STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
George C. James Jr., Circuit Court Judge
James F. Barber Jr., Supervising Circuit Court Judge
Case No. 2009-CP-40-05911
Case No. 2010-CP-40-02889

Appellate Tracking Number 2013-001634

Howard Hammer, Appellant,
v.
Shirley Hammer, aka Shirley Grace Hightower,
Respondent.

And

1634 Main LP, Appellant,
v.
Shirley Hammer, aka Shirley Grace Hightower,
Respondent,
v.
Howard Hammer, Appellant.

REPLY TO INTIAL BRIEF FILED BY OR ON BEHALF OF HOWARD HAMMER

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December 16, 2013

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE[1]

Howard Hammer filed a declaratory judgment action and *lis pendens* in the Circuit Court against his former wife, Shirley Hammer, seeking to have "a certain contract" between himself and Shirley declared void *ab initio*. Case No. 2009-CP-40-05911 (herein "contract action"). His basis for the claim was that it is contrary to public policy for a party to agree not to press criminal charges against another party in exchange for money. Throughout that litigation, Howard refused to acknowledge that the "certain contract" is actually the May 2008 family court order incorporating the parties' partial settlement agreement as to the division of property. (__)

Judge Manning dismissed Howard's claims against Shirley on the ground that the Circuit Court lacked subject matter jurisdiction. (__) Howard appealed the dismissal, and on June 6, 2012, the Court of Appeals affirmed Judge Manning's decision. (__) Thus, only Shirley's counterclaims against Howard continued.

During the pendency of the contract action, a second lawsuit was filed against Shirley under 2010-CP-40-02889 (the "Main Street" case). This case involved certain real property located at 1634 Main Street, in Columbia. A special warranty deed showed that when Shirley and Howard entered into the 2008 family court property agreement addressing the division of property between them, Shirley owned a 52.75% outright share of the building at 1634 Main Street and an 8% minority share of the limited partnership 1634 Main LP. (__) Meanwhile, Howard is the sole member of SH5, LLC, which is the

[1] Howard Hammer's statement of the case, *pro se,* included assertions that there was no evidence of the punitive damages, sanctions, attorney's fees, and that there was "uncontroverted" evidence of the good faith behind the lawsuits brought and "unconverted" expert testimony on emotional damages. It would take pages and pages to refute each misstatement, and therefore, Respondent denies the accuracy of Howard's conclusory statements therein, generally.

general partner that controls decisions for 1634 Main Street, LP, the plaintiff in the second lawsuit. (__)

Part of the family court agreement required Shirley Hammer to tender *all* of her interest in certain real property located at 1634 Main Street in Columbia, South Carolina, including her interest in the limited partnership that jointly owned the property. (__) Her family court lawyer's attempts to transfer the property were refused by Howard Hammer. (__) When the Main Street action was filed in April 2010, just a couple weeks after Howard's declaratory judgment action was dismissed, Howard effectively alleged that Shirley technically still held some ownership interest in the property by virtue of his refusal to comply with the family court order.

The Main Street suit was initiated by Danville Business Advisors, LLC, the management company retained to maintain the real property, presumably under the direction or and with the permission of the limited partnership's general partner, SH5, LLC (e.g. Howard Hammer). (__) The suit inaccurately alleged that the limited partnership owns the entire property and that because Shirley owns 56.75% of the limited partnership, she is responsible for an amount of $88,040 for maintenance and repairs, based on an assessment of the building for the period of time after she attempted to convey her interest in the partnership and the building to Howard.

Shirley moved to dismiss and also answered the complaint, filed counterclaims, and brought a third party action against Howard whereby she alleged, among other causes of action, abuse of process. (__)

Shirley's counterclaims in the declaratory judgment action and the 1634 Main were consolidated and came before the Court for trial on October 29, 2012. At that time, Howard was represented by Arthur K. Aiken in the case of Hammer v. Hammer, (Case

No. 2009-CP-40-05911)(hereafter referred to as "the contract action."), and also in his capacity as a third-party defendant in the case of 1634 Main LP v. Shirley Hammer v. Howard Hammer, (Case No. 2010-CP-40-2889)(hereafter the "1634 action"). The morning of trial, Howard discharged Mr. Aiken as his counsel in the 1634 Main action and appeared *pro se* for trial. Even though the matters were consolidated for trial, in order to keep things orderly, the court took specific evidence and arguments separately. It was clear, however, that the court considered the matters consolidated for purposes of hearing evidence, and the parties were aware of the consolidation.

