity by clear and convincing evidence...The challenger must disprove every reasonable possibility that could vitiate the prior marriage...") (internal citations omitted); *Wood v. Paulus*, 524 S.W.2d 749, 757-58, 1975 Tex. App. LEXIS 2721, *14-16 (Tex. Civ. App. Corpus Christi 1975) ("It is well settled that where two or more marriages of a person are alleged, the most recent marriage is presumed to be valid as against each marriage which precedes it until one who asserts the validity of a prior marriage proves the continuing validity of the prior marriage.") (citations omitted).

[48] James Brown, II took a DNA test early on in the litigation, proving that he was the biological son of James Brown. Upon the insistence of the LSA, James II also had to undergo a second DNA test, which confirmed – again – that he is the biological son of James Brown. (ROA VOL. I p. 255 at ¶ 3, p. 268)

B. Because Mr. Brown's Most Recent Marriage Is Presumed Valid, Appellants Bear the Burden of Proving that Mrs. Brown's Marriage to Ahmed Remained Valid When She Married Mr. Brown

All of the opposing briefs in this case are built on the foundation that Mrs. Brown had the burden of proving that her marriage to Mr. Brown was not bigamous. *This premise is fundamentally wrong.* Mrs. Brown met her burden of proof by presenting a facially valid marriage certificate for James Brown's most recent marriage. A presumption then arose that all prior marriages of either spouse were dissolved before Mrs. Brown married Mr. Brown. The burden of proof lies fully and completely upon the parties who seek to rebut that presumption.

Appellants recognize the *Yarbrough* presumption (*see* Appellant Sojourner's Br. 8), last paragraph, but then claim that "the stipulated facts reveal [Mrs. Brown] was married to another man." (*Id.* at 9) The stipulated facts reveal nothing of the sort, and in fact the trial court held expressly to the contrary. The stipulated facts show the existence of a marriage certificate between Mrs. Brown and Ahmed, but they do not show that the certificate established a valid marriage. Under *Yarbrough*, there is a presumption that Mr. Brown's most recent marriage (to Mrs. Brown) is valid, and Appellants therefore bear the burden of proving that Mrs. Brown's marriage to Ahmed was initially valid and remained valid as of the date she married Mr. Brown. The trial court held that Appellants had not met this burden.

Likewise, Deanna Brown et al. mistakenly claim that Mrs. Brown stipulated that "no other occurrence ended the marriage between her and Ahmed." (Appellants Deanna Brown et al.'s Br. ["Brown Br."] 16) The source cited is Joint Stipulation paragraph 6, but that source does not support the statement made. Instead, paragraph 6 states that no

occurrence "of which Plaintiff [Mrs. Brown] is aware" ended the putative marriage. (ROA VOL. I, p. 256) Mrs. Brown need not be aware of any "other occurrence" ending the putative marriage because it was never a marriage. Even if it were, it is Appellants' burden to prove that the marriage was not otherwise dissolved.

Because Mr. Brown's most recent marriage is presumed valid, it is Appellants' burden, not Mrs. Brown's burden, to prove that Ahmed did not die or divorce Mrs. Brown, without her knowledge, before Mrs. Brown married Mr. Brown. "[W]here a valid prior marriage is shown, *it is presumed to have been dissolved by divorce or death* so that the attacking party has the burden of adducing evidence to the contrary." 55 C.J.S., *supra*, § 55 (emphasis added). The fact that Mrs. Brown was not aware of such a dissolution is not sufficient to meet Appellants' burden of proving that no such dissolution occurred.[49]

Mrs. Brown's statement in the present case is no evidence that a divorce was not obtained *by Ahmed.* A divorce can be sought by either spouse, in any jurisdiction in which either party is domiciled. *Williams v. North Carolina*, 325 U.S. 226 (1945). Appellants have not met their burden of proving that Ahmed did not divorce Mrs. Brown ex parte, without her knowledge.

