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**S.C. Supreme Court**

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

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

**BRIEF OF APPELLANT 1634 MAIN, L.P.**

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## STATEMENT OF ISSUES ON APPEAL

- I. STANDARD OF REVIEW
- II. THE LOWER COURT ERRED IN AWARDING RESPONDENT ACTUAL DAMAGES AGAINST 1634 MAIN L.P. FOR FRUSTRATION FOR THE FOLLOWING REASONS:
  - A. FRUSTRATION IS A TYPE OF EMOTIONAL DISTRESS DAMAGES AND RESPONDENT HAD WITHDRAWN ANY CLAIM FOR EMOTIONAL DAMAGE AND THE COURT ORDERED A VOLUNTARY NON-SUIT WITH PREJUDICE AS TO ANY CLAIMS FOR EMOTIONAL DAMAGES;
  - B. FRUSTRATION ALONE DOES NOT SUPPORT AN AWARD OF DAMAGES.
  - C. THERE WAS NO EVIDENCE OF FRUSTRATION, IN FACT, OR EVIDENCE OF PROXIMATE CAUSE OF ANY ALLEGED FRUSTRATION
- III. THE LOWER COURT ERRED IN FINDING AGAINST 1634 MAIN LP FOR ABUSE OF PROCESS WHEN THE FINDING WAS NOT SUPPORTED BY THE EVIDENCE.
- IV. THE LOWER COURT ERRED IN AWARDING SANCTION AGAINST 1634 MAIN LP UNDER EITHER THE FRIVOLOUS SANCTIONS ACT OR RULE 11 FOR THE FOLLOWING REASONS:
  - A. THE MOTION WAS NOT TIMELY MADE
  - B. THE EVIDENCE IS THAT 1634 MAIN DID NOT VIOLATE THE FRIVOLOUS SANCTIONS ACT OR RULE 11, SCRCF

## STATEMENT OF THE CASE

On April 30, 2010, Appellant 1634 Main, L.P. filed a Summons and Complaint in the Richland County Court of Common Pleas against Defendant Shirley Hammer a/k/a Shirley Grace Hightower for declaratory judgment that Ms. Hammer was a duly qualified member of the limited partnership, having 56.8% interest in the partnership and requesting payment of the sum of \$88,040 as an assessment made by the property manager of 1634 Main, Danville Management Advisors. (R. pp. 228-231)

An Amended Summons and Complaint was filed June 9, 2010, requesting the same relief. (R. pp. 232-235). On June 18, 2010, Respondent Ms. Hammer filed an Answer to Complaint, Motion to Dismiss, Motion for Injunction, and Third Party Complaint, naming Howard Hammer as Third Party Defendant. (R. pp. 236-244). On June 24, 2010, Ms. Hammer filed an Amended Answer to Complaint, Motion to Dismiss, Motion for Injunction, and Third Party Complaint, alleging abuse of process, malicious prosecution, intentional infliction of emotional distress/outrage, and in the alternative conversion, and civil conspiracy. (R. pp. 245-253). Ms. Hammer made a Motion to Compel, Subpoena, Motion for Default Judgment, and Affidavit of Default as to Mr. Hammer on November 11, 2010. (R. pp. 296-307). The hearing was held and the Court found that Mr. Hammer had not been properly served and thereafter issued an Order. (R. p. 213).

On February 25, 2011, Defendant Ms. Hammer filed a Second Amended Answer to Complaint, Motion to Dismiss, Motion for Injunction, and Third-Party Complaint, which was served on Mr. Hammer and 1634 Main, L.P. On March 28, 2011, Mr. Hammer filed and served a Notice of Motion and Motion pursuant to South Carolina

Rules of Civil Procedure, Rules 12(b), 12(e) for more definite statement and pursuant to 10(b), 11(a) and 12(d). (R. pp. 311-316). Ms. Hammer filed a Supplemental Motion to Dismiss dated July 19, 2011. The Court granted Mr. Hammer's Motion to Dismiss as to the malicious prosecution cause of action and granted Mr. Hammer's Motion to Make More Definite and Certain as to paragraphs 11 and 29 of the Amended Answer. (R. pp. 214-219).