> Howard Hammer: Apparently, because the cases were consolidated --- and this is why I asked Ms. Lipscomb to be able to also speak to this because it does involve --- both cases do involve the same set of witnesses. They involve virtually the same identical set of claims. Some of the claims have been dismissed by --- I have been aggrieved to be dismissed by voluntary non-suit as I understand it, and so I can only answer that question in that fashion. (Trial Trans. Pg. 22 lines 6-14).

Furthermore, without objection, the court affirmed that all of the exhibits that have been previously marked and moved into evidence in the Howard versus Shirley case are moved into evidence in this case as well. (Tr. P. 243, lines 1-5).

After three days of trial and two additional hearings on damages and sanctions, the court determined that Howard Hammer was intent on ruining his wife's life and awarded her damages accordingly.

Respondent incorporates by reference herein her brief in response to 1634 Main, LP, where relevant. Rule 208(b)(6), SCACR.

ARGUMENT

I. THE BRIEF OF HOWARD HAMMER, FILED *PRO SE*, SHOULD BE STRICKEN BECAUSE APPELLANT IS REPRESENTED BY COUNSEL AND BECAUSE IT DOES NOT COMPLY WITH THE RULES OF APPELLATE PROCEDURE.

The parties involved herewith were involved in two separate matters filed in the common pleas court, which were tried together. At trial of the 2009 action, Plaintiff Howard Hammer was represented by Arthur K. Aiken, Esquire and at trial of the 2010 action, Plaintiff 1634 Main LP was represented by Susan Batten Lipscomb, Esquire while Howard Hammer appeared *pro se* in connection with the third party claims asserted against him. Desa Ballard represented Shirley Hammer as to all claims. Multiple notices of appeal were filed by Howard Hammer and 1634 Main, LP and the referenced matters were consolidated for appeal by Order dated October 2, 2013.

On November 15, 2013, appellant Howard Hammer submitted his initial brief in the consolidated appeal styled *Initial Brief of Appellant Howard Hammer* in which he seems to make arguments as to both matters, and then, on November 19, 2013, the undersigned received from attorney Art Aiken an *Initial Brief of Appellant Howard Hammer in Howard Hammer v. Shirley Hammer.* Respondent objects to Appellant Howard Hammer's submission of two briefs, and would show that when a party is represented by counsel, he may not also proceed *pro se* in the appeal. The separate *pro se* representation through the two cases is a fiction that is being used to allow Howard Hammer to file his own pleadings even though he has counsel. See generally, *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010)("Since there is no right to " hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by

counsel are not to be accepted unless submitted by counsel"); (*State v. Stuckey*, 508 S.E.2d 564, 333 S.C. 56 (1998) "Appellant submitted a *pro se* initial brief and designation of matter on appeal and moved this Court to incorporate his initial brief with the initial brief that . . . Office of Appellate Defense will file on his behalf. Here, appellant, who is represented by counsel, attempted to file a substantive document relating to his case. Since this document was not submitted through counsel, it is not appropriate for consideration by this Court.")

Further, Respondent would show that Mr. Hammer's *pro se* brief does not include a Table of Authorities or Index, as required by 208(b)(1)(A), SCACR, and his Proof of Service is not dated.

The Rules of Appellate Procedure are not mere technicalities, and a party's failure to abide by those rules has warranted a dismissal of the party's appeal or the striking of the party's pleading in this State. *See generally*, "An appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction but not of subject matter jurisdiction." *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004). "Whenever it appears that an appellant has failed to comply with the requirements of the SCACR, an order of dismissal shall be issued." *Wise v. South Carolina Dept. of Corrections*, 372 S.C. 173, 642 S.E.2d 551(2007)(citing Rule 231(a), SCACR). "This was a motion to dismiss the appeal herein noticed to be heard before the clerk, for non-compliance with rules 1 and 7 of the Supreme Court, and, by agreement of counsel, heard by the court. After hearing affidavits and arguments *pro* and *con*, the court dismissed the appeal; the appellant, in the judgment of the court, having failed

to comply with the requirements of rules 1 and 7." *Gardner v. Mays*, 26 S.C. 613, 7 S.E. 71 (1887).

