THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Court of Common Pleas
George James, Jr., Circuit Court Judge
James F. Barber, Supervising Circuit Court Judge
(Formerly Pending before the South Carolina Court of Appeals)

Howard Hammer ..... Appellant

v.

Shirley Hammer.....Respondent

Case No. 2009-CP-40-05911
Appellate No. 2013-001652

1634 Main, L.P. .....Plaintiff/ Appellant

v.

Shirley Hammer a/k/a Shirley Grace Hightower .....Defendant and Third Party Plaintiff/Respondent

v.

Howard Hammer.....Appellant/Additional Defendant on Counterclaim/Appellant

Case No. 2010-CP-40-2889
Appellate No. 2013-001634

INITIAL REPLY BRIEF OF APPELLANT 1634 MAIN, L.P. TO RESPONDENT'S BRIEF

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I. STANDARD OF REVIEW

Claims for sanctions under the Frivolous Sanctions Act and under Rule 11 SCRCP are claims in equity. *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 713 S.E.2d 650 (S.C. App. 2011). The determination of whether attorney's fees should be awarded under Rule 11 or under the Act is treated as one in equity. *In re Beard,* 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App. 2004). As such the Court can find facts in accordance with its views of the preponderance of the evidence. *Crowder v. Crowder,* 246 S.C. 299, 143 S.E.2d 580 (1965). *Townes Associates, LTD v. The City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

II. THE LOWER COURT ERRED IN AWARDING RESPONDENT ACTUAL DAMAGES AGAINST 1634 MAIN L.P. FOR FRUSTRATION.[1]

A. FRUSTRATION IS AN EMOTIONAL DAMAGE

The court erred in awarding Respondent actual damages in the amount of $25,000 jointly against 1634 Main LP and Mr. Hammer for frustration damages. "Frustration" is a form of emotional distress. Ms. Hammer had withdrawn any and all claims for emotional distress damages; and, the Lower Court had ordered a voluntary non-suit with prejudice as to any such claim by Respondent.

The sole cause of action for which the trial court awarded damages against 1634 Main was for abuse of process. In *Huggins v. Winn-Dixie Greenville, Inc.,* 252 S.C. 346. 665 S.E.2d 311 (Ct. App. 2008), the South Carolina Supreme Court held as follows:

> Damages recoverable for abuse of process are compensatory for the natural results of the wrong, and may include recompense for physical or *mental injury*; expenses; loss of

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[1] Pursuant to Rule 208(b)(6), SCACR, Appellant 1634 Main, L.P. incorporates by reference the Reply Brief of Howard Hammer insofar as applicable to 1634 Main, L.P., reserving however the right to submit a separate brief and make a separate oral argument.

> time; and injury to business, property or financial standing.' 72 C.J.S. Process, § 124g, p. 1203. See also 1 Am.Jur. (2d) 269, Abuse of Process, Sec. 25.

252 S.C. at 362, 166 S.E.2d at 301 (emphasis added). Mental injury or emotional distress damages include frustration, embarrassment, and humiliation. *See*, *Swicegood v. Lott,* 379 S.C. 346, 354, 665 S.E.2d 211, 215 (Ct. App. 2008). Although the lower court cited *Swicegood* for authority to parse emotional distress damages and to designate frustration as a damage distinct from emotional distress damages, *Swicegood* does not stand for that proposition. In *Swicegood*, there was testimony of frustration as a part of the emotional damages specifically plead by Plaintiff and sought in that case. Furthermore, Swicegood's claim for emotional damages had not been withdrawn.

Once Ms. Hammer withdrew all claims for emotional distress damages and the lower court granted a motion for nonsuit with prejudice as to any claims by Shirley of any emotional damages, and then she failed to prove attorney's fees or costs in either the 1634 Main trial on the merits or in the proceedings on sanctions[2], there was a complete failure of proof as to any damages resulting from any abuse of process. Instead of dismissing the claim for abuse of process, the court fashioned a new damage, the damage of "frustration." Clearly, hard facts make "bad law." However, there can be no real question that frustration is a form of emotional damage and those claims were withdrawn and dismissed with prejudice.

