THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate No.2013-001634

Howard Hammer.....Plaintiff/Appellant

v.

Shirley Hammer.....Defendant/Respondent

And

1634 Main, LP.....Plaintiff/Appellant

v.

Shirley Hammer.....Defendant/Respondent

v.

Howard Hammer.....Third-Party Defendant on Counterclaim/Appellant

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REPLY BRIEF OF APPELLANT HOWARD HAMMER IN HOWARD HAMMER V SHIRLEY HAMMER

AIKEN & HIGHTOWER, P.A.

ARTHUR K. AIKEN
2231 Devine Street, Suite 201
Columbia, South Carolina 29205
Phone: 803-799-5205
Fax: 803-799-5206
Email:art@aikenandhightower.com
ATTORNEYS FOR HOWARD HAMMER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

OTHER AUTHORITIES

ARGUMENT

I. THE RESPONDENT HAS MADE NO CASE FOR THE PROPOSITION THAT THE FRUSTRATION DAMAGES AWARDED TO HER BY THE TRIAL COURT ARE NOT INCLUDED IN THE CLAIM FOR EMOTIONAL DISTRESS DAMAGES THAT SHE WITHDREW BEFORE THE TRIAL OF THIS CASE.

There can be little doubt that the trial court was seeking a platform for an award for the Respondent in the face of the nearly impossible constraints imposed by the Respondent's gutting of her own damage claim by (1) her outright and unqualified *withdrawal of any claim for emotional distress damages* and (2) her failure to provide cognizable proof for attorneys' fees in the merits trial. (R. pp. 185, 1297-1298, 1773-1774) At critical junctures the trial court, perceiving the void, could not have been more transparent in guiding the Respondent along concerning what he needed to allow him to award attorneys' fees (i.e., his admonition to her to re-serve the sanctions motion properly and within a proper time line, which she nonetheless failed to do, [R. p. 52] and his elucidation for her that the attorneys' fee entries tendered to the court were essentially incomprehensible and non-probative without further details [R. p. 1925-1927]). Against this insurmountable challenge, the trial court, rather than dismissing the claim for Respondent's failure to prove damages, cast about for an alternative basis for a damage award and fashioned a novel stand-alone element, i.e., "frustration," a concept wholly new to the jurisprudence of this state when, as here, erected outside the ambit of emotional distress as clearly established but carefully circumscribed by this Court.

"Frustration" of the kind found by the trial court must fall within the all-embracing definition of emotional distress. The alternative definition introduced by the Respondent in her "Reply Brief" relates to contract principles and has not even a tangential connection to anything in this case. (Resp. Brief p. 18-20) It is a feeble attempt to dodge the problem created by the trial

court's reliance on "frustration" (clearly a mental or emotional response) juxtaposed against the Respondent's voluntary withdrawal of her plea for any emotional damages. The all-inclusive nature of the term "emotional distress," which was precisely the kind of damages for which the Respondent originally pled, is fully 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 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.

Henry Campbell Black, Black's Law Dictionary 315 (9th ed. 2013) (citing, Restatement [Second] of Torts § 46 [1978]) (emphasis added).

A review of the development of the law of South Carolina related to emotional distress makes crystal clear how carefully our courts have set forth the limits for recovery based on mental or emotional elements. While some early decisions did allow recovery for mental or emotional damages absent the stringent requirements of today (See, *e.g.*, Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 604, 103 S.E.2d 265, 270 [1958] [allowing shock with a physiological basis injury to be submitted to the jury because "nervous shock or paroxysm, or a disturbance of the nervous system is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism."]), this Court has clearly rejected that approach in recent decades by requiring objectively verifiable criteria for recovery of emotional distress by any name, "frustration" obviously being one. Specifically, in Hudson v. Zenith Engraving Co., 273 S.C. 766, 770, 259 S.E.2d 812, 813 (1979), this Court held that "[i]n order to prevail in a tortious action in which the sole damages alleged are those of mental anguish, plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature."