A. IF HOWARD HAMMER'S BRIEF IS NOT STRIKEN IN ITS ENTIRTY, THEN RESPONDENT WOULD SHOW THAT HIS THIRD ARGUMENT IS NOT RIPE FOR APPEAL AND SHOULD BE STRICKEN.

In his third *pro se* argument, Appellant Howard Hammer argues that this Supreme Court's order of September 2012 unreasonably influenced the lower court and therefore infringed on his due process rights. However, there was no objection at trial[2] to the introduction of the order, and the argument is not ripe for appeal because it was raised for the first time on reconsideration. It is axiomatic that an issue cannot be raised for the first time on rehearing. *See, Nelson v. QHG of South Carolina, Inc.*, 362 S.C. 421, 608 S.E.2d 855 (2005).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011)(quoting, *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006)). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Herron v. Century BMW, supra, (citing, I' On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

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[2] Trial trans. pg. 42, 206, 218-220.

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. *Id. (citing, Glover v. County of Charleston,* 361 S.C. 634, 606 S.E.2d 773 (2004) *overruled on other grounds.*) *See also, Grant v. S.C. Coastal Council,* 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); [395 S.C. 466] *Merriman v. Minter,* 298 S.C. 110, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised in the trial court.)

If this Court determines that the issue is preserved, Shirley would show that the trial judge had every right to consider this Court's opinion in rendering its verdict.

In *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984), it was held that:

> A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. 31 C.J.S., Evidence, Section 50(1), p. 1018-1021. It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case. *Montalbano v. Automobile Ins. Co.*, 218 S.C. 367, 62 S.E.2d 829 (1950).

Moreover, a court can take judicial notice of its records, files, and proceedings for all proper purposes. *See, South Carolina Department of Social Servs. v. Jamie C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 466–67 (Ct. App. 2009) (explaining use of Rule 201, SCRE). Rule 201, SCRE, plainly contemplates judicial notice of records from other courts. To be subject to judicial notice, a fact must be such that "its accuracy may be ascertained by reference to readily available sources of indisputable reliability." *Bowers v. Bowers*, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (citation omitted).[3] Unquestionably, a

[3] *See Maverick Momentum, L.L.C. v. M.S.S. Supply Co.*, 2006 WL 3192273 (S.C. Com. P., May 9, 2006), in which Circuit Judge Alison Renee Lee took judicial notice of records from the United States District Court for the Western District of Washington. See also

Supreme Court order addressing the subject matters meets the Rule 201(b) SCRE standard. Moreover, it has been noted that "the most frequent use of judicial notice is in noticing the content of court records." *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989). Rule 201(c) even permits a court to take judicial notice *sua sponte*.

The Supreme Court's review of matters related to this litigation and order resulting therefrom is not only available to the trial judge pursuant to the judicial notice rule, but also *should* be considered by the trial judge as part of the record in this case. Whereas Howard likens the lower court's consideration of the Supreme Court order to situations in military court, we can liken it to a criminal court. "A trial judge generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come. *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976) (citing, *U.S. v. Magliano,* 336 F.2d 817 (4th Cir. 1964)(emphasis added). "If justice is to be done, a sentencing judge should know all the material facts. Fair administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding. Hence, the judge is required to listen and give serious consideration to any information material to punishment." *Id* at 245. In this case, the trial court, if it considered the Supreme Court's order, did not abuse its discretion in doing so.

United States v. Vann, 630 F.3d 431, 437–38 & n.3 (2010) (Rehearing En Banc Granted Jan. 6, 2011) (noting that the Fourth Circuit may take judicial notice of state court records not part of the record before the district court) (citing *Loavar v. de Santibanes*, 430 F.3d 221, 224 n.2 (4th Cir. 2005) (taking "judicial notice of the records of a court of record"); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Circ. 1989) (noting that courts of appeals may properly take judicial notice of state court proceedings that were not part of the record before the district court)).

II. THE TRIAL COURT RETAINED JURISDICTION AND PROPERLY ADDRESSED RESPONDENT'S MOTION FOR SANCTIONS, FILED PURSUANT TO THE FCPSA AND RULE 11, SCRCP.

In both of his briefs, Appellant Howard Hammer concludes the Frivolous Civil Proceedings Sanctions Act (FCPSA) and case law unequivocally required motions under the FCPSA to be filed and served within ten days after the parties received the final order. For the reasons set forth herein, and as concluded by the trial judge, Howard is mistaken.