"Emotional distress" is defined in *Black's Law Dictionary* as follows:

> "A highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct; emotional pain and suffering. Emotional distress, when severe enough, can form a basis for the recovery of tort damages—Also termed emotional harm; mental anguish; mental distress; mental suffering. . . ." "Emotional

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[2] See Argument V page ___.

> distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It also includes *all* highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." (Citing *Restatement [Second] of Torts § 46*) (emphasis added). *Black's Law Dictionary, 9th Edition for iPhone, Version 2.1.2.*

"Emotional distress" is defined in Restatement (Second) Torts § 46, comment j, as follows: "[E]motional distress...includes all *highly unpleasant mental reactions*, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." Cited with approval in *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778-79 (1981)(emphasis added).

The Court of Appeals holding in *Swicegood* is that frustration, humiliation and embarrassment are evidence sufficient enough to support the presentation of a claim for emotional distress damages to the jury. To extend the *Swicegood* finding to the proposition that frustration is not an emotional distress damage or that frustration alone can support a damage award, is a step too far.

Limits on the recovery for emotional distress damages or damages for "feelings" are guarded carefully. Once reason for this is because it is difficult to verify objective criteria for any such damages. The history of the development of the law in South Carolina in Mr. Hammer's brief is instructive and incorporated by reference. In addition the South Carolina Supreme Court in *Hansson v. Scalise Builders of South Carolina* offered a timeline of the development of case theory regarding recovery for emotional damages. 374 S.C. 352, fn.1, 650 S.E.2d 68 fn. 1(S.C. 2007). The court in *Hansson* acknowledged that in *Ford v. Hutson* it had ruled that the party could recover damages for emotional distress in the absence of physical injury, but also held as follows:

> Recognition of this tort, however, did not come without qualification. In *Ford,* the Court emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was "extreme and outrageous," and that the conduct caused distress of an "extreme or severe nature." *Id.* at 161, 276 S.E.2d at 778 (quoting *Hudson,* 273 S.C. at 770, 259 S.E.2d at 814). Chief Justice Littlejohn, writing for the Court, further reasoned that "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious." *Id.* at 166, 276 S.E.2d at 780 (citing William L.] Prosser, *The Law of Torts* § 12 (4th ed.1971)). In this vein, our courts have since noted "the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct." *Todd v. S.C. Farm Bureau Mut. Ins. Co.,* 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct.App.1984) , *rev'd on other grounds,* 287 S.C. 190, 336 S.E.2d 472 (1985) .

Frustration is an aspect type or element of emotional damages. It is not distinguishable from emotional distress damages.

Respondent seeks solace in the law that the trial judge has considerable discretion regarding the amount of an award of damages; however, the trial judge does not have the discretion to create a new subset of damages that has no support in the law of South Carolina or elsewhere.

Respondent is critical of 1634 Main's reference to law outside the jurisdiction of South Carolina and argues that the law developed in South Carolrolina supports the trial court's award of damages for "frustration". It does not. Respondent uses the definition of "frustrate", the verb, not the noun "frustration" to attempt to weave a difference in frustration damages and emotional distress damages. Respondent cites *Sanchez v. Tilley*, 285 S.C. 449, 451, 330 S.E.2d 319, 320 (ct. App. 1985) and *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 603-04, 527 S.E.2d 371, 387-88 (Ct. 2000) aff'd as modified and remanded, 343 S.C. 587, 541 S.E.2d 257, Those cases do not support the Respondent's theory, in fact,

they are completely irrelevant. Both cases discuss the doctrine of frustration as relates to a contract. *Sanchez* held:

> "The doctrine of frustration, which is of relatively recent growth, excuses performance of a contract, in a proper case, where the purpose of the contract, or of the parties thereto, is frustrated by a supervening event, not readily foreseeable, without fault of the parties." There is no finding, holding, or even discussion of frustration as a type of damage for which recovery is available in a tort matter."

Likewise, the statement cited in the court of Appeals decision in *Kiriakies* was specifically overruled. The Supreme Court held: "we specifically reject the 'reasonable expectations' approach adopted by the Court of Appeals.

