

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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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

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**S.C. Supreme Court**

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.

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**REPLY TO INTIAL BRIEF FILED  
BY 1634 MAIN, LP**

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December 16, 2013

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**STATEMENT OF THE ISSUES ON APPEAL**

- I. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING AGAINST 1634 MAIN, LP FOR ABUSE OF PROCESS**
  
- II. DAMAGES FOR "FRUSTRATION" WERE PROPERLY AWARDED AND WERE NOT DAMAGES FOR EMOTIONAL DISTRESS**
  
- III. THE TRIAL COURT RETAINED JURSDICTION AND PROPERLY ADDRESSED RESPONDENT'S MOTION FOR SANCTIONS, FILE PURSUANT TO THE FCPSA AND RULE 11, SCRCP**
  - A. Even if the Court deems Respondent's FCPA motion was untimely, she would show that the award for sanctions may still be affirmed**

## STATEMENT OF THE CASE<sup>1</sup>

In 2009, Howard Hammer filed a declaratory judgment action against his former wife Shirley Hammer titled *Howard Hammer v. Shirley Hammer, a/k/a Shirley Grace Hightower*, Case No.: 2009-CP-40-05911. ( ) In the suit, Howard sought to set aside “a certain contract” which was really the parties’ 2008 property settlement agreement, which was made the Order of the Family Court.

Shirley filed counterclaims against Howard and moved for summary judgment on the basis that the circuit court did not have jurisdiction to declare void a family court order. ( ) Judge Manning dismissed Howard’s claims on April 14, 2010, and the Court of Appeals affirmed (*Hammer v. Hammer*, 399 S.C. 100,730 S.E.2d 874 (Ct.App. 2012)). Shirley’s claims against Howard survived and were consolidated for trial with the matter that is the subject of this brief. ( )

On April 30, 2010, just weeks after Howard’s declaratory judgment action against Shirley was dismissed, the appellant herein, 1634 Main, LP, filed a lawsuit against Shirley under 2010-CP-40-02889 (the “Main Street” case). ( ) The Main Street suit was initiated by Danville Business Advisors, LLC, the management company retained by the limited partnership to maintain the real property located at 1634 Main Street in Columbia, under the direction of and with the permission of the limited partnership’s general partner, SH5, LLC (e.g. Howard Hammer). ( ) The suit inaccurately alleged that Shirley owns 56.75% of the limited partnership<sup>2</sup> and that she is responsible for contributing \$88,040 for maintenance and repairs, based on an assessment of the building for the

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<sup>1</sup> Where relevant, Respondent incorporates her brief filed in response to Howard Hammer, per Rule 208(b)(6), SCACR.

<sup>2</sup> The evidence established that Shirley owned only an 8% interest in the limited partnership.

period of time after she attempted to convey her interest in the partnership and the building to Howard pursuant to the 2008 family court order.

1634 Main, LP owns, in part, certain real property located at 1634 Main Street in Columbia, South Carolina; the real estate was the location of Howard Hammer's former law office, which he continues to use for personal reasons. ( ) As part of the divorce settlement agreement (e.g. the "certain contract" which was the subject of the 2009 declaratory judgment litigation, *supra*) reached between Howard and Shirley in 2008, Shirley was to convey all of her ownership in the partnership and real estate to Howard. The evidence shows that she did, in fact, tender her ownership, but that Howard refused to accept tender thereof.

Shirley filed counterclaims against 1634 Main, LP, alleging, among other causes of action, abuse of process; she also filed a third-party complaint against Howard Hammer.

The court properly determined that Howard Hammer used his position as de facto general partner of 1634 Main, LP to bring a baseless litigation against his former wife and adjudged the partnership accordingly.

## ARGUMENT

### I. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING AGAINST 1634 MAIN, LP FOR ABUSE OF PROCESS.

“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 of Greenville*, 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.* “There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged.” *Voorhees v. Jackson*, 35 US 449, 10 Pet. 449 (1836).

In this case, the trial court discerned after hearing all the evidence, that “SH5, LLC was the general partner in 1634 Main LP. Howard was the sole member of SH5, LLC. Thus, he controlled the general activities of 1634.” (January Order, pg. 16, para 49) “In short, there is no doubt that Howard was 1634 Main LP.” (*Id.* pg. 17., para 53)(emphasis in orig)<sup>3</sup>. The court, having heard the evidence, then adjudged that the claims asserted against Shirley by 1634 Main, LP were completely without merit. The findings of the court should be affirmed.