In 2005, the General Assembly substantially revised the FCPSA via 2005 Act No. 27, Section 12. The Court of Appeals has expressly stated that the old act was "completely revised" by the 2005 Act and that the statutes relied upon in *Beard* and *Pitman*[4] "were repealed." *Rutland v. Holler, Dennis et al,* 371 S.C. 91, 637 S.E.2d 316 (Ct.App. 2006), footnote 2. Furthermore, the prefatory language of the 2005 act provides that the amendments to the FCPSA were intended to ". . . replace the existing provisions with provisions to. . . provide a procedure for administering sanctions for a violation. . ." (emphasis added) 2005 Act. No. 27. The old statutes were repealed in their entirety. 2005 Act No. 27, Section 12.

The only requirement that exists at common law regarding post-trial motions is that the trial judge still have jurisdiction over the case when the motion is made. The trial judge loses jurisdiction only when the time to file post-trial motions has elapsed. *Ex Parte Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2002). The trial judge retains jurisdiction over any motion that is filed within ten days of entry of judgment, and if post-trial motions are filed, over anything else filed while the case is under the judge's

[4] *Pitman v. Republic Leasing Company Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct.App. 2002); *Ex Parte Beard*, 359 S.C. 351, 597 S.E.2d 835(Ct. App. 2002).

consideration. *See e.g., Cox v. Fleetwood Homes of Georgia Inc.,* 334 S.C. 55, 512 S.E.2d 498 (1999).

Shirley recognizes that in *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (S.C. 2006), the Supreme Court determined that "as a result, a motion for sanctions must be filed within ten days of the notice of entry of judgment", but she would show that in making that declaration, the Court was relying on *Pitman,* which does not apply in this case because in *Pitman* Republic Leasing waited until almost two months after the grant of summary judgment to move for sanctions under the Act, and by that time, the trial judge no longer had jurisdiction over the case. In *Pitman,* the logic used by the Court in attaching the 10-day limitation found in Rule 59, SCRCP to motions filed under the FCPA was that "we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment [as] [s] an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Pitman,* at 570 S.E.2d 190. Appellants Howard Hammer and 1634 Main, LP had filed motions for reconsideration pursuant to Rule 59(e), SCRCP, so jurisdiction was clearly still with the trial judge.

In other words, so as long as jurisdiction was still with the trial judge when the motion for sanctions was filed, it was timely. "An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." *Brown v. S.C. Dep't of Health & Envtl. Control,* 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002). The FCPSA conspicuously does not contain <u>any</u> time period within which the motion must be filed, instead stating only that "At the conclusion of a trial and after a verdict for or a verdict

against damages has been rendered . . . upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous." S.C. Code §15-36-10(C)(1)(2005, as amended).

In stark contrast, the statute does give a specific time limit by which the nonmoving party must respond (i.e. "Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) **has thirty days to respond to the allegations** as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.") S.C. Code §15-36-10(D)(2005, as amended)(emphasis added). Therefore, Respondent would show that the Legislature intended that a motion under §15-36-10 may be heard at any time after the matter has concluded, so long as the Court has jurisdiction. Shirley would also point out that no substantive response to the motions for sanctions was ever made; the target parties instead filed motions to dismiss the motion for sanctions. (__)

Even if this court determines that the 10-day deadline should apply in all cases to motions under the FCPSA, Shirley would show that her motion was filed on January 15, 2013 and a copy of the motion was delivered to the non-moving parties that day. (__) In *Rutland v. Holler, Dennis et al*, 371 S.C. 91, 637 S.E.2d 316 (Ct.App. 2006)[5], the party moving for sanctions filed the motion *prior* to the trial judge's final order dismissing the case. The Court of Appeals took no issue with (and affirmed) an award of sanctions being imposed after final judgment on a motion filed before the final judgment was issued.

[5] The Court of Appeals decided this case based on the pre-2005 version of the FCPSA.

Initially, in this case, the lower court determined that the parties received notice of the motion for sanctions at the hearing on January 15, 2013:

> MR. HAMMER: ---the motion should be filed or after Your Honor, after Your Honor issues his order?
> THE COURT: I knew that that would be an issue[6], and what I will do is I'm gonna set that hearing for a time where nobody has any question about the 30-days. Now, you can certainly use your good common sense, as I'm sure, as I am sure Mr. Aiken and Ms. Lipscomb will use, and get cracking on it. You got a copy of it. NOW, I do not agree that Ms. Ballard will have to refile her motion to coincide with the post-issuance of my order.