Appellants also rely upon a statement by Ahmed in applying for his Texas marriage license with Mrs. Brown, stating that he was not previously married. That statement is an out-of-court declaration made by Ahmed, which is being used for the truth of the matter asserted. It is therefore inadmissible hearsay.

The application does not fall within the scope of the hearsay exception for public

[49] Other courts have expressly held that a stipulation that a spouse was not aware of a divorce is not a stipulation that no divorce took place. *See Tex. Emp'rs Ins. Ass'n*, 155 Tex. at 31, 282 S.W.2d at 374

record and reports. Rule 803(8), SCRE. The application is an application, not a public record. It does not reflect any official action; it is simply a request for official action. The exception applies only to "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report." *Id.* The application certainly is not a report of the activities of an agency, and it is not a report of matters observed by any agency. Hearsay does not cease to be hearsay merely because it is reported to the government.

In addition, there is nothing at all trustworthy about the statement made by Ahmed on the marriage license. Mrs. Brown testified (ROA VOL. I, p. 256 at ¶ 8, p. 297-312), and the Family Court held that Ahmed married her in order to obtain a more favorable immigration status. (ROA VOL. I, p. 257 at ¶ 11, p. 295) Given that Ahmed's intent was to defraud the government, any statement he made is inherently suspect.

If hearsay ceases to be hearsay when reported to the government, a considerable volume of hearsay evidence will suddenly become admissible. Hearsay statements, made to police officers and repeated in their reports, will be admissible in civil cases. A party desiring to have hearsay evidence admitted need only attach a copy of the statement to a document filed with a public official, and suddenly the statement will become official. Tolerating this sort of practice is not the purpose of the public records exception.

It is also useful to take note of the evidence which the appellant did not present in the trial court. "In order to rebut the presumption that a prior marriage was dissolved, it is necessary to rule out divorce proceedings where a spouse might reasonably have been expected to have pursued them." *Jordan v. Jordan*, 938 S.W.2d 177, 179 (Tex. App. 1997). This is normally done by presenting evidence that no record of a divorce is found

in the divorce records of the states in which the parties to the first marriage lived after their separation and before the date of the second marriage. Failure to check the records of any such jurisdiction prevents rebuttal of the presumption. *Id.* at 179-80; *see also Smith v. Weir*, 387 So. 2d 761, 764 (Miss. 1980).

Here, none of the opposing parties have checked the divorce records in any jurisdiction, let alone all relevant jurisdictions. Absent a search of divorce records in Pakistan and other places where Ahmed was domiciled, Appellants cannot meet their burden to prove that Ahmed never obtained an ex parte divorce from Mrs. Brown without her knowledge.

Adoption of Appellants' position in this case would create chaos in the law of marriage. Given modern divorce rates, a significant number of citizens of this state are married more than once. Appellants' position seems to be that all persons who are married once must be prepared to prove, at a moment's notice, to every third party who seeks to contest the issue, the validity of their second marriage. The law has quite reasonably provided otherwise for years, presuming that the most recent marriage is valid and placing the burden of proof upon the parties who seek to attack it. *Yarbrough v. Yarbrough*, 280 S.C. 546, 550, 314 S.E.2d 16, 18 (Ct. App. 1984). That rule is sound and wise, and the court should reaffirm it in this action.

Because Appellants bear the complete burden of proof, Mrs. Brown is not required to prove that her marriage to Ahmed was bigamous. Rather, it was Appellants' burden to prove that the marriage was not bigamous. On the facts, Appellants cannot meet that burden. But the Court need not even reach the facts, because Appellants have a much greater problem: they are legally bound by a family court judgment holding that

Mrs. Brown's marriage to Ahmed was void from its inception.

Regardless of who has the burden of proof, Mrs. Brown proves as a matter of law that she is the surviving spouse of James Brown.

