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

v.

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

Case No.: 2012-CP-40-2889
Appellate No.: 2013-001634

BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIM/APPELLANT

Howard Hammer
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Pro Se Appellant

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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, L.P., Danville Business Advisors, LLC. The Management Agreement not only designated Danville as the party to institute legal action but notably set out a requirement that all such legal actions were to be commenced based upon the best judgment of Danville, as opposed to the judgment of the owners of the L.P. The L.P.'s only part was to provide consent to the recommendation of Danville. **(Exhibit A, Agreement between Danville and L.P.)** The Summons and Complaint in the instant matter was therefore filed at Danville's direction and based solely upon its best judgment and solely at the instance and direction of Danville. (R. p. 1319) 1634 Main, L.P., SH5, its General Partner, and Howard Hammer, the member of SH5, did not instigate or institute the action against Ms. Hammer.

Thereafter, an Amended Summons and Complaint was filed on June 9, 2010, requesting the same relief. Respondent Ms. Hammer filed an Answer to the Complaint, a Motion to Dismiss, and a Motion for Injunction, and a Third Party Complaint naming Appellant Howard Hammer as Additional Defendant on Counterclaim. Subsequently, on June 24, 2010, Respondent Shirley Hammer filed an Amended Answer to Complaint, a Motion to Dismiss, a Motion for Injunction, and a Complaint against Additional Defendant on Counterclaim, Appellant, alleging abuse of process, malicious prosecution, intentional

infliction of emotional distress/outrage, and in the alternative conversion and civil conspiracy.

On the day before trial Respondent filed a withdrawal of her claim for emotional distress damages as an element of damages in her Abuse of Process counterclaims. At the opening of trial Respondent reiterated the withdrawal of any claim for emotional distress damages and the Court ordered on the record there would be no "emotional damages." (R. p. 437, line 10 – p. 438, line 12)

After initial pleadings by her, Respondent then made Motions to Compel for Default Judgment and filed Subpoena and Affidavit for Default Judgment on November 11, 2010. Upon hearing, it was determined that the Additional Defendant on Counterclaim, Appellant Howard Hammer, had not been properly served and an order was thereafter issued.

On February 25, 2011, a Second Amended Answer to Complaint, a Motion to Dismiss, a Motion for Injunction, and a Complaint against Additional Defendant on Counterclaim, Separate Appellant, was finally properly served on Separate Appellant Hammer and 1634 Main, L.P. Additional Defendant on Counterclaim/Separate Appellant Hammer filed and served a Notice of Motion and Motion pursuant to South Carolina Rules of Civil Procedure, Rules 12(b) and 12(e), for a more definite statement, and pursuant to 10(b), 11(a) and 12(d). Respondent Shirley Hammer filed a Supplemental Motion to Dismiss dated July 19, 2011.

A further hearing was held on Additional Defendant on Counterclaim/Separate Appellant Hammer's Motions, with the Motion to Dismiss the Malicious Prosecution cause of action being granted along with granting of the Motion as to paragraphs 11 and 29 of

the Amended Answer requiring more definite and certain response to paragraphs 11 and 29 of the Amended Answer. (It is to be noted that Mr. Hammer was represented by counsel, Art Aiken, Esquire, at this juncture.)

Respondent Shirley Hammer served her Amendment to Amended Answer to Complaint dated November 3, 2011, which Amended Answer stated it was being served "pursuant to Order of Judge DeAndrea G. Benjamin, filed on October 17, 2011." Inexplicably, in the face of the court order requiring dismissal of the Malicious Prosecution cause of action, that cause of action was again pled after the Order of Judge Benjamin. Both Appellant Plaintiff and Additional Defendant on Counterclaim/Separate Appellant Hammer filed Replies to Defendant's Amendment to Amended Answer and Counterclaim. Additional Defendant on Counterclaim/Separate Appellant Hammer also filed and served a Motion to Dismiss and, in the alternative a Motion to Strike on November 23, 2011. Several months after the time for any response to both Appellant Plaintiff and Additional Defendant on Counterclaim/Separate Appellant Hammer had lapsed, Respondent Shirley Hammer filed with the Court a Second Amendment to Amended Answer to Complaint, Counterclaims and Third Party Complaint dated March 14, 2012. Final pleadings were served by Appellant Plaintiff 1634 Main, L.P. and Additional Defendant on Counterclaim/Separate Appellant Hammer on April 3, 2012, and May 1, 2012, respectively.