Tr. pg. 115 lines 8-13

By his Order of January 29, 2013, Judge James clarified that

> The court notes that counsel for Shirley handed to the court her unfiled motion for relief under this Act at the conclusion of the hearing. *Counsel for Shirley is instructed to serve a filed copy of the motion upon all other parties and to mail the court a copy of the filed motion.* The court will then hold a hearing on this issue in the manner contemplated by the statute. (pg. 41).

There is nothing in the January order that required Shirley Hammer to re-file the January 15, 2013 motion or serve it within a certain time period. In this case, then, the trial judge had already determined the motion filed on January 15, 2013 would be heard after the issuance of the January 29, 2013 order.

Finally, all opposing parties filed motions for reconsideration, and no one took issue with the trial judge's instruction that a filed copy of the January 15th motion was to be served after an order was rendered. In fact, the court expressly said "[t]he court will then hold another hearing on this issue. . ."

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[6] S.C. Code §15-36-10(D): "A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations...".

Until the trial judge ruled on the pending motions for reconsideration, no time or other limitation exists which prohibited the filing of a motion for sanctions, either pursuant to the FCPSA or Rule 11 because the Court still retained jurisdiction over the matters. The trial judge served the final order in this matter by placing it in the United States mail on January 29, 2013[7]. Shirley's counsel received it on January 30, 2013. Ten (10) days from that date would be February 10, 2013. Service by mail of the motion for sanctions on February 13, 2013 was timely, and was, in fact, two days prior to the deadline of February 15, 2013. "Whenever a party . . . is required to do some act or take some proceedings within a prescribed time period after the service of . . . a paper upon him, and the . . . paper is served upon him by mail, . . . five days shall be added to the prescribed period." Rule 6(e), SCRCP. The motion filed (and served) on January 15, 2013 was timely, as was the re-service of the motion (made pursuant to the Court's order) on February 13, 2013.

A. Even if the Court deems Respondent's FCPA motion was untimely, she would show that the award for sanctions may still be affirmed by Rule 11.

"In determining whether the evidence is sufficient to support an award of punitive damages, the Court of Appeals will consider the evidence in the light most favorable to the prevailing party and will give the prevailing party the benefit of every inference that can reasonably be drawn on his or her behalf." *Cash v. Kim,* 288 S.C. 292, 297, 342 S.E.2d 61, 64 (Ct. App. 1986)(citing *Cf. Watson v. Wilkinson Trucking Co.,* 244 S.C. 217,

[7] The trial judge sent an email to counsel and Mr. Hammer on January 30, 2013 at 12:53 pm advising that the order had been mailed the prior day, January 29, 2013. That email also contemplated additional proceedings, including the previously-filed motion under the FCPSA. The email did not attach a copy of the order. The only service of the order was via United States mail.

224, 136 S.E.2d 286, 289 (1964)). Respondent would show that punitive damages and sanctions are analogous in this regard.

Paragraph (C)(1) of Section 15-36-10 clearly vest the trial judge with discretion to address a motion filed by a party, and no motion is required for the imposition of sanctions under Section (A) or (B) of Section 15-36-10[8]. Section (B) expressly provides for sanction to be imposed by the Court "upon its own motion." S.C. Code 15-36-10 (B)(2). "An attorney or *pro se* litigant participating in a civil . . . proceeding . . . may be sanctioned for. . ." conduct specified by the FCPSA. S.C. Code §15-36-10(A)(4). If the court does not act *sua sponte*, then the procedure for a motion by a party is governed by Section (C) of the Act. However, as stated above, the Act does not provide a time period, leaving it to the general rule that a trial judge retains jurisdiction to rule on all pending matters until the case is finally determined. *Cox v. Fleetwood Homes of Georgia, Inc., infra.* Furthermore, South Carolina's version of Rule 11[9] applies from the beginning of the case to the end (". . . every pleading. . ."), and permits sanctions to be imposed at any time for frivolous pleadings, arguments, filings for the purpose of delay, or failure to act in good faith. *See Kilcawley v.Kilcawley*, 312 S.C. 425, 440 S.E.2d 892 (Ct.App. 1994). Like the FCPSA, Rule 11 permits the court to impose the sanctions *sua sponte*. Rule 11(a), SCRCP. The rule does not provide any time period within which a motion must be filed, and is therefore governed by the same jurisdictional requisite discussed above.