In 1981, this Court formally recognized the tort of outrage (or intentional infliction of emotional distress). *See*, Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). (It should be noted here that the Respondent withdrew from consideration by the trial court her claim for intentional infliction of emotional distress and, therefore, could not recover on that basis regardless of what name the trial court might give it.[R. p. 185]) Thereafter, in Dooley v. Richland Hasp., 283 S.C. 372, 322 S.E.2d 669 (1984), this Court rejected an invitation to recognize a general tort of negligent infliction of emotional distress beyond intentional and reckless conduct because the plaintiffs had failed to make any showing of physical injury to support their claim. The Court recognized that one criticism of permitting a tort for negligent infliction of emotional distress was "that it will allow for fraudulent claims" and that "[o]ne method of eliminating this danger has been to require some type of physical injury in addition to any claimed emotional injury." 283 S.C. at 375, 322 S.E.2d at 671.

The cautious evolution proceeded another step with Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985), where this Court recognized the tort of negligent infliction of emotional distress, albeit with the most stringent restrictions:

> (a) the negligence of the defendant must cause death or serious physical injury to another;
>
> (b) the plaintiff bystander must be in close proximity to the accident;
>
> (c) the plaintiff and the victim must be closely related;
>
> (d) the plaintiff must contemporaneously perceive the accident; and
>
> (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

286 S.C. at 582, 336 S.E.2d at 465.

These developments are reviewed here to underscore not only the degree to which non-physical injuries have been circumscribed but also the extreme circumspection and vigilance exercised by this Court to guard against an opening of the floodgates of litigation, an inevitable outcome if the parameters of damages so carefully constructed by this Court can be expanded on a whim by the

courts below.

South Carolina law recognizes emotional distress damages in only three specific circumstances, none of which exist here: (a) when accompanied by a physical injury, such as in a vehicular accident; (b) upon proof of outrage or intentional infliction of emotional distress (which here was withdrawn and dismissed by the trial court and is unappealed); and (c) negligent infliction of emotional distress in the "bystander" context (clearly inapposite here).

In the nearly thirty years since *Kinard,* this Court has refused to extend liability for emotional distress damages beyond these three limited circumstances. For example:

- In Hansson v. Scalise Buillders of S.C., 374 S.C. 352, 358-59, 650 S.E.2d 68, 72 (2007), the Court held in the context of an outrage claim: "Under the heightened standard of proof for emotional distress claims emphasized in *Ford,* a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"-in the form of third party witness testimony and other corroborating evidence-in order to make a prima facie showing of 'severe' emotional distress."

- In Doe v. Greenville County School District, 375 S.C. 63, 67, 651 S.E.2d 305, 307 (2007), the Court refused to extend the negligent infliction of emotional distress damages to encompass a claim by parents stemming from sexual activity between their daughter and a school teacher, stating: "Because South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr. and Mrs. Doe have not stated a claim which 1s cognizable under South Carolina law."

- In Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 141, 747 S.E.2d 468, 474 (2013), the Court refused to allow a claim for emotional distress damages flowing from trespass and nuisance in the form of odors from a landfill: "In short, allowing recovery for personal annoyance and discomfort under the guise of trespass and nuisance would be the stealth recognition of an entirely new tort."

The Respondent cannot direct this Court to any judicial precedent liberalizing the recovery of

emotional distress damages described in her Complaint. To the contrary, *all of the cases* decided in the appellate courts of this state have limited the recovery of emotional distress damages to the very narrow circumstances described above.

In sum, the trial court's award of damages based on a finding of "frustration" must fail because (1) "frustration" *standing alone*, as here, does not fall within the ambit of any cause of action for emotional distress separately recognized by this Court and (2) the Respondent pulled the rug out from under her own damage case by withdrawing *in toto any emotional distress damages* (which necessarily includes "frustration") from both her abuse of process cause of action and her outrage cause of action. (R. p. 185) The trial court simply confected an element of damage which, absent a claim for mental or emotional damages, does not exist in our jurisprudence. The Respondent clings to this finding of "frustration" as the "stealth recognition of an entirely new tort," presumably to be denominated "intentional infliction of frustration." If this Court permits the Respondent thus to prevail it will be setting a precedent that is directly contrary to the past decades of careful distillation of the law in this area and will open the floodgates to recovery for an endless range of human emotions with perhaps even less familiar names, a development this Court has scrupulously avoided.