In September 2012, even though the case of Howard Hammer v. Shirley Hammer, a/k/a Shirley Grace Hightower, Case No.: 2009-CP-40-05911, and the case of 1634 Main, L.P. v. Shirley Hammer a/k/a Shirley Grace Hightower v. Additional Defendant on Counterclaim/Separate Appellant Hammer, Case No.: 2010-CP-40-2889, were still

pending for trial in the jurisdiction of the Circuit Court, and without any of the record or pleadings to establish any evidence in those cases of any wrongdoing by Additional Defendant on Counterclaim/Separate Appellant Hammer, an order was issued by the Chief Justice "for the Court" setting forth that "Howard Hammer had abused the judicial system". The September Order assigned the above cases to be overseen by the Honorable James R. Barber, III, with special provisions not attendant to other cases of like kind filed in the Circuit Court. The order was based solely on a motion presented without evidentiary support which motion involved appeals from orders of the Family Court then pending between the parties in the Court of Appeals. The September 2012 Order not only required special provisions not attendant to other untried cases of a similar kind filed in Circuit Court but additionally required, without stating any evidentiary bases therefor, that the cases be expedited. Moreover, although the cases were of a kind equal to that usually tried in the Circuit Court without any distinguishing features from the class of other cases of like kind tried in the Circuit Court, the above Order was issued with the additional provision that required special reports every thirty days to the Chief Justice on the litigation until it was resolved. Further, the September 2012 Order provided that all subsequent actions between the parties, regardless of the absence of such actions falling into any special class, to be subject to the same provisions herein set out. The lower Court specifically indicated that while it may not be bound by the Supreme Court's Order he was going to give it some weight in connection with, if nothing else, the sanction/Rule 11 matter. (R. p. 1990, line 5 - 8)

In accord with the Supreme Court Order the cases were expedited for trial and consolidated the three actions (Hammer v. Hammer, Declaratory Judgment case with

Counterclaims, Case No.: 2009-CP 40-05911, being tried first; 1634 Main, L.P., Plaintiff vs. Shirley Hammer, being tried second; and the Counterclaim of Shirley Hammer vs. Additional Defendant on Counterclaim, Separate Appellant Howard Hammer, being tried thereafter.) Order of Judge George C. James filed January 29, 2013. (R. p. 13, last paragraph) (R. p. 1726, lines 1 – 12)

The cases were tried consecutively on October 28 and 29, and November 1, 2012. Case Number 2009-CP-40-05911, Howard Hammer v. Shirley Hammer (Counterclaim by Shirley Hammer tried first, followed then by what amounted to a separate case of Shirley Hammer as Plaintiff on her Counterclaims v. 1634 Main L.P. and Howard Hammer as Additional Defendant on Counterclaim. After conclusion of the trial on November 1, 2012, the Honorable Judge George C. James ordered the cases to be reconvened on January 15, 2013, for the purpose of receiving evidence on attorney's fees, remaining issues regarding punitive damages, and arguments for recovery under the Frivolous Proceedings Sanctions Act (see email of the Honorable George C. James dated Monday, December 17, 2012, 12:22 p.m., attached to and incorporated in Additional Defendant on Counterclaim/Separate Appellant's initial 59(e) Motions). (R. p. 3738[a])

A Motion for Mistrial was made at the beginning of the hearing, which Motion was denied. The hearing then proceeded with no admissible evidence or testimony presented by Respondent Shirley Hammer in either case on the issue of attorney's fees, punitive damages, frivolous actions, or Rule 11 sanctions. Appellant presented uncontradicted testimony that the 1634 Main, L.P. action was brought on behalf of 1634 Main, L.P. after 1634 Main, L.P.'s attorney investigated all aspects of the claim including making a determination by interviewing the accountant for 1634 Main, L.P. that as late as October