Respondent alleges that an individual may recover for "sentimental frustration." There is no definition of "sentimental frustration" in Black's Law Dictionary, or any state or federal case located by counsel for Appellant. That is the very type of "touchy-feely" damage that the courts have diligently sought to preclude. As stated in the Restatement, "Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46 cmt. j

Therefore because frustration is a component of mental distress, an award of damages for frustration cannot be independent of an award for emotional damages, which as discussed above were waived.

As stated in its Appellant Brief the courts addressing the issue in other states have held that mental distress or mental anguish damages include frustration. *Horton Homes, Inc. v. Brooks*, 832 So.2d 44, 53 (Ala. 2001). *Volkswagen of America, Inc. v. Dillard*, 579 So.2d 1301, 1307 (Ala. 1991); *B & M Homes, Inc. v. Hogan*, 376 So.2d 667, 673 (Ala. 1979).

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Liberty National Life Insurance Co. v. Daugherty, 840 So.2d 152 (Ala. 2002); *Slack v. Stream*, 988 So.2d 516 (Ala. 2008). See also, *Gaudry v. Bureau of Labor and Industries*, 48 Or. App. 589, 617 P.2d 668 (Or.App. 1980).

B. FRUSTRATION ALONE DOES NOT SUPPORT AN AWARD FOR EMOTIONAL DISTRESS DAMAGES.

Frustration without more is not a damage for which recovery is appropriate. *Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002). *Patterson v. PHP Healthcare Corp*, 90 F.3d 927, 940

C. THERE WAS NO EVIDENCE OF FRUSTRATION, IN FACT, OR EVIDENCE OF PROXIMATE CAUSE OF ANY ALLEGED FRUSTRATION

In this case the finding that Respondent suffered frustration damages was without any evidentiary support. There was no evidence of frustration as a result of anything done by 1634 Main. In fact, Respondent testified that she was frustrated by the appeals and other matters in the family court. (Tr. P. 604-681). Neither nor anyone else provided any evidence of frustration.

Even though *Swicegood* held that "there may be recovery without proof for harm to the plaintiff's reputation, standing and credit" as well "as to humiliation and other mental suffering..., there still has to be *some* evidence." CITE (emphasis added). In *Swicegood* the plaintiff gave actual testimony to his frustration and embarrassment. The damages here, cannot be presumed or subject to conjecture. *Smith v. Doe*, 366 S.C. 370, 623 S.E.2d 370 (2005).

In conclusion, an award of any damages based on frustration alone was an error of law and should be reversed.

III. THERE WAS NO EVIDENCE AGAINST 1634 MAIN LP FOR ABUSE OF PROCESS DAMAGES

To establish a claim for abuse of process, the moving party must establish (1) an ulterior purpose, and (2) a willful act in the use of the process that not proper in the conduct of the proceeding. *Huggins v. Winn Dixie Greenville, Inc.*, 252 S.C. 353, 362, 166 S.E.2d 297, 301 (1969). There is no evidence that 1634 Main had an ulterior purpose or used the process improperly in filing this case.

In *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) the court held as follows:

> The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. *See Huggins v. Winn-Dixie Greenville, Inc.,* 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) ("[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect--the improper use of a regularly issued process.")

"There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). Accord, *Southern Glass & Plastices Co.*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005). There must be some definite act that is not authorized by the processor aimed at an object that is not legitimate in the use of the process. *Hainer*, 328 S.C. at 136, 492 SE2d at 107 (*quoting Huggins*, 249 S.C. at 209, 153 SE2d at 694. The court in *Food Lion* found that the complaint failed in that *Food Lion*, although it did allege a use of process, it did not state an improper willful act.

The court in *Food Lion* held that although an ulterior purpose may be inferred from an improper willful act, the reverse is not true. It is not proper to infer an improper act from the existence of an improper motive or purpose alone. The court held that it is the perversion

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of the process, the improper act, the improper use of the process that is required to prove an abuse of process.

The court cited the Restatement of Torts Section 682 "there is no action for abuse of process when the process is used for the purpose for which it is intended, even if there is an incidental motive of spite of other ulterior purpose. *Food Lion*, 351 S.C. at 75, 567 S.E.2d at 256. In this case, the suit was brought to collect an assessment. There was no other use of the process. There was no perversion of the process. There was no evidence at all of the second element any willful act required to prove the tort.