CONCLUSION

Appellants lack standing to contest the Browns' marriage. They are in the wrong court to assert subject matter jurisdiction over annulments. Because they are in privity with Mr. Brown, they cannot assert claims that he could not assert during his lifetime. Mr. Brown could not attack the validity of the family court order invalidating as void *ab initio* the putative marriage between Mrs. Brown and Ahmed because Ahmed was already married and thus precluded by the bigamy statute from marrying Mrs. Brown. Therefore, Appellants cannot do what Mr. Brown could not do and cannot attack that order.

Appellants are estopped from contesting Mrs. Brown's marital status, (1) having agreed to a settlement agreement with a term recognizing the marriage as valid, regardless of whether a court approved that settlement agreement, (2) having asserted the validity of that marriage to the Supreme Court, and (3) Mr. Brown having sought affirmative relief in his own family court action asking the Aiken Family Court to adopt the findings of the Charleston Family Court.

Even if Appellants do have standing and are not estopped, the order of the family court finding the putative marriage of Mrs. Brown and Ahmed void *ab initio* because of Ahmed's bigamy is final and the law of the case. A probate court cannot override that family court order. Thus, it is the law of the case that Mrs. Brown had no impediment to

her marriage to Mr. Brown. The burden of proof is on Appellants, and they have no ability to overcome that burden.

All relevant precedent supports the indisputable conclusion that Mrs. and Mr. Brown's marriage was valid. *Lukich* provides that the family court order is final and the law of the case.

Even if Appellants were correct in their mistaken reading of *Lukich*, the "logic" of their attempt to apply it to the Browns' situation is horribly flawed as set forth above because, under their theory, Mr. and Mrs. Brown's marriage, even if bigamous, is valid until an annulment order is obtained, and it is too late to do so.

For Appellants to prevail, this Court would have to conclude all of the following:

1. That Appellants have standing to attack the Brown-Ahmed final family court order, even though Mr. Brown did not have standing under applicable law and even though Mr. Brown himself in his amended complaint, in his own action, asserted that the order was final and binding;

2. That Appellants are not bound by their own agreement that Mrs. Brown is the surviving spouse of Mr. Brown;

3. That Appellants are not bound by their own assertion to the Supreme Court that Mrs. Brown is the surviving spouse of Mr. Brown;

4. That a court in a probate matter has authority to overturn a final binding family court order, despite the chaos such a precedent would create, and despite the state statute and all South Carolina precedent to the contrary, and even though Mr. Brown himself in his complaint asserted that the family court order was final and binding;

5. That *Lukich* and all other relevant South Carolina precedent about bigamous marriages being void *ab initio* hold for the opposite result that these cases actually hold;

6. That a bigamous marriage is valid unless and until a court finds that the marriage is bigamous — i.e., that the policy of this state, despite its bigamy statute, is to allow valid bigamous marriages unless and until someone complains in court and gets a court order;

7. That the incorrect view of the *Lukich* holding held by Appellants applies only when they want it to — i.e., they want their mistaken view to apply to the putative Brown-Ahmed marriage but not to the Browns' marriage; and

8. That the family court's finding of fact and conclusion of law that Mrs. Brown is the surviving spouse is not the law of the case.

Mrs. Brown asserts that none of these eight conclusions asserted by Appellants is correct under the law, let alone all eight that would have to apply for Appellants to prevail. And, of course, all of this discussion falls within the context of the burden of proof being on Appellants.

These are all issues of law and not subject to factual dispute. For the reason stated throughout this Brief, Mrs. Brown respectfully requests that the decision of the trial court be affirmed.

This ___ day of June 2017.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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

Appellate Case No. 2015-002417

Tommie Rae Brown .....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown, Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, Terry Brown, Michael Deon Brown, and Daryl Brown are the.....Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this FINAL BRIEF OF RESPONDENT TOMMIE RAE BROWN complies with Rule 211(b), SCACR, with the

exception of the removal of Erin C. Casey from the list of counsel of record as she is no longer employed with Rosen Law Firm, LLC.

Respectfully Submitted,

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