Ms. Hammer served her Amendment to Amended Answer to Complaint dated November 3, 2011, which stated that the Amendment was "pursuant to Order of Judge DeAndrea G. Benjamin, filed on October 17, 2011; however, the pleading still contained the cause of action for Malicious Prosecution, which the Court had ordered to be stricken from the pleading. (R. pp. 254-262). On November 28, 2011, Plaintiff served and filed a Reply to Defendant's Amendment to Amended Answer and Counterclaim and Third-Party Complaint. (R. pp. 276-280). Mr. Hammer filed and served a Motion to Dismiss and, In the Alternative Motion to Strike. Defendant Ms. Hammer filed and served her Second Amendment to Amended Answer to Complaint, Counterclaims and Third Party Complaint dated March 14, 2012. (R. pp. 263-270). Plaintiff 1634 Main, L.P. filed and served its Reply on April 3, 2012. (R. pp. 271-275). Additional Defendant Mr. Hammer filed his Amended Reply/Answer/Counterclaim/Cross-Claim dated May 1, 2012. (R. pp. 285-293).

The case was consolidated for trial with the case of *Howard Hammer v. Shirley Hammer, a/k/a Shirley Grace Hightower*, Case No.: 2009-CP-40-05911. On Friday, October 26, 2012, Ms. Hammer through her counsel filed a document withdrawing her claims for emotional distress damages in both cases. (R. pp. 185, 317). On the first day

of trial, October 29, 2012, counsel for Ms. Hammer called to the Court's attention the withdrawal of any claims for emotional damages. (R. pp. 414, lines 6-13; p.437, line 2-p.438, line 17). The Lower Court ordered a voluntary non-suit of any claims for emotional damages of Ms. Hammer with prejudice. (R. p. 437, line 10-p.438, line 17). Although consolidated, the cases were tried consecutively on October 29 through November 1, 2012. Case Number 2009-CP-40-05911 was tried first, followed by *1634 Main L.P versus Shirley Howard v. Howard Hammer*, and lastly, *Howard Hammer versus Shirley Hammer*. (R. p. 1726, lines 1-11). During trial the Judge again stated that there would be no "emotional damages." (R. pp. 993, line 14-p. 994, line 21). A hearing was convened on January 15, 2013, for hearing on attorney's fees as well as any outstanding issues pertaining to punitive damages. (R. pp. 1689-1695, line 9). After the hearing counsel for Ms. Hammer handed the court a copy of a Motion for Sanctions. She placed one copy of the Motion for Sanctions on the table for counsel for 1634 Main LP, counsel for Mr. Hammer in the 2009-CP-40-05911 case, Art Aiken, and Howard Hammer, *pro se*. (R. pp. 179-184, 202-209). The Lower Court issued its Order in both cases on the merits dated January 28, 2013, and filed January 29, 2013, awarding Ms. Hammer actual damages jointly against Mr. Hammer and 1634 Main, LP in the amount of \$25,000 and punitive damages against Mr. Hammer in the amount of \$50,000. (R. pp. 8-53).

As to the Motion for Sanctions the Order provided in relevant part:

133. At the conclusion of the January 15, 2013 hearing, counsel for Shirley asserted a claim under the South Carolina Frivolous 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 must be [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. (R. p. 52).

Appellant 1634 Main L.P. served its Motion to Reconsider February 11, 2013, and filed it February 13, 2013. (R. pp. 325-327). Mr. Hammer served his Motion to Reconsider on February 11, 2013. (R. pp. 328-374). On February 13, 2013, Ms. Hammer's counsel served the Motion for Sanctions. (R. pp. 179-184). Mr. Hammer moved to dismiss the Motion for Sanctions as untimely by motion dated February 20, 2013. (R. pp. 186-187). Appellant 1634 Main moved to dismiss the Motion for Sanctions as untimely by Motion dated February 25, 2013. (R. pp. 376-377). By Motion dated March 29, 2013, Arthur K. Aiken moved to dismiss Ms. Hammer's claim for Sanctions as against him, also on the basis that the Motion was not timely made. The trial court held a hearing on the issue of timeliness on May 1, 2013; (R. pp. 1808-1866) and, held a hearing on the merits of the Motion for Sanctions on May 17, 2013. (R. pp. 1867-1996).