2007 Respondent signed under oath two tax returns verifying that she owned 56.8% of the L.P. and further signed two other verifications under oath required by her then accountant and the accountant for 1634 Main, L.P. that her tax verifications were accurate. In other words, nine months prior to any agreement in May 2008 Appellant acknowledged and verified under oath on four different documents that she owned 56.8% of the L.P. (see accountant Bernard N. Ackerman's deposition, full cross examination). (R. p. 2015, line 24 – p. 2075[a])

Moreover, 1634 Main, L.P.'s attorney testified that a Family Court order required Respondent, Shirley Hammer, to convey her interest (56.8%) to Howard Hammer by July 24, 2009. Three months after the deadline set in the Family Court order for the conveyance of her interest in 1634 Main, L.P., Respondent, through her attorney allegedly attempted improperly to convey her interest in the L.P. Her attempt to convey was after her breach in failing to abide by the requirement for the time of conveyance by the Family Court order and accordingly, among other reasons, was not accepted.

Notwithstanding the above uncontroverted evidence including absence of proof on punitive damages at the January 15, 2012, hearing Ordered for, among other reasons, the presentation of evidence on punitive damages, the Court issued a verdict in Respondent's favor based solely on "frustration" even though no evidence was presented on the subject and in the face of uncontradicted expert testimony that frustration constituted an emotional damage.

Although the Court had stated it was trying two separate cases and three separate matters, it issued one order on January 29, 2013, wherein a verdict was granted against Howard Hammer and 1634 Main, L.P., jointly and severally, in the amount of $25,000

actual damages; no punitive damages were assessed against 1634 Main, L.P.; and, $50,000 punitive damages were assessed solely against Howard Hammer. The order set forth a finding of evidence common to both cases, thereby using evidence from one case as a basis for its conclusions in the second case in which the evidence had not been offered. Both 1634 Main, L.P. and Appellant thereafter served Motions to Reconsider on February 11, 2013.

Thirteen days after the verdict, later than the ten days allowed for the filing of such motion, Respondent filed a Motion for sanctions under Rule 11 and the Frivolous Civil Proceedings Sanction's Act. The Motion failed to meet the requirements of notice for its basis and the particular conduct also required by the Sanctions Act.

On May 17, 2013, a hearing was held on Respondent's Frivolous Civil Proceedings Sanctions Act Motion. Respondent presented no evidence at the hearing on attorney's fees and in fact no evidence at all in connection with her Motion. A Final Order was issued on June 3, 2013, filed June 6, 2013, granting sanctions against Howard Hammer and 1634 Main, L.P.

1634 Main, L.P. and Additional Defendant on Counterclaim/Separate Appellant Hammer timely filed Motions for Reconsideration, which were denied on September 19, 2013. A Notice of Appeal was filed and served on September 23, 2013. The Supreme Court then issued an order expediting the briefing schedules on October 15, 2013, requiring Appellants' brief thirty days from that date. Final receipt of the Transcripts consisting of a total of over 1200 pages was thereafter received on October 23, 2013.

ARGUMENT

I.

THE LOWER COURT ERRED IN AWARDING DAMAGES FOR EMOTIONAL DISTRESS (FRUSTRATION) WHERE RESPONDENT SPECIFICALLY AND UNEQUIVOCALLY WITHDREW ANY CLAIM FOR EMOTIONAL DISTRESS DAMAGES AND THE COURT SPECIFICALLY ORDERED AN INVOLUNTARY NON-SUIT WITH PREJUDICE ON THE ISSUE OF EMOTIONAL DAMAGES (R. p. 437, line 10 – p. 438, line 12), AND WHERE THERE WAS A FAILURE OF ANY EVIDENTIARY SUPPORT FOR FINDING OF DAMAGES FOR FRUSTRATION.

Emotional damages for frustration was the only element of actual damages awarded against this Appellant on the 1634 Main, L. P. , Abuse of Process Counterclaim. Appellant urges that such award was improper for several reasons.