In this case the lower court held that the act of Mr. Hammer was the act of 1634 Main, L.P. It held that the only evidence was that Mr. Hammer had provided the information about Ms. Hammer's ownership interest in the limited partnership to Mr. Ackerman. That is not correct. Contrary to the argument by Respondent that Howard instructed Ackerman to change Shirley's percentage of ownership in the tax return and contrary to the Court's finding that the only evidence was that Mr. Ackerman received instruction from Howard as to the change in Shirley's percentage of ownership in the limited partnership, the undisputed evidence was that there was a plan put in place involving Mr. Hammer, Mr. Ackerman, and a tax attorney to attempt to eliminate potential tax liability to Ms. Hammer. Mr. Ackerman's testimony was that the tax returns through 2004 showed that Ms. Hammer had an 8% ownership in the limited partnership and thereafter received a 52.75% interest in the real estate. The purpose of it was to accomplish a 1031 exchange so that she did not have to pay the capital gains that she would have to on the property in the Isle of Palms. Mr. Ackerman testified that the tax attorney had worked out of plan. (Ackerman deposition 110-161) Mr. Ackerman testified that the tax attorney had worked out the plan.

In conclusion there was no evidence of abuse of process on the part of 1634 Main and the Order awarding damages should be reversed.

IV. THE LOWER COURT ERRED IN AWARDING SANCTIONS AGAINST 1634 MAIN UNDER EITHER THE FRIVOLOUS SANCTIONS ACT OR RULE 11 FOR THE FOLLOWING REASONS:

The case was tried nonjury on October 29, through November 1, 2012, and the court convened a hearing on January 15, 2013, pertaining to issues regarding punitive damages, and attorney's fees as actual damages for abuse of process. At the January 15, 2013 hearing Respondent's counsel handed the court an unfiled copy of a motion for sanctions and put one copy on the table for all three participants in the trials, Arthur Aiken, Hammer and Susan Lipscomb.

Thereafter the court issued its Order dated January 28, 2013, which provided in relevant part as follows:

> 133. At the conclusion of the January 15, 2013 hearing, counsel for Shirley asserted a claim under the South Carolina Civil Proceedings Sanctions Act (SCFCPA), S.C. Code Ann. Section 15-36-10. The SCFCPA is not a factor at this stage as the very terms of the Act do not apply until the post-trial stage and such claims must [sic] heard in accordance with the Act. As a result, the court denies that claim without prejudice to Shirley's right to seek relief under the SCFCPA after this matter is concluded. 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.

The Court's January 28, 2013 Order was mailed to all partied on January 29, 2013. Respondent's counsel served the filed Motion for Sanctions on February 13, 2013, more than ten days after receipt of the Court's Order.

A. THE MOTION WAS NOT TIMELY MADE

The Motion for Sanctions under the Act is time barred. Any motion under the Act is treated as a post-trial Motion and must be made within ten days of receipt of a final order on the merits. *Ex parte Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004), *Pittman v. Republic Leasing Company, Inc.*, 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), *Rutland v. Holler. Dennis, Corbett, Ormond & Garner*, 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006).

After the time to file post-trial motions has elapsed, the judge loses jurisdiction over the case, and loses jurisdiction to hear post-trial motions. *Ex Parte Beard*, 259 S.C. 251, 597 S.E. 2d 835; *Pitman v. Republic Leasing, Co.*, 351 S.C. 429, 431, 570 S.E. 2d 187, 189 (Ct. App. 2002). Because the Motion for Sanctions was not served until February 13, 2013, it was untimely and should not be considered.

Respondent contends that because other post-trial motions were pending before the Court, it necessarily had jurisdiction. That proposition ignores the law and the very terms of the South Carolina Rules of Civil Procedure. Rule 50, Rule 52 and Rule 59 all provide in relvent part that the trial judge 'shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion..."

The rules do not provide that post-trial motions somehow extend the jurisdiction of the trial judge to entertain other post-trial motions. The motion for sanctions under the Act was not timely made. Furthermore, Rule 6, SCRCP does not apply to give additional time by mail. See *Witzig v. Witzig*, 479 S.E.2d, 297 ( ).