The Court issued its Order Addressing Post-trial Motions dated June 3, 2013, filed June 6, 2013. (R. pp. 54-78). Appellant 1634 Main L.P. received written notice of the entry of the Order on July 9, 2013, served its Motion to Reconsider and Notice of Appeal on July 15, 2013, both filed on July 16, 2013. (R. pp. 378-381); pp. 294-295). Ms. Hammer made a Motion for Certification/Consolidation/ and to expedite the appeals in

the Supreme Court dated July 19, 2013. Mr. Hammer served and filed his Notice of Appeal on August 8, 2013. 1634 Main LP filed a Motion to Remand the case for consideration of the Motion to Reconsider on August 30, 2013. On September 18, 2013, the Supreme Court issued an Order granting the Motion to certify the appeals to the Supreme Court and to consolidate and to expedite the appeals, and remanding the 1634 case for a ruling on the Rule 59(e) motion. The Lower Court issued its Order Denying 1634 Main, L.P.'s and Howard Hammer's Motion for Reconsideration on Thursday, September 19, 2013. (R. pp. 220-222). 1634 Main LP filed and served its Notice of Appeal on September 23, 2013. (R. pp. 294-295). The Supreme Court issued its Order expediting the briefing schedule on October 15, 2013.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

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. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974). *Townes Associates, LTD v. The City of Greenville*, 266 S.C.81, 86, 221 S.E.2d 773, 775 (1976).

In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to 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 FOR THE FOLLOWING REASONS.**

The court erred in awarding Respondent actual damages in the amount of \$25,000 jointly against 1634 Main LP and Mr. Hammer for frustration when “frustration” is a form of emotional distress; and, 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 claim by Respondent for emotional damages.

On October 26, 2013, Ms. Hammer filed and served a document entitled “WITHDRAWAL OF: Certain claims for damages in both cases.” (“WITHDRAWAL”). (R. pp. 185, 317). The document provides in relevant part as follows:

Defendant Shirley Hammer hereby: .A. Withdraws her claim for emotional distress damages as an element of damages in her first counterclaim and third party claim for abuse of process.

Immediately prior to trial the court, after discussion with, and consent of counsel, ordered a voluntary non-suit with prejudice as to any claims made by Respondent for emotional damages. (R. pp. 993, line 14-p. 994, line 22). This point was reiterated during trial when Respondent’s counsel again agreed that any claims for emotional damages had been withdrawn. The court agreed, stating: “there aren’t going to be any emotional distress damages.” (R. p. 993, line 14-p. 994, line 22).

The court then ordered a judgment against Mr. Hammer and 1634 Main jointly in the amount of \$25,000 as damages for frustration.<sup>1</sup> In its January 28, 2013, Order the court stated as follows: “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*.” (1/28/13 Order at Para. 120)(emphasis added). (R. p. 44). This decision was an error of law for the reasons set out below.

**A. FRUSTRATION IS AN EMOTIONAL DAMAGE**

In making its award of frustration damages the court relied on a Court of Appeals case, *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) and a Supreme Court case, *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 S.E.2d 297 (1967), for the proposition that abandonment of claims for emotional distress damages doesn’t equal abandonment of claims for damages founded in frustration or embarrassment. The court’s reliance appears to rest on the those cases 1) drawing a distinction between “damages for frustration” and “emotional damages” and 2) finding that an award of damages can be made for frustration independent of an award for emotional damages. This reliance, on both premises, however, is unfounded.

The finding of *Swicegood* is that frustration, humiliation and embarrassment are evidence sufficient enough to support the presentation of a claim for damages to the jury.

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<sup>1</sup> The court also awarded a judgment against Mr. Hammer for \$50,000 punitive damages, but made no award of punitive damage damages against 1634 Main.

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.

Frustration is an aspect of emotional damages. It is not a separate species of damages. Frustration is not a physical injury, expense, loss of time or injury to business, property or financial standing. It is an element or type of emotional damage. The South Carolina Supreme Court, in *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001), defined mental or emotional distress damages very broadly. The Supreme Court also, however, gave examples of emotional damages. It held that mental anguish, or emotional damages, include “shock, fright, emotional upset and/or humiliation.” 343 S.C. 498, \_\_\_\_, 541 S.E.2d at 244.