First, Respondent specifically and unequivocally withdrew any claim for emotional distress, and the Court specifically ordered a non-suit with prejudice on the issue of emotional damages (R. p. 437, line 10 – p. 438, line 12). Second, even if there had not been a withdrawal of damages for emotional distress, in cases in which the issue has been considered, frustration has not been found to be the type of emotional harm to support an award of damages, particularly where, as here, one claiming such damage has failed to produce evidence of such damage. *Price v. City of Charlotte*, 93 F. 3d, 1241 (4th Cir. 1996). (Claimant cannot simply rely on "conclusory statements".) *Harrison Kerr Tigrett, Bradley Clark Kintz, Plaintiffs-Appellants, v. The Rector and Visitors of the University of Virginia; John T. Casteen, III; John P. Ackerly, III; Charles M. Caravati, Jr.; Champ Clark; William G. Crutchfield, Jr., et al.*, 290 F.3d 620, 629; *Computer Publications, Inc. v. Welton*, 49 P.3d 732, 202; *Liberty National Life Insurance Co. v. Daugherty*, 840 So.2d 152; *Gaudry v. Bureau of Labor and Industries*, 48 Or. App. 589, 617 P.2d, 668 (Or. App. 1980); *Mintz v. Accident and Injury Medical Specialist, P.C.*, 284 P.3d (Colo. App. 2010); *Horton Homes, Inc. v. Brooks* , 832, So.2d, 44 (Ala. 2001); *Boan v. Blackwell*, 541 S.E. 2d, 242; *Slack v. Stream*, 977 So. 2d, 516.

The Court's reliance upon the case of *Swicegood v. Lott*, 379 S.C. 346, S.E.2d 711 (Ct. App. 208) to support an award of actual damages for frustration it is respectfully submitted is misplaced. In *Swicegood* the actual damage award was "***based on testimony from the Plaintiff*** [emphasis added] about the degree of frustration . . . he experienced as a result of Defendant's Abuse of Process." In the instant case, as discussed hereinafter and as the transcript of record confirms, there is a ***total absence of any testimony from Plaintiff about any degree of frustration, or in fact, any frustration at all, resulting solely from the lawsuit against her by 1634 Main, LP.***

The Fifth Circuit Court of Appeals has succinctly addressed the issue of frustration on both a legal and common sense plane in the case of *Hitt v. Connell*, 301 Fed.3d 240, C.A.5, wherein the Court stated:

> "Hurt feelings, anger and frustration [emphasis added] are a part of life and not types of emotional harm to support an award of damages. Rather in order to recover emotional distress damages Plaintiff must present ***specific*** [emphasis added] evidence of emotional damage; there must be specific discernible injury to Plaintiff's emotional health proven with evidence regarding the nature and extent of harm."

To hold and allow otherwise would open the door to a nearly endless list of feelings that should not rise to the level of cognizable damages in any jurisdiction. The problem should be illustrated by the likelihood that parties would claim damage on such things as affront, ostracism, belittlement, teasing, insult, exclusion, irritation, discomfort, offensive language, slight, and rejection, to name a few.

In the instant case, not only was the claim for "emotional damages" withdrawn with a specific order of non-suit with prejudice on the issue of emotional damages, but moreover no testimony was offered by Respondent in the separate 1634 Main case concerning any emotional damage and/or emotional distress. During direct examination of Respondent,

when it was pointed out that the emotional distress damages had been withdrawn, Respondent's counsel not only acknowledged that fact but clearly indicated that the damages being sought in the 1634 Main, L.P. counterclaim for Abuse of Process were attorney's fees. (R. p. 993, line 14 – p. 994, line 14)

In connection with an inquiry by the Court, Respondent's counsel asserted that the purpose of her questions to Respondent was to determine what Respondent's thoughts were upon the filing of the lawsuit by 1634 Main, L.P. against her and what she elected to do after the filing of that lawsuit. The Court allowed this inquiry but specifically noted that there "aren't going to be any emotional distress damages" on the 1634 Main, L.P. Counterclaim. (R. p. 994, lines 19 –22)

Thereafter, Respondent's attorney continued her questions as follows: (R. p. 995, lines 1-7)

> 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 assuming for the sake of discussion that emotional distress known as frustration had not been withdrawn as an element of damages, which it had, there is an absence of any testimony of any frustration on account of the filing of the lawsuit by 1634 Main, L.P. It is well established law that damages may not be based on a fact-finder's speculation, surmise, and/or conjecture and that an abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law.