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[8] Section (B) does *permit* a motion by a party for sanctions, but does not require it. Section (C) is solely related to motions by a party (as opposed to *sua sponte* action by the Court). S.C. Code §15-36-10.

[9] Our Rule 11 equates to the pre-1983 Federal version of Rule 11. *Ex Parte: Bon Secours-St. Francis Hospital*, 393 S.C. 590, 713 S.E.2d 624 (2011).

B. Sanctions are warranted in these cases

Rule 11, SCRCP is evaluated by a subjective standard and focuses on whether a pleading, motion or other paper is signed or filed to cause delay, to harass or when no good ground exists to support the filing. *Bon Secours-St. Francis Xavier Hospital, Inc.* v. *Weiters, MD.*, 393 S.C. 590, 713 S.E.2d 624 (S.C. 2011). Judge Manning's order of April 2010 acknowledged that Howard's action in the initial case, Hammer v. Hammer, had no legal basis, and that decision was upheld by the Court of Appeals. Hammer v. Hammer, 399 S.C. 100, 730 S.E.2d 874 (Ct.App. 2012). The Supreme Court has ruled both that Howard is "obsessed with . . . [Shirley]" and that Howard has engaged in "abuse of the judicial system." *In re: Hammer*, 395 S.C. 385, 718 S.E.2d 442 (2011); Order dated September 7, 2011 (introduced without objection). Those points, therefore, have been established as the law in this case.

"If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing . . . including a reasonable attorney's fee.[10]" *Russell v. Wachovia Bank*, N.A 370 S.C. 5, 19, 633 S.E.2d 722 (2006)(explaining Rule 11, SCRCP). The South Carolina Courts have held that "a party who makes a frivolous claim or raises a frivolous defense has committed a more egregious act than one who merely acts without substantial justification, for purposes of awarding costs and/or attorney fees." *Father v. South*

[10] *In Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.* 393 S.C. 590, 713 S.E.2d 624, 628 (2011), the Supreme Court held that "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." (quoting) *Runyon,* 322 S.C. at 19, 471 S.E.2d at 162.

Carolina Dept. of Social Services, 353 S.C. 254, 578 S.E.2d 11 (S.C. 2003))

The court found, by clear and convincing evidence, that Howard Hammer, individually and as controlling member of 1634 Main, LP, willfully, deliberately and unapologetically attempted to misuse the legal process through both of these cases, and that doing so was frivolous and in bad faith. "An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions: (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party." S.C. Code §15-36-10(C)(1), (2005, as amended). Both Howard and 1634 Main, LP argued that since the claims by 1634 Main, LP survived Shirley's pre-trial motion for non-suit, then that is proof that the party is not subject to sanctions, citing *Hanahan* v. *Simpson,* 326 S.C. 140, 157,485 S.E.2d 903,912 (S.C. 1997). The parties made this same argument to the trial judge, who specifically clarified and stated that he denied the motions for non-suit in order to preserve the record and take in all the necessary evidence (___).

The total amount of sanctions imposed against Howard for these matters is in the amount of $60,744.30, and Shirley requests this court affirm the award.

III. DAMAGES FOR "FRUSTRATION" WERE PROPERLY AWARDED AND WERE NOT DAMAGES FOR EMOTIONAL DISTRESS.

The term "frustrate" is comprised of two definitions. "Frustrate" can mean "to cause (someone) to feel . . . upset," *or* it may mean "to prevent (efforts . . .) from succeeding." Merriam-Webster Dictionary, "frustrate".

Respondent Shirley Hammer does not deny she relinquished her claims for "emotional distress", but she would show that this element of damages is not awarded only in response for emotional distress claims. Perhaps Judge James could have used "lost time" or "harassment" instead of "frustration; for the reasons set forth herein and the Order, the award of actual damages based on Howard Hammer's frustration of his former wife's life was appropriate.

Frustration is not found only in cases of emotional distress. The South Carolina courts and General Assembly supply numerous examples of the concept of "frustration" in relation to an action, not a feeling. For example, in contract law, the doctrine of frustration "excuses performance of a contract . . . where the purpose of the contract . . . is frustrated by a supervening event, not readily foreseeable, without fault of the parties." *Sanchez v. Tilley,* 285 S.C. 449, 451, 330 S.E.2d 319, 320 (Ct. App. 1985) (emphasis added). This frustration is not of the emotional kind; it is related to an event that hinders performance of a legal instrument, as Howard hindered Shirley's sale of 320 St. James.