In *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) the Supreme Court cited with approval Restatement (Second) Torts § 46, comment j, which states that “[E]motional distress...includes all *highly unpleasant mental reactions*, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” 276 S.C. at 162, 276 S.E.2d at 778-79 (emphasis added).

Any damages for frustration are encompassed in the emotional damages, which were withdrawn with prejudice.

In *Swicegood*, the court of appeals referencing *Huggins*, held recovery for an abuse of process claim may include “physical or mental injury; expenses; loss of time; and injury to business, property or financial standing” without actual proof of harm, as well as humiliation and other mental suffering or injury to a person’s feelings. 379 S.C. at 355, 665 S.E.2d at 215.

The sole cause of action for which the trial court awarded damages against 1634 Main was for abuse of process. In *Huggins*, the South Carolina Supreme Court listed the types of compensatory damages recoverable for abuse of process. The *Huggins* 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 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). 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.

In *Horton Homes, Inc. v. Brooks*, the Supreme Court of Alabama held as follows: "Mental anguish includes anxiety, embarrassment, anger, fear, frustration, disappointment, worry, annoyance, and inconvenience." 832 So.2d 44, 53 (Ala. 2001), citing *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). Accord, *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).

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).

The court in *Horton* also held that when the only evidence of a type of emotional damage is the person claiming the damages there is a higher level of scrutiny. The Alabama Supreme Court held:

We now clearly allow the testimony of a witness as to his or her mental anguish. The question thus remains, in the present era, when we permit a witness to offer evidence as to the witness's own mental anguish, is indirect evidence of mental anguish alone sufficient to support a substantial verdict? We answer this question in the negative. We give stricter scrutiny to an award of [mental-anguish damages] where the victim has offered little or no direct evidence concerning the degree of suffering he or she has experienced."

832 So.2d at 53 (Ala. 2001), quoting *Kmart Corp. v. Kyles*, 723 So.2d 572, 578 (Ala. 1998). Accord, *Liberty National Life Insurance Co. v. Daugherty*, 840 So.2d 152 (Ala. 2002).

Emotional damages include a broad spectrum of specific mental or emotional specific manifestations of such damages. In *Computer Publications, Inc. v. Welton*, 49 P.3d 732, 736 (Okla. 2002) the Supreme Court of Oklahoma, in a claim for outrage, held that "emotional distress includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." See also, *Boan v. Blackwell*, 343 S.C. 498, 541 S.E. 2d 242 (2001).

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

Frustration alone is not a damage for which recovery is appropriate. In *Hitt v. Connell*, the Fifth Circuit Court of Appeals held: “hurt feelings, anger and frustration are part of life,” and are not the types of emotional harm that could support an award of damages. 301 F.3d 240, 250 (5th Cir. 2002), citing *Patterson v. P.H.P. Healthcare Corp*, 90 F.3d 927, 940 (5<sup>TH</sup> Cir. 1996). An individual’s own uncorroborated testimony is only sufficient if the testimony is “particularized and extensive” to meet the specificity requirement. 301 F.3d at 250-251. *Accord, Hopwood v. State of Texas*, 999 F.Supp 872 (W.D.Tex. 1998); *Mintz v. Accident and Injury Medical Specialists, PC*, 284 P.3d 62 (Colo.App.Div.4 2010); *Vadie v. Miss. State University*, 218 F.3d 365 (5th Cir. 2000).

In *Mintz v. Accident and Injury Medical Specialists, PC*, the court held “a defendant is only liable for abuse of process if his or her abuse caused damages to the plaintiff. [citation omitted.] Thus, mere vexation or frustration without demonstrable damage is insufficient to sustain liability.” 284 P.3d at 67.

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

Respondent never claimed or provided any evidence of physical injury, loss of time, injury to business, property of financial standing; and, she withdrew any claim for emotional distress damages. There was no evidence of frustration. In fact, Respondent testified that she was frustrated by the appeals and other matters in the family court. (R. p. 995, line 1-7). Her sole testimony as to any alleged frustration was as follows:

- Q. What was your reaction, Shirley, when you received this lawsuit?
- A. I said here goes Howard again. He --- I feel like he has harassed me. We’ve had appeals after appeals after appeals after appeals.