Bultman v. Barber , 277 SC 5, 281 S.E. 2d, 791, 1981; *Horton v. Greyhound Corporation*, 241 S.C. 430, 128 S.E.2d 776 (1962); *Bernard Tolk and Reliable Quilting Company, Inc. v. Milton Weinsten, et al.*, 265 S.C. 546, 220 S.E.2d 239(S.C.1975); *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642 (2006); *Strategic Resource Co. v. BCS Life Co.*, 367 S.C. 540, 627 S.E.2d 687; *Smith v. Doe,* 366 S.C. 469, 623 S.E.2d 370 (2005); *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004); *Edwards v. Ferguson,* 254 S.C. 278, 175 S. E.2d 224(1970).

As noted in the foregoing answers to questions, Respondent's concern was with the appeals in the Family Court. The record is devoid of any evidence of concern expressed by Respondent in the 1634 Main, L.P. case other than those in the Family Court. Accordingly, the Court's finding in paragraph 103 of its order that Respondent "sustained actual damages for frustration as a result of having to defend against a claim filed by Howard" in the 1634 action is not only against the preponderance of evidence but contrary to and reached in the absence of any evidence of record to support that finding. It is a factual finding without evidentiary support. A finding of the court contrary to the preponderance of the evidence and/or unsupported by the evidence cannot be allowed to stand. *Tolk* , Supra; *Edwards,* Supra.

The Court's finding in Paragraph 103 of its Order is both contrary to the preponderance of the evidence and based solely upon speculation, surmise, and/or conjecture of what Respondent's feelings ***might have been*** in connection with the claim against her by 1634 Main, L.P. There is no evidentiary support from Respondent's testimony to support the Court's findings. *Tolk*, Supra; *Horton,* Supra; *Edwards,* Supra.

In the instant case, in view of the absence of any testimony of frustration, it is respectfully submitted that any finding by the trier of facts must necessarily have been based purely upon speculation, surmise, or conjecture, especially so in view of the uncontradicted testimony of the expert qualified in psychotherapy, psychology, and sociology on the question of the definition of frustration:

Q. "[I]t's [frustration] an emotional concept?" (emphasis added)

A. "Yes." (R. p. 1776, lines 10 – 13)

Most significantly, and certainly contrary to any recognized principle of law, the court in its findings in Paragraph 103 incorporated findings from an unrelated case in order to reach a finding of damages on account of frustration. *Smith* , Supra; *Patel*, Supra; *Strategic Resource Co.*, Supra; *Law*, Supra; *Gooding*, Supra.

Paragraph 103 of the order is the only portion of it in which a finding of actual damages on account of frustration was specifically made by the court. The order stated that its "general consideration of damages in the form of frustration" was based upon the evidence and its findings set out in Paragraph 46 of the order. The court went on to incorporate by reference those findings in Paragraph 46 of the order. Paragraph 46, however, pertains solely to the separate and distinct case of *Hammer v. Hammer* (Contract/DJ. Action) Case No.: 2009-CP-40-5911. That case was tried separately and distinctly from the 1634 Main, L.P. case with no evidence from that case being allowed to be considered in the 1634 Main, L.P. case. The award of damages for frustration in the 1634 Main, L.P. case was therefore based on evidence submitted in a totally different and distinct case, that being the *Hammer v. Hammer* contract/DJ Action case. The court thereby made use of evidence from a case other than that which was being tried to reach

its finding and conclusion on the issue of damages. Accordingly, since the only finding of evidence of damages was based upon evidence from a case other than that being tried it is respectfully submitted that Respondent's claim failed, requiring reversal.

In summarizing her testimony Respondent did not ask for any damages for frustration. Rather than requesting the court for an award of damages based on some recognizable element from which the same is awarded, she asked for damages merely because of her belief that she had proved an abuse of process had occurred. In essence, and in fact, she and her attorney were ignoring black letter law that not only must there be a cause of action proven, but also in order to recover the element of damages and proximate cause must also be proven. *Swicegood v. Lott*, supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that based upon the facts and the law applicable thereto, there being an absence of proof of damages and/or proximate cause, the verdict should be reversed.