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<sup>3</sup> Testimony of Marian Turbeville: Q. And that lawsuit was initiated at the request of who? A The general partner of the 1634 Main L.P. Q And who was speaking for the general partner when that request was made? A That would have been Howard Hammer. (Tr. P. 558, lines 9-14)

Appellant 1634 Main, LP argues that the court improperly found it abused the judicial process by bringing this litigation because "1634 Main, LP at the direction of Danville brought suit to collect an assessment". This assertion is disingenuous because the evidence clearly established that Danville initiated suit only at Howard's instruction. "There [would] be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." *Multimedia Pub. of S.C., Inc. v. Mullins*, 314 S.C. 551, 556, 431 S.E.2d 569, 573 (1993) (citation omitted.) The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Id.*

The tort of abuse of process "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion v. United Food & Commercial Workers Int'l. Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002), cert. dismissed (June 10, 2004). In this case, the evidence established that Shirley had no interest in the real property, or partnership, at the time the litigation was filed, or at least but for Howard's actions thwarting Shirley's compliance with the family court order she wouldn't have. A special warranty deed showed that when Shirley and Howard entered into the 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. (Shirley's Exhibit 14) The deed to Shirley was executed by Howard, in his capacity as sole member of SH5, LLC, which is the general partner of the limited partnership. *Id.* See also, Shirley's Exhibit 11 (Agreement of Limited Partnership).

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. (Tr. Pg. 484-488; 500). Instead, Howard instructed the property manager, Marion Turbeville, to hire Susan Lipscomb (e.g. Howard's lawyer in other matters) to sue Shirley for contribution to an assessment. ( ) No other limited partner was sued. ( )

As found by the court, "Sometime while dealing with the 2005 limited partnership tax returns, Howard instructed Ackerman to change Shirley's percentage ownership in the tax returns of the limited partnership to reflect that she owned 56.8% of the limited partnership." (Jan Order pg. 18, para 58)(Shirley's Exhibit 19). This information to Ackerman was inaccurate, and it was persuasive to the court that there is no writing to support the transfer of any additional partnership interest to Shirley. Also, there is no written evidence, whether in the form of a bill of sale, certificate, partnership minutes, or memoranda, indicating that the transfer of an additional interest was ever made or was intended to be made. In fact, the accountant testified that the only documentation he received establishing that Shirley transferred her interest in the real estate to the partnership was "written notes, but no documentation" from "Mr. Turbeville or Mr. Hammer". (Ackerman Tr. Pg. 42, Lines 10-16).

The appellant insists that by signing the electronic filing authorization for the tax returns, Shirley was acknowledging that she owned 56.8% of the limited partnership. But, as the lower court points out, there is no evidence that her interest in the partnership ever increased from 8% to 56.8%. ( ) Even the accountant would not make that leap and

equate the authorization to e-file as “affirmation” by Shirley that her ownership interest had changed. (Ackerman depo. Pg. 118, lines 4-14; pg. 122, lines 1-15).

Further, the evidence showed, and the court concluded, that Shirley had tendered to Howard, pursuant to the Family Court order, her 8% partnership interest, and her interest in the dirt, as early as October 29, 2009 or November 5, 2009. ( ) As far as she was concerned, her ownership interest in the property at 1634 Main, and the partnership, ended in 2008. The evidence unequivocally showed the Howard Hammer pulled the strings behind 1634 Main, LP, and provided inaccurate information to Danville and to the accountant in order to pursue his nefarious intent.

“Our courts have also noted an abuse of process action may lie if a party prosecutes an entire cause of action for collateral purposes. *See Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.c. 65, 73,567 S.E.2d 251, 255 (Cl.App.2002). The trial judge concluded that

“Howard arranged for 1634 to commence this action against Shirley on baseless grounds, while not ensuring that an action was brought against himself or SH 5, LLC for their *pro rata* share of the repairs. It is clear that one reason the partnership did not have sufficient funds on hand to pay for repairs was because Howard himself was not paying rent due the partnership. Howard then arranged for Shirley to be sued for her supposed share of repair costs while making sure he was not sued for his share. This clearly and convincingly establishes that Howard's and 1634's purpose in initiating this action was to harass Shirley over a partnership interest she had tried to convey to Howard in accordance with the family court order.” Jan. Order Para 80.