- Q. In the family court matter?  
A. In the family court matter.

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. In *Swicegood* the plaintiff gave actual testimony to his frustration and embarrassment. The damages here cannot be presumed or a product of conjecture. *Winters v. Fiddie*, 394 S. C. 629, 716 S.E.2d 316 (S. C. App. 2011).

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

**III. THE LOWER COURT ERRED IN FINDING AGAINST 1634 MAIN LP FOR ABUSE OF PROCESS DAMAGES WHEN THE FINDING WAS NOT SUPPORTED BY THE EVIDENCE.**

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. *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S. C. 65, 71, 567 S.E. 2d 251, 254 (S. C. App. 2002). *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.

Prior to 2002, the real estate located at 1634 Main Street had been owned by a South Carolina limited partnership called 1634 Main, L.P. (R. pp. 627 line 2-3). Respondent Ms. Hammer became the owner of eight percent (8%) of the limited partnership in 2000 and 2001, via transfers of interest from, Henry Hammer and Eleanor

Hammer, the parents of Howard Hammer. (R. p. 1368 – 1373 - Defendant's Exhibit 14) (Deed to Ms. Hammer) (R. pp. 1366-1367 - Defendant's Exhibits 12 and 13) (R. pp. 627, line 14-p. 632, line 7).

In 2002, Respondent purchased a 52.75% interest in real property at 1634 Main Street in Columbia (an office building) owned by the limited partnership. (R. pp. 1368-1373 - Shirley's Exhibit 14). This was the end result of a tax-deferred exchange after Shirley sold some real estate on the Isle of Palms. The deed to Respondent was executed by Petitioner, 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 (R. pp. 1346-1365 - Agreement of Limited Partnership). There is no evidence that Petitioner was 1634 Main, L.P. (R. pp. 625, line 14-p.646, line 23, pp. 1368-1373) (Defendant's Exhibit 14). Ms. Hammer signed at least four documents reflecting that she knew she had this interest. (Contract for 1634 Main, L.P. for 2005 and 2006, Requests for extension to file to IRS for 2005 and 2006, R.p. 2015, line 24-p. 2075A).

Tax returns and other documents reflect that SH5, LLC, the general partner, had a 36.8% interest in the limited partnership of 1634 Main, L.P. and in 2005 Respondent Ms. Hammer had 56.8% interest and David Hammer had 4.7%. in the limited partnership. (R. 625, line 1-p. 646, line 23, pp. 1456-1527, 1534-1585) (Tax documents) (Defendant's Exhibits 19-22A, 24 and 25).

The parties entered into an agreement dated May 8, 2008, which was made a part of an Order in Richland County Family Court dated May 12, 2008. (R. pp. 762-770, line 14, pp. 1374-1416) (Orders). The agreement provided that Respondent transfer to Petitioner any interest that she had in 1634 L.P. and in the real estate of 1634 Main. (R.

pp. 767-769, line 9) Respondent did not tender the property or interest in 1634 Main, L.P. in accordance with the Settlement Agreement or the Court's Order. (R. pp. 770, line 15-p. 776, line 18). As a result the documents tendered did not comply with the Court Order or the Limited Partnership Agreement and they were returned. (R. pp. 771-774, line 24, pp. 1425-1426) (Defendant's Exhibit 17) (Letter dated December 1, 2010).

1634 Main entered into an Exclusive Leasing and management Agreement with Danville Business Advisors, LLC ("Danville"). (R. 647, line 9-p. 649, line 1, p. 1319-1325). (1634 Main's Exhibit 1) ("Management Agreement"). The duties and responsibilities of Danville included, among other things, the duty to initiate all legal actions or proceedings required in the best judgment of the agent, and with owner's consent, for the collection of rent or other amounts. (R. pp. 647, line 9-p. 649, line 1; pp. 1319-1325). Danville also had the responsibility to make or cause to make repairs on the property. (R. 649, lines 10-15, pp. 1319-1326 - Management Agreement).