ARGUMENT

II.

THE LOWER COURT ERRED IN AWARDING SANCTIONS UNDER EITHER THE FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT OR RULE 11 FOR THE FOLLOWING REASONS:

A. THE MOTION FOR SANCTIONS WAS NOT TIMELY MADE.

B. THE MOTION FOR SANCTIONS DID NOT NOTIFY THE APPELLANT OF THE CONDUCT CONSTITUTING A VIOLATION OF THE PROVISIONS OF THE ACT AND *EXPLAIN* THE BASES FOR THE POTENTIAL SANCTION IMPOSED.

C. THE EVIDENCE IS THAT APPELLANT DID NOT VIOLATE THE ACT OR RULE 11, SCRCP.

D. THE COURT ESSENTIALLY ALLOWED TWO HEARINGS ON THE SANCTIONS MATTER: REOPENING THE CASE ON JANUARY 15, 2013, OVER APPELLANT'S OBJECTION AND BY DENIAL OF MOTION FOR MISTRIAL AND THEREAFTER HOLDING A SECOND HEARING ON THE SANCTIONS MATTER.

After trial the court, over objection by Appellant, reopened the case on January 15, 2013, to receive evidence regarding punitive damages, attorney's fees as actual damages for Abuse of Process, and sanctions under the Act. At the hearing Respondent presented no admissible evidence on any of the foregoing issues. The Appellant, however, presented evidence from Ms. Lipscomb, attorney for 1634 Main, L.P. and highly respected in the legal community, concerning all that was done by her to meet the requirements of Rule 11 including a reasonable investigation that the action was brought in good faith, that she believed after investigation that facts existed for the claim under existing law, that a reasonable attorney would believe likewise, that the case was not brought to harass or injure the Respondent nor did she, nor would a reasonable attorney believe that the claim was frivolous or brought for any purpose other than that for which it was brought on its face. (R. p. 1736, line 2 - p. 1770, line 15)

At the conclusion of the January 15, 2013, hearing counsel for Ms. Hammer 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. Counsel for Ms. Hammer 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, L.P. 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 (S.C. App. 2004). *Pittman v. Republic Leasing Company, Inc.*, 351 S.C. 429, 570 S.E.2d 187 (S.C. App. 2002); *Rutland v. Holler. Dennis, Corbett, Ormond & Garner*, 371 S.C. 91, 637 S.E.2d 316 (S.C. App 2006).

After the time to file post-trial motions has elapsed, the judge loses jurisdiction over the case. *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.

Whether or not a Rule 11, SCRCP motion 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."** (Emphasis added) 370 S.C.5, 20, n.11, 633 S.E.2d 722, 730, n.11 (S.C. 2006).

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 MOTION FOR SANCTIONS DID NOT NOTIFY APPELLANT OF THE CONDUCT CONSTITUTING A VIOLATION OF THE PROVISIONS OF THE ACT AND *EXPLAIN* THE BASES FOR THE POTENTIAL SANCTION IMPOSED; RATHER THE MOTION AGAINST 1634 MAIN, L.P. WAS IMPROPERLY COMBINED WITH A MOTION IN THE SEPARATE CASE OF HAMMER V. HAMMER, CASE NO. 2009-CP-40-05911.**

The Motion for Sanctions set out a history of facts intermingling the two separate cases from Hammer v. Hammer, Case No. 2009-CP-40-05911, and 1634 Main, L.P. v. Shirley Hammer v. Howard Hammer, Case No. 2010-CP-40-2889, by so doing the motion did not comply with § 15-36-10 (D), which requires notification to the party against whom the motion is made of the conduct constituting the alleged violation, and it further requires an explanation of the bases of the sanctions imposed. Even if the written motion had been timely filed, it is clear from any review of the motion that the specific conduct that Appellant was allegedly guilty of in the 1634 Main, L.P. case was not set forth or explained. Moreover, there is nothing in the motion itself setting forth the particular pleadings by which any violation of Rule 11 could be deemed to have occurred in the 1634 Main, L.P. case. (See Motion dated January 15, 2013, filed January 15, 2013). (R. pp. 179 – 184)