Similarly, the South Carolina Court of Appeals has held that a shareholder majority is considered to have "oppress[ed]" and "unfairly prejudice[ed]" other shareholders where "reasonable expectations of the minority shareholders have been frustrated by the actions of the majority." *Kiriakides v. Atlas Food Sys. & Servs., Inc.,* 338 S.C. 572, 603-04, 527 S.E.2d 371, 387-88 (Ct. App. 2000) aff'd as modified and

remanded, 343 S.C. 587, 541 S.E.2d 257 (2001). Again, Howard's actions against Shirley, by filing the Main Street litigation against her as a limited partner, by providing false information for the partnership tax purposes, and by refusing her tender of the ownership, frustrated the reasonable expectations Shirley had regarding her ownership interest in 1634 Main LP. Of course, these examples, not all-inclusive of South Carolina law on the interpretation of "frustration", imply that "frustration" is a concept that comes from more than an individual's feelings. Frustration may come about in various scenarios where a person or event has impeded the actions or rights of another individual. Concordantly, the concept of frustration extends beyond the scope of a claim for emotional distress.

Even though Appellants all alleged the grounds for frustration damages are linked to Shirley's claims for emotional distress, which she abandoned, the lower court made clear that its intent to award damages for frustration was based not on emotional distress, but on a finding that "frustration" is an actual damage as a result of abuse of process.

> These damages are assessed and based on the level of frustration that, in my view, would be incurred by a reasonable person as a basic human response to being forced to defend baseless legal claims and is not predicated on any pre-existing emotional condition of Shirley. (Order 1-29-13, pg 14, para 46)
>
> Howard's ulterior purpose is established by virtue of his attempt to purposefully prevent closing of the sale of 320 St. James to purchasers and to avoid the family court agreement in an improper forum. (Id. pg 29, line 105)
>
> Howard's bringing of the contract action and the *lis pendens* to subvert the transaction with the purchasers, to prevent the sale, to avoid the family court agreement or to gain some leverage against Shirley in the family court constitutes an ulterior purpose that supports a claim for abuse of process. (Id. at line 106)
>
> In *Swicegood,* the court upheld an actual damages award based on testimony from the plaintiff about the degree of frustration, embarrassment, and humiliation he experienced as a result of the defendant's abuse of process. In my view, whatever one calls the assault on Shirley's feelings, an award of damages in this case has

basis in the law. **Even though Shirley may have abandoned all claims for "emotional distress", in my view that does not equate to an abandonment of a claim for damages founded in frustration or embarrassment.** (Id. at pg. 33, Para 120)(emphasis added) (citing, *Swicegood v. Lott,* 379 S.c. 346, 665 SE2d 711 (Cl. App. 2008)).

Damages are allowed in a finding of abuse of process where an individual suffers a sentimental frustration. As noted by Judge James, there may be recovery of damages without proof of injury to the aggrieved person's feelings[11]. Order dated Jan. 29, 2013. (citing *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 S.E.2d 297 (1969) (where the South Carolina Supreme Court held that the harm to the plaintiff's reputation by the defendant may be recoverable, as it would be for harm to the plaintiff's feelings)). The short hurdle that a party must overcome in recovering damages for abuse of process is to show that the injury incurred was a "natural and probable consequence of the abuse of process." *Swicegood v. Lott,* 379 S.C. 346, 355, 665 S.E.2d 211, 215 (Ct. App. 2008) (citing *Huggins* at 363, 166 S.E.2d at 301). In the pending matter, the court appropriately found that frustration is an actual damage anyone, and specifically Shirley Hammer in this case, would incur under these facts.

With regards to an award of compensatory damages where the judge finds an abuse of process, "[d]amages recoverable . . . are compensatory for the natural results of the wrong, and may include recompense for physical or mental injury . . . and injury to business, property or financial standing." *Huggins* at 362, 166 S.E.2d at 301 (1969) (citing 72 C.J.S. Process, s 124g, p. 1203). In the pending matters, the Judge found that

[11] Nevertheless, the transcript did include the observation of witnesses that Shirley was "very distraught" and "almost in a panic". Tr Pg. 94 5-6. "Shirley was in such a panic. I mean, I don't think she slept for three days. . ." Id. at pg. 101, lines 9-10. And, Shirley testified she thought the litigation would never end and wanted Howard to leave her alone. (___).