In 2009, Petitioner, as sole partner of SH5, LLC, the general partner of 1634 Main, L.P., asked for information concerning maintenance, when he observed deterioration of the eaves. He requested a study of all necessary repairs to get the building up to standard to rent. (R. p. 649, line 16-p. 650, line 14). Danville provided Petitioner with a report showing that to get the building up to par would cost approximately \$155,000 and what each partner would be required to contribute. (R. pp. 659-660) (R. pp. 1528-1535). Letter to limited partners).

A letter dated November 12, 2009, from Danville showed a need to expend \$155,000 to bring the property to proper repair and required a contribution by Respondent of \$88,040. (R. p. 654, line 1-10). The sole testimony was that Mr.

Turbeville engaged Lipscomb Law Firm, PA to bring the suit on behalf of 1634 Main. (R. p. 659, line 20-24).

Petitioner then sent the memo to Respondent. (R. pp. 655, line 2-656, line 12). Mr. Turbeville, as a partner of Danville, engaged Lipscomb Law Firm, PA to file suit against Ms. Hammer for the assessment. (R. 659, line 20-p. 660, line 9).

There is no evidence that 1634 Main, L. P. had either an ulterior purpose or abused the process. Respondent, who had eighteen years of banking experience, signed four different documents acknowledging that she had a 56.8% interests in the partnership. (R. 1008, line 24-p.1009).

1634 Main, LP at the direction of Danville brought suit to collect an assessment.

“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 & Plastics Co.*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005).

In conclusion there was no evidence of abuse of process on the part of 1634 Main and any award of damages against it for abuse of process.

**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 parties 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**

Any Motion for Sanctions under the Act as to 1634 Main 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*, 359 S.C. 351, 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 Respondent's Motion for Sanctions was not served until February 13, 2013, it was untimely and should not be considered.

Whether or not a Rule 11, SCRCP must be filed within ten days has not been decided. In a footnote in *Russell v. Wachovia Bank, N.A.* the Supreme Court stated:

We do distinguish between the FCSA and the Rule 11 sanctions. There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment .... **As a result, we decline to address what time limit is proper with regard to the Rule 11 sanctions because the issue is not before us.**

370 S.C. 5, 21, n.11, 633 S.E.2d 722, 731, n.11 (2006) (Emphasis added).

It is logical that if a judge loses jurisdiction after ten days, such that he or she loses jurisdiction to rule on an untimely Motion for Sanctions under the Act, he or she would lose jurisdiction over a Rule 11 Motion in that case as well.

## **B. THE EVIDENCE IS THAT 1634 MAIN DID NOT VIOLATE THE FRIVOLOUS SANCTIONS ACT OR RULE 11, SCRCP**

### **1) The South Carolina Frivolous Civil Proceedings Sanction Act ("The Act")**

The South Carolina Frivolous Civil Proceedings Sanction Act ("The Act") is found at S.C. Code § 15-36-10, et. seq. (1976, as amended). Section 15-36-10 (A)(4) provides that an attorney or *pro se* litigant may be sanctioned for:

- (a) filing a frivolous pleading, motion, or document if:
  - (i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely

delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

Section 15-36-10(C)(1) provides in relevant part as follows:

At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

The Act provides that in determining whether an attorney, party, or *pro se* litigant has violated the provisions of the Act, the court should take into account the following factors:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

The Act provides a “reasonable attorney” standard, an objective standard as opposed to a subjective standard. *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors*, 394 S.C. 97, 105, 713 S.E.2d 650, 654 (Ct. App. 2011). The moving party, Respondent herein, has the burden of proof and must prove that the conduct was frivolous by a preponderance of the evidence. S.C. Code §15-36-10(C)(2). *See also, Rutland v. Holler, Dennis, Corbett, Ormand & Garner*, 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006).<sup>2</sup>

If a party survives a pretrial motion to dismiss or a motion for summary judgment that party is not subject to sanctions. “The theory ... is that if a case is submitted to the jury, it cannot be deemed frivolous.” *Hanahan v. Simpson*, 326 S.C. 140, 157, 485 S.E.2d 903, 912 (1997); *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors*, 394 S.C. at 109, 713 S.E.2d at 656.

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<sup>2</sup> Rutland was decided under the previous Act, which was substantially revised effective July 1, 2005, but the standard and burden of proof was not amended.