C. THE EVIDENCE IS THAT 1634 MAIN DID NOT VIOLATE THE FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT OR RULE 11, SCRCP

a. 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, 107, 713 S.E.2d 650, 655 (S.C. App. 2011). The moving party 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 (S.C. App. 2006).[1] 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 (S.C. 1997); *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors*, 394 S.C. at 109, 713 S.E.2d at 656. In the instant case, in her pre-trial brief, Respondent stated that her motion for summary judgment would be converted into a motion for directed verdict. In essence 1634 Main survived a motion for summary judgment and any sanctions should be denied. (Pre-trial Brief page 1 and 4). Furthermore, the only evidence of record regarding both good faith and what a reasonable attorney under similar circumstances would do is that which Ms. Lipscomb offered at the January 15, 2013, hearing. The evidence was uncontradicted and unimpeached and made clear that the pleadings were filed in good faith after proper investigation and review of all the facts, discussion with the accountant, and consideration of the applicable law. (R. pp. 1736 – 1765) Accordingly, there was an absence of any evidence to support the findings of facts necessary to impose sanctions.

[1] 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.

D. THE COURT ESSENTIALLY ALLOWED TWO HEARINGS ON THE SANCTIONS MATTER: REOPENING THE CASE ON JANUARY 15, 2013, OVER APPELLANT'S OBJECTION, AND BY DENIAL OF MOTION FOR MISTRIAL AND THEREAFTER HOLDING A SECOND HEARING ON THE SANCTIONS MATTER.

The court reopened the case on January 15, 2013, over objection. The purpose stated by the trial judge was to take testimony on the sanctions issues among other matters. The testimony apparently envisioned was proper evidence concerning attorney's fee. Respondent presented no proper evidence of attorney's fees. The only evidence presented was by Appellant. Having opened the case for hearing on the issue of sanctions on January 15, 2013, even if proper evidence had been submitted, having a second hearing would be a denial of due process.

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, SCRCP provides that an attorney may be sanctioned for filing a claim in bad faith. Clegg v. Lambrect, 678 S.E.2d 260 (S.C. 2009); 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 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 (S.C. 2011). To prove a violation of Rule 11, the party claiming damages 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.

DISCUSION

1634 Main L.P. did not act frivolously in filing the lawsuit to collect the assessment. 1634 Main, L.P. 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, 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 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 was frivolous, interposed merely for delay or 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. As set forth above, if a cause of action survives a motion for directed verdict or motion for summary judgment, 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 (S.C. 1997);*Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors,* 394 S.C. at 109, 713 S.E. 2d at 656.

Moreover, even if the motion for sanctions had been timely, and even if it had complied with the statute, no evidence was submitted at the May 17, 2013, hearing on the motion. Ms. Ballard requested that she be allowed to submit a detailed billing (R. p. 1919) but at the conclusion of the hearing the court made it clear that he would not allow any further evidence on attorney's fees (R. p. 1995); and, the attorney affidavit she had attempted to hand up in the January hearing was excluded as hearsay. Therefore, any finding would have been without evidentiary support (*Smith,* supra; *Patel,* supra; *Strategic Resources Co.,* supra; *Law*, supra; *Gooding,* supra). Furthermore, the court determined that Appellant's conduct in the 1634 Main, L.P. case warranted sanctions by using evidence from the Hammer v. Hammer case (specifically January 29, 2013, order paragraphs 1, 2, 13, 14, 20, 22, 30, 32, 37, 39, 40, 41, 42, 43, and 46 of that case) in its determination on page 14 of its order that Appellant's conduct warranted an award of sanctions. The inclusion of the numbered paragraphs was the use of evidence from a case other than the

case from which the award was made and therefore was without proper evidentiary support (cases cited immediately above, all supra).

Accordingly, Ms. Hammer's Motion for Sanctions against 1634 Main, L.P. pursuant to the Act and Rule 11 should be denied. Under the required analysis and standards for sanctions under the Rule 11 the suit was not frivolous. It was not interposed for delay and it was not brought to harass anyone or for any improper purpose.

CONCLUSION

The Motion for Sanctions under either the Act or Rule 11 in this case should be denied.