B. THERE IS NO EVIDENCE IS THAT 1634 MAIN VIOLATED THE FRIVOLOUS SANCTIONS ACT OR RULE 11, SCRCP

It is clear that the court used the alleged attorney's fees incurred by Shirly to make the award of sanctions against both Howard Hammer and 1634 Main. However, there was no proof in fact as to attorney's fees or other damages.

At the trial of the case Shirley Hammer testified that she had incurred attorney's fees and costs in the amount of $175,445.00 for representation in the two actions. She did not break out the specific costs of each action, or identify which fees were for defense of the claims filed against her and which were for prosecuting the counterclaims. The court correctly held in its January 29, 2013 Order that it was not able to determine based on the evidence submitted which fees and costs were incurred for what reason or for what case.

The court then convened a subsequent hearing on January 15, 2013, for the purported purpose on determining attorneys fees and costs and punitive damage. In the hearing on January 15, 2013, no admissible evidence was presented as to attorney's fees. The affidavit presented was hearsay. At that hearing Shirley's attorney presented an "Affidavit of Attorneys' Fees and Costs wherein she attempted to break out the fees and costs between the contract action and 1634 action. When the parties objected to the hearing being held on the ground that the court had concluded the trial on November 1, 2012, and that it would not be proper to re-open the record for additional trial evidence, the court agreed, holding as follows: "Any issues pertaining to an award of fees and costs will be left for resolution upon the filing and hearing of any motion made by Shirley under the South Carolina Frivolous Civil Proceedings Sanction Act." (January 29, 2013 Order page 14, paragraph 45).

There was no evidence of any attorney's fees or other damages as a result of either suit. The lower court correctly found that it agreed with Mr. Hammer that Shirley's right to

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present evidence to attorney's fees as actual damages ended with the presentation of the evidence during the trial. (January 28, 2013, Order, p. 4).

The May 1, 2013, the Court convened a hearing as to the Respondent's Motion for Sanctions. No evidence of attorney's fees was presented.

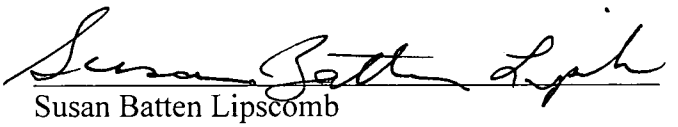
On May 17, 2013, the Court had an additional hearing. Counsel for Respondent states she had filed an amended affidavit after the January 15, 2013, hearing (p. 50). She did not submit the packets referred to in the Amended Affidavit, which purported to break our the attorney's fees and costs for each case. (May 17, 2013 Tr. p. 50). Admittedly the sanctions were in the form of attorney's fees. (May 17, 2013 Tr. p. 51). Counsel offered to submit the detailed billing to the court, but the Court refused any further submission from either party (May 17, 2013 Tr. p. 129). Respondent argued that because the attorney's fees claimed were being requested as sanctions, she should not be put to the task of proving attorney's fees. (May 17, 2013 Tr. p. 54). In other words, she was entitled to an award of sanctions having no basis in fact, or in the evidence. Such an award is impermissible.

For reasons set forth in Appellant's Brief and Mr. Hammer's Reply Brief, Respondent's Motion for Sanctions against 1634 Main pursuant to the Act and Rule 11 should be denied.

V. Conclusion

In conclusion the lower court Order on the merits and the Order granting sanction should be reversed and entry of judgment for 1634 Main should be made.

Respectfully Submitted,



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APPELLANT'S CERTIFICATE OF COUNSEL PURSUANT TO RULE 209, SCACR

The undersigned attorney for Appellant certifies that the Reply Brief of Appellant 1634 Main, L.P. complies with Rule 209, SCACR.

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PROOF OF SERVICE

I, Susan Batten Lipscomb, Attorney for Appellant 1634 Main, L.P., do hereby certify that on December 23, 2013, the **SUPPLEMENTAL DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL OF**

APPELLANT 1634 MAIN, L.P., INITIAL REPLY BRIEF OF APPELLANT 1634 MAIN, L.P. TO RESPONDENT'S BRIEF, and **CERTIFICATE OF COUNSEL PURSUANT TO RULE 209, SCACR** was served on counsel of record by causing a copy to be placed in the U.S. Mail, postage prepaid and addressed as set forth below:

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