### **C. SOUTH CAROLINA RULES OF CIVIL PROCEDURE, RULE 11**

Rule 11 is directed to the signing of a document, pleading, motion, etc. It specifically relates to whether the attorney or party signed a document for an improper purpose, for example to harm the other party, for delay or other improper purpose.

Rule 11 of the South Carolina Rules of Civil Procedure provides as follows:

(a) Signature. Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar, and whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Rule 11, SCRPC provides that an attorney may be sanctioned for filing a claim in bad faith. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008); *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Rule 11, SCRPC 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, M.D.*, 393 S.C. 590, 713 S.E.2d 624 (2011). To prove a violation of Rule 11, SCRPC, the party claiming damages, Respondent herein, must prove the other party acted frivolously. *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors*, 394 S.C. at 108, 713 S.E.2d at 656.

### **DISCUSSION**

1634 Main did not act frivolously in filing the lawsuit to collect the assessment. At trial, 1634 Main survived a motion for a directed verdict made at the conclusion of its case. The claim survived the motion for directed verdict and proceeded to the trial judge as fact finder for determination. Accordingly, the Motion for Sanction under the Act or Rule 11, SCRCF should have been denied and the award of sanctions against 1634 Main should be reversed.

Applying the factors in §15-36-10(A)(4), the filing of the lawsuit was not frivolous under the facts and circumstances known at the time of filing. A reasonable attorney in the same circumstances would believe that under the facts, the claim and the filing of the Complaint was warranted under existing law. §15-36-10(A)(4)(a)(ii). A reasonable attorney presented with the same facts and circumstances would not believe that the procurement, initiation, or continuation of the civil cause was intended to harass or injure the other party. §15-36-10(A)(4)(a)(iii). A reasonable attorney presented with the same facts and circumstances would not believe that the pleading is frivolous, interposed for merely delay or merely brought for any purpose other than securing proper discovery and adjudication of the claim. §15-36-10(A)(4)(a)(iv). A reasonable attorney would believe that the arguments and pleading were supported by the facts and were being made in good faith. §15-36-10(A)(4)(a).

The standard under Rule 11 is a subjective one, and is whether the party signing the document did so for an improper purpose, for example, to harm the other party, for delay, or other improper purpose. 1634 Main did not bring the suit for an improper purpose. As set forth above, because 1634 Main survived a motion for directed verdict, as was the case in this trial, the claim is not frivolous as a matter of law. *Hanahan v.*

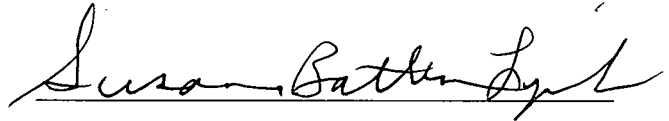
*Simpson*, 326 S.C. 140, 157, 485 S.E.2d 903, 912 (1997); *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors*, 394 S.C. at 109, 713 S.E.2d at 656.

Accordingly, 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 for the foregoing reasons and entry of judgment for 1634 Main.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Susan Batten Lipscomb", written over a horizontal line.

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**RECEIVED**

JAN 23 2014

**S.C. Supreme Court**

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

---

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

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**APPELLANTS' CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b), SCACR**

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The undersigned attorney for Appellant 1634 Main, L.P. certifies that the **BRIEF OF APPELLANT 1634 MAIN, L.P.** in this appeal complies with Rule 211(b), SCACR.

  
Susan Batten Lipscomb  
Attorney for 1634 Main, LP

**RECEIVED**

**JAN 23 2014**

**S.C. Supreme Court**

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**PROOF OF SERVICE**

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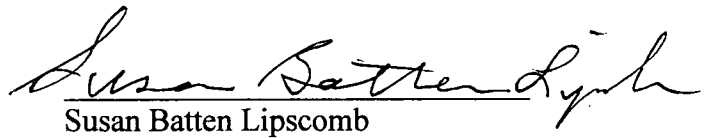
I, Susan Batten Lipscomb, attorney for Appellant 1634 Main, L.P., do hereby certify that on January 23, 2014, the **BRIEF OF APPELLANT 1634 MAIN, L.P. and APPELLANTS' CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(b), SCACR** was served on counsel of record by causing a copy to be hand delivered addressed as set forth below:



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