Howard Hammer and 1634 Main, LP abused process and, accordingly, awarded damages for that abuse, including damages for the frustration imposed onto Shirley Hammer[12].

"[A] respondent ... may raise ... any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions." *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (S.C. Ct. App. 2012) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)).

The Court discussed the discretionary aspect of damages in *Mellen v. Lane* as follows:

> "The South Carolina Supreme Court illuminated the discretionary nature of an award of punitive damages in *Jordan v. Holt,* 362 S.C. 201, 608 S.E.2d 129(2005) [The Court of Appeals] must affirm the trial court's finding of punitive damages if any evidence reasonably supports the judge's factual findings. An award of punitive damages is left almost entirely to the discretion of the jury and trial

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[12] Shirley Hammer testified that: Q So the $175,445 that you've incurred defending Hammer vs. Hammer and 1634 Main is money that you incurred to my law firm for our representation of you in these two civil --- these circuit court matters, correct? A It is and it's a small amount compared to what I've spent all together. Q Okay. A And I do feel that for the past seven years, I been in and out of court so many times that I'm just --- I'm just so overwhelmed. I can't --- it's amazing to me that something that could have been fairly simple end up like this. Pg 620 lines 5-17.

She also testified that: Q After this lawsuit was filed, this lawsuit being 1634 Main vs. Shirley Hammer, has Mr. Hammer, Howard Hammer, had any occasion to make threats to you disregard regarding your financial ruin? A Yes. He has said that he is going to bankrupt me. He said that he's going to keep me in court until I'm old and ugly and nobody will want me. Q Has he made any threats to you about your personal safety? A Of course. Q And what has he said to you since this lawsuit was filed about your personal safety? A Many times he has told me that I need to be very, very careful. Trial Trans. P. 622, Lines 10-23.

judge. *Charles v. Texas Co.,* 199 S.C. 156, 18 S.E.2d 719 (1942) *Mellen v. Lane* 377 S.C. 261, 291, 659 S.E.2d 236, 252, (S.C.App. 2008).

In *Lucht v. Youngblood,* 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976), the rationale for vesting discretion in the trial court was expressed as, "The fact [the trial judge] heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives [the trial judge], we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on the observation of the [witnesses] and evaluation of their testimony."

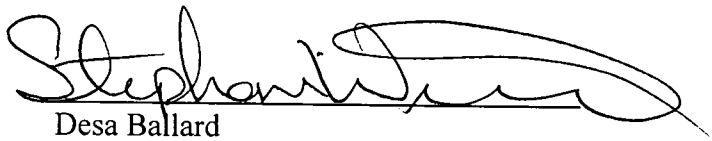
"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs. v. City ofGreenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The trial court's findings are equivalent to a jury's findings in a law action." *Id.* The lower court found by clear and convincing evidence "that Howard's conduct was reprehensible in the sense that he, as an attorney, was aware that bringing the contract action in a forum that had no subject matter jurisdiction was totally improper, and especially in the sense that he was aware that filing the *lis pendens* on property he had deeded over a year prior was totally unfounded. (Jan Order Para 40). The court found by clear and convincing evidence that "Howard's filing of the *lis pendens* was reprehensible because he well-knew he had no claim to the property." (Id. at para 41). And the court found by clear and convincing evidence that "Howard was aware of the frivolity of his conduct, and while he did not try to conceal it in the traditional sense, he did cloak his conduct under the guise of trying to attack a family court order in circuit court." (Id. at para __).

The court awarded actual damages against Howard Hammer in *Hammer v Hammer* in the amount of $20,000.00, with $60,000 for punitive, and charged an additional $50,000 in punitive damages against him for the 1634 case.[13] Respondent Shirley Hammer asks this court to affirm the judgments.

CONCLUSION

Respondent Shirley Hammer requests this Court to affirm the orders by Judge James, in hopes that in so doing, Howard Hammer might finally be forced to cease his incessant abuse of her and the South Carolina judicial system.

Respectfully submitted,



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December 16, 2013

[13] 1634 Main, LP and Howard Hammer were assessed actual damages for abuse of process in the 1634 Main case, jointly and severally, in the amount of $25,000. Those damages are addressed in Shirley's other brief, responding to 1634 Main, LP.