II. THE RESPONEDENT'S ARGUMENT THAT THE MAKING OF TIMELY MOTIONS UNDER RULE 59(e) SCRCP CONFERS POWER ON THE TRIAL COURT TO DECIDE UNTIMELY POSTTRIAL MOTIONS FILED WHILE THE TIMELY RULE 59(e) SCRCP MOTIONS REMAIN PENDING IS NOT SUPPORTED BY THE AUTHORITIES.

Rule 59(f) SCRCP circumscribes the power conferred on the trial court on the filing of a post-trial Rule 59(e) SCRCP Motion. That Rule states that the trial court "shall retain jurisdiction for the purpose of hearing and disposing of such motion." Rule 59(f) SCRCP. The inclusion of the language "for the purpose of" shows that the Rule drafters did not intend to give the trial courts power to hear untimely made post-trial motions so long as a timely made Rule 59(e) SCRCP motion remained pending. The case law supports this reading of Rule 59(f) SCRCP.

Citizens and Southern National Bank of South Carolina v Easton, 310 S.C. 458, 427 S.E.2d 640 (1993).

In Easton, C&S filed a motion for j.n.o.v. under Rule 50(b) SCRCP. Although neither party made a motion for a new trial, the trial court entered an order 229 days after judgment that denied the motion for j.n.o.v. and granted a new trial sua sponte. Reversing the trial court, this Court held that the "trial court was without authority to order a new trial beyond 10 days after entry of judgment regardless of the pendency of the Rule 50(b) motion of C&S." If a post-trial Rule 50(b) SCRCP motion does not expand the trial courts power in posttrial matters, it stands to reason that a posttrial Rule 59(e) SCRCP motion does not either.

III. THE RESPONDENT CONCEDES THAT THE RULES LIMITING THE TRIAL COURTS' POWERS TO DECIDE POSTTRIAL MATTERS APPLY TO SANCTIONS MOTIONS UNDER RULE 11 SCRCP, AND UNDER THOSE RULES, THE RESPONDENT'S RULE 11 MOTION IS UNTIMELY.

Following a detailed discussion of the rule limiting a trial courts' power to decide posttrial matters (the 10 day rule) and a discussion of Rule 11 SCRCP, the Respondent's Brief states that "[t]he rule does not provide any time period within which a motion must be filed, and is therefore governed by the same jurisdictional requisite discussed above." Respondent's Brief p. 15. This language stands as a concession that the 10 day rule applies to the Respondents' Rule 11 SCRCP Motion. Under the 10 day rule, the Rule 11 SCRCP Motion is untimely. The Respondents' did not make her Rule 11 SCRCP Motion until February 13, 2013, more than 10 days after written notice of entry of the judgment.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court.

Respectfully Submitted,

AIKEN & HIGHTOWER, P.A.

By: _____
ARTHUR K. AIKEN
2231 Devine Street, Suite 201
Columbia, South Carolina 29205
Phone: 803-799-5205
Fax: 803-799-5206
Email:art@aikenandhightower.com
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with Rule 211(b) SCACR.

Respectfully Submitted,

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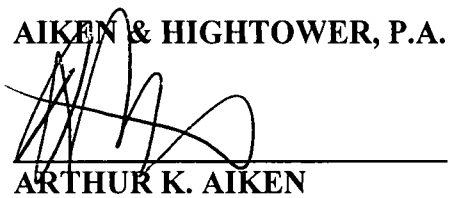
AIKEN & HIGHTOWER, P.A.



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PROOF OF SERVICE-REPLY BRIEF OF APPELLANT HOWARD HAMMER IN HOWARD HAMMER V SHIRLEY HAMMER

I hereby certify that I served Howard Hammer's Reply Brief in Howard Hammer v Shirley Hammer on Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, on January 23, 2014, addressed to her attorney of record, Desa A. Ballard, PO Box 6338, West Columbia, SC 29171-6338.

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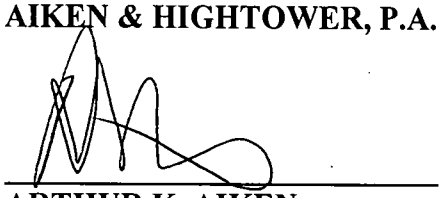
AIKEN & HIGHTOWER, P.A.



ARTHUR K. AIKEN
2231 Devine Street, Suite 201
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Fax: 803-799-5206
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