Not only did Shirley not own any part of the property, the evidence presented established that the partnership agreement did not allow the partnership to make demands for capital contribution against limited partners. ( ). A review of the four-corners of the document revealed that there was no clause allowing for an assessment either. The entire

premise behind the litigation was a farce. The finding against 1634 Main, LP (e.g. Howard Hammer, incognito) should be affirmed.

**II. DAMAGES FOR “FRUSTRATION” WERE PROPERLY AWARDED AND WERE NOT DAMAGES FOR EMOTIONAL DISTRESS.**

Damages that are recoverable in an abuse of process claim are compensatory damages which are the natural results of the abuse of process and may include recovery for physical or mental injury. *Huggins v. Winn Dixie Greenville, Inc.*, 252 S.C. 353, 362, 166 S.E.2d 297, 301 (1969). Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. *See Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958).

The trial judge has considerable discretion regarding the amount of damages. Because of this discretion, the Court’s review on appeal is limited to the correction of errors of law. “Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.” *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct.App.2004) (internal citations omitted).

In this case, the trial judge awarded damages 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). The trial judge continued, holding that

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)).

The appellant insists that damages for “frustration” cannot be affirmed because Shirley abandoned her claims for emotion damages. Shirley would show that in this case, there was no claim for emotional damages made, and none awarded. Respondent does not deny she relinquished her claims for “emotional distress”, but she would show that this element of damages is not only awarded in response for emotional distress claims.

In support of its assertion that frustration must be an emotional distress damage and that it is not a sufficient cause to award damages, Appellant examines law outside the jurisdiction of South Carolina. Shirley would show that the law developed in this State, however, supports the judge’s award of damages. Frustration is not found only in cases of emotional distress, and 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”.

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). 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).

This frustration is not of the emotional kind; it is related to an event that hinders performance of a legal instrument, as Howard Hammer hindered Shirley’s transfer of her ownership in 1634 Main to him pursuant to their agreement, and as Howard’s provision of false information to various third parties hindered their performance in preparing legal documents, such as tax returns and the pleadings in this case. Shirley’s frustration was also felt financially, buy causing her expend \$175,000, years, and by the energy to defend against this frivolous litigation.

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. It 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 allege the grounds for frustration damages are linked to Shirley Hammer’s claim for emotional distress, which she abandoned, the 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. “Actual damages are such as will compensate the party for injuries suffered or losses sustained. . . They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense

for, loss or injury sustained.” *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989).

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. 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 matter, the Judge found that there was an abuse of process and, accordingly, awarded damages for that abuse, including damages for the frustration imposed onto Shirley Hammer.

“[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)).

Shirley testified that because of the baseless litigation brought against her, in part by 1634 Main, LP, she had to pay more than \$175,000 in legal fees, has spent years defending herself against the baseless litigation, and has potentially suffered as yet realized tax consequences due to Howard’s provision of fraudulent information to the accountant. The court determined that this “frustration” of Shirley’s life warranted damages in the amount of \$25,000, jointly and severally by 1634 Main, LP and its guiding hand, Howard Hammer. It further awarded punitive damages against Howard Hammer in this matter because of the action he took against Shirley by and through 1634 Main, LP, in the amount of \$50,000<sup>4</sup>.

### **III. THE TRIAL COURT RETAINED JURISDICTION AND PROPERLY ADDRESSED RESPONDENT’S MOTION FOR SANCTIONS, FILED PURSUANT TO THE FCPSA AND RULE 11, SCRPC.**

Like Howard Hammer, Appellant 1634 Main, LP concluded the Frivolous Civil Procedure Sanctions Act (FCPSA) and case law unequivocally required motions under

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<sup>4</sup> 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, 224, 136 S.E.2d 286, 289 (1964)).

the FCPSA to be filed and served within ten days after judgment, and relied on *Pitman v. Republic Leasing Company Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct.App. 2002) and *Ex Parte Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct.App. 2004). For the reasons set forth herein, and in the law of this case, Shirley would show that the award should be affirmed.