ARGUMENT

III.

THE SUPREME COURT ORDER OF SEPTEMBER 2012 EXERTED AN UNREASONABLE INFLUENCE ON THE LOWER COURT PREJUDICIAL TO THE RIGHT OF DEFENDANT TO BE AFFORDED A TRIAL WITHOUT THE POSSIBILITY AND/OR POTENTIAL OF OUTSIDE INFLUENCE ON THE TRIER OF THE FACT, THEREBY INFRINGING OR DENYING APPELLANT'S CONSTITUTIONAL RIGHT OF DUE PROCESS.

The Supreme Court Order of September 2012 was analogous to a "unlawful command influence" which had an impact on the lower court by exerting unreasonable influence on it, causing a risk of prejudice to the right of Appellant to be afforded a trial without the possibility and/or potential of outside influence on the trier of the fact, thereby diminishing, infringing upon and/or causing a denial of Appellant's constitutional rights, among others, to due process and a fair and impartial trial by the trier of the fact.

Although "unlawful command influence" has generally been applied in military proceedings, it finds its basis in the fact that it is a violation of the constitutional right of

due process and the doctrine of unfair pretrial publicity which itself is based upon the constitutional right of due process. See: *Chandler v. Florida,* 449 U.S. 560, 1981; *Wainwright v. Whitt* , 469 U.S. 412, (1985); *Reynolds v. U. S.* , 98 U.S. 145 (1878); all cited in *U.S. v. Curtis*, 46 M. J. 129, CAAF (1997) and *U. S. v. Delmar G. Simpson* , Crim. App. 9700775 U.S. Ct. App. Armed Forces (July 1, 2003).

The defense may raise the issue which in this case is analogous to unfair pretrial publicity by demonstrating either presumed prejudice or actual prejudice. To establish presumed prejudice it should be shown that the pre-trial publicity is (1) prejudicial, (2) is inflammatory, and (3) has saturated the community. See *Curtis* citing *Nebraska press Association v. Stewart*, 427 U. S. 539. In the instant matter of the Supreme Court order, such order is on its face prejudicial in that it states that it is issued on account of Appellant's "abuse of the judicial system" and is specifically issued in connection with the case of 1634 Main, L.P. v. Shirley Hammer, Case No. 2010-CP-40-2889 and the case of Howard Hammer v. Shirley Hammer Case No. 2009 - CP-40-05911. Likewise, for the same reasons, it should be considered inflammatory on its face and clearly it being an order of the court, has saturated the judicial community. The trial judge in fact made reference to it (R. p. 1990, lines 5 - 8), stating in essence that he intended to give it some weight. In the instant matter it is clear that Appellant's rights were affected by the order, particularly in view of the fact that the causes of action on which verdicts were found dealt only with abuse, whereas in four or five other causes of action findings were rendered in Appellant's favor. Moreover, the Respondent vigorously argued against the application of the order to the instant case and to the matter of sanctions. The general remedy is for dismissal or the granting of a new trial with a strong protective admonition to the trier of the fact to ignore

the "unlawful command influence." It is respectfully submitted that the concept of "unlawful command influence" is applicable to the instant case and requires dismissal or a new trial with appropriate admonitions.

CONCLUSION

On account of any and/or all of the foregoing arguments and for any and/or all of the foregoing reasons set forth therein, in accord with the facts and applicable law, it is respectfully submitted that the verdicts of the lower court should be reversed and/or a new trial granted only on the abuse of process cause of action with appropriate admonitions to the lower court[2] .

Howard Hammer, *pro se*

[2] Specifically reserving and not waiving all rights by this specific Appellant for separate argument and further specifically reserving and not waiving objection to use of evidence from consolidated case for findings, conclusions, and/or verdicts in this case, this Appellant hereby adopts by reference such parts of the Appellant's briefs in case 2009-CP-40-05911, Appellate No. 2013-001652 as relates to the issue of frustration as proper damages and all portions of briefs pertaining to the issues of sanctions under the Frivolous Civil Proceedings Sanctions Act and under Rule 11. Appellant also adopts the briefs of 1634 Main, L.P. filed in this case.