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* “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. *Beard, infra*. 359 S.C. at 358, 597 S.E.2d at 838. 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 consideration. *See e.g., Cox v. Fleetwood Homes of Georgia Inc.*, 334 S.C. 55, 512 S.E.2d 498 (1999).

Respondent Shirley Hammer recognizes that in *Russell v. Wachovia Bank, N.A.*, 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. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (S.C. 2006). In *Pitman*, the logic used by the Court in attaching the 10-day limitation found in Rule 59, SCRPC 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), SCRPC, 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 any 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, Shirley 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.

Even if this court determines that the 10-day deadline should apply in all cases to motions under the FCPSA, Respondent 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.<sup>5</sup> In *Rutland v. Holler, Dennis et al*, 371 S.C. 91, 637 S.E.2d 316 (Ct.App. 2006)<sup>6</sup>, 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.

Initially, the court determined that the parties received notice of the motion for sanctions at the hearing:

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<sup>5</sup> In my view, the unique posture of this case on January 15 compels the conclusion that the motion was timely "made", i.e. served, on January 15. See *Curtis v Blake*, 381 S.C. 189, 672 S.E. 2d 576 (2009) for the proposition that "made" means "served"). The target parties were fully aware that Mrs. Hammer had prevailed on the merits, and they were fully aware she had moved for sanctions. I conclude they were properly served with the motion on January 15, 2013. (Order 6-6-13, pg. 10).

<sup>6</sup> The Court of Appeals decided this case based on the pre-2005 version of the FCPSA.

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, 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. 1-15-13 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 serve the filed copy of the January 15, 2013 motion 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 15<sup>th</sup> 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. . ."

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 motion 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. The trial judge served

the final order in this matter by placing it in the United States mail on January 29, 2013<sup>7</sup>. Shirley Hammer'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), SCRPC.

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

"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, 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

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<sup>7</sup> 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.

sanctions under Section (A) or (B) of Section 15-36-10<sup>8</sup>. 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. Section 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<sup>9</sup> 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), SCRPC. 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.

The party or attorney may also be sanctioned for doing these things in bad faith **whether or not** there is good ground to support the filing or argument. *Ex parte Gregory*, 378 S.C 430, 663 S.E. 2d 46 (2008). Claims which are not made in good faith are subject

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<sup>8</sup> 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).

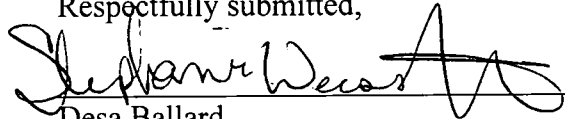
<sup>9</sup> Our Rule 11 equates to the pre-1983 Federal version of Rule 11. *Ex Parte: Bon Secours-St. Francis Hospital*, 393 S.C. 590, 713 S.E.2d 624 (2011).

to sanction pursuant to Rule 11. *Chewing v Ford Motor Co.*, 354 S.C 72, 579 S.E. 2d 605 (2003). Shirley Hammer incurred fees and costs totaling \$102,032.87 in defending herself in the 1634 action and the court properly sanctioned 1634 Main, L.P. in that amount.

## CONCLUSION

The evidence in the 1634 Main, LP v. Shirley Hammer case clearly established that (1) Howard Hammer controlled the decision of 1634 Main, LP to sue his former wife, and only his former wife, for contribution to an assessment, (2) the partnership agreement did not have a provision allowing it to seek funds for assessments against limited partners, assuming arguendo that Shirley still owned her 8% interest and (3) that when the litigation was filed by 1634 Main, LP, it knew, vis a vis Howard Hammer, that Shirley no longer owned any portion of the property located at 1634 Main Street, by virtue of their family court property agreement and her attempts to tender her shares to Howard in light of the family court order she do so. The clear and convincing evidence caused the lower court to award actual damages to Shirley Hammer for 1634 Main, LP's abuse of process, and awarded her punitive damages against the partnership's puppeteer, Howard Hammer. Respondent Shirley Hammer requests that the Orders of the lower court be affirmed.

Respectfully submitted,



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ATTORNEYS FOR SHIRLEY HAMMER

*December 16, 2013*