

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JAN 23 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

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

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

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN AWARDING RESPONDENT ACTUAL DAMAGES FOR FRUSTRATION FOR ABUSE OF PROCESS AND PUNITIVE DAMAGES WHEN RESPONDENT AFFIRMATIVELY WITHDREW HER CLAIM FOR EMOTIONAL DISTRESS DAMAGES ON HER ABUSE OF PROCESS CAUSE OF ACTION BEFORE THE TRIAL OF THE CASE?
- II. DID THE TRIAL COURT ERR IN AWARDING RESPONDENT SANCTIONS UNDER THE SCFCPSA WHEN RESPONDENT DID NOT MEET THE APPLICABLE DEADLINE FOR MAKING HER SANCTIONS MOTION UNDER THAT STATUTE?
- III. DID THE TRIAL COURT ERR IN AWARDING RESPONDENT SANCTIONS UNDER RULE 11 SCRPC WHEN IT USED AS PART OF ITS BASIS FINDINGS OF FACT FROM THE COMPANION CASE THUS MAKING IT IMPOSSIBLE TO DISCERN FROM THE SANCTIONS ORDER THE ACTUAL BASIS FOR THE SANCTIONS IN THIS CASE?

STATEMENT OF THE CASE

This case is a dispute between former spouses. On July 31, 2009, the Appellant, Howard Hammer (HH) filed a lis pendens in Richland County against property located at 320 St. James Street (320 St. James) in Columbia, South Carolina, a property that was then titled in the name of the Respondent, Shirley Hammer (SH). (R. p. 87-88) HH filed this action on August 18, 2009, and thereafter on November 9, 2009, filed and served an Amended Complaint for a Declaratory Judgment and/or in the Alternative for Damages, primarily requesting a declaration that a contract entered into between the parties in May 2008 (May 2008 Contract) to settle prior Family Court litigation was void *ab initio*, as against public policy in that an integral part of the consideration for the May 2008 Contract was SH's agreement to withdraw and dismiss her criminal complaints against HH. (R. pp. 90-98, 115-122, 1392-1407) The May 2008 Contract also required that HH agree to an "Order of Protection" not only as to SH, but also as to a person, not a party to the contract, that HH and SH execute an Agreement and Release of claims one against the other and that HH execute a Receipt and Release in favor of persons not parties to the

Family Court litigation on account of any potential claims by HH. (R. pp. 1398, 1399, 1401-1407) The May 2008 Agreement in issue contained a final clause stating that “this agreement is a binding contract and is enforceable as such under law.” (R. p. 1400)

On October 1, 2009, SH served an Answer, Motion to Dismiss, and Counterclaims. SH served a First Amended Answer, Motion to Dismiss, and Counterclaims on October 30, 2009. (R. pp. 99-105) After HH served and filed his Amended Complaint, SH, on November 11, 2009, served a document styled Answer to Amended Complaint, Motion to Dismiss and Counterclaims. (R. pp. 115-122) The primary defense of SH was that the Circuit Court did not have subject matter jurisdiction over any matter related to the May 2008 Agreement; however, SH also alleged defenses of res judicata, laches, waiver and estoppel, release, another case was pending between the parties, and failure to state facts sufficient to constitute a cause of action. (R. pp. 115-122) SH’s counterclaims included slander of title, tortious interference with an existing contractual relationship, intentional infliction of emotional distress, abuse of process, invasion of privacy/wrongful intrusion as to contracts to sell and purchase, and malicious prosecution. (R. pp. 115-122) On December 9, 2009, HH served his Reply to the Counterclaims. (R. pp. 123-127)

A hearing on SH’s Motion to Dismiss as solely set out in the documents entitled Answer, Motion to Dismiss, and Counterclaims, First Amended Answer, Motion to Dismiss and Counterclaims, and Answer to Amended Complaint, Motion to Dismiss and Counterclaims was held by the trial court on March 2, 2010. By Order dated and filed April 14, 2010, the trial court dismissed HH’s Complaint for lack of subject matter jurisdiction. (R. pp. 1435-1441)

HH received written notice of the April 14, 2010 Order on April 20, 2010 and served and filed a Motion under Rule 59(e) SCRCF on April 29, 2010. The trial court issued its Order denying the Motion to Reconsider on May 18, 2010, which was received by HH on May 24,

2010. Notice of Appeal from the Order denying the Motion under Rule 59(e) SCRCF and the Order dated April 14, 2010 was served on June 17, 2010.

On May 9, 2012, our Court of Appeals affirmed the trial court's Order dismissing HH's Amended Complaint, and rehearing was denied. (R. pp. 1427-1434) HH did not file a certiorari petition with this Court, so the claims in HH's Amended Complaint were ended. This left only SH's counterclaims pending. On October 26, 2012, SH filed and served a Withdrawal in which she withdrew "her claim for emotional distress damages in her fourth counterclaim for abuse of process." (R. p. 185)

SH's counterclaims were tried on October 29 and 30, 2012 and on November 1, 2012. The trial court held another hearing on January 15, 2013 to hear additional evidence on punitive damages and attorneys' fees and to determine whether to admit this additional evidence into the trial record. On January 28, 2013, the trial court signed an Order (merits Order) in which it returned a defense verdict on all counterclaims except for the abuse of process counterclaim, awarded SH \$20,000 actual damages for frustration on her counterclaim for abuse of process and awarded SH \$60,000 punitive damages. (R. pp. 9-53)

HH's counsel received written notice of entry of the merits Order on January 30, 2013. On February 11, 2013, HH timely filed and served a Motion to Amend Findings of Fact, to Alter or Amend Judgment and for a New Trial. (R. pp. 188-189) On February 13, 2013, SH served a Motion for Sanctions under the SCFCPSA, S.C. Code §15-36-10, and Rule 11 SCRCF to which HH responded with a Motion arguing that the Motion for Sanctions was untimely. (R. pp. 179-184, 186-187) the trial court held a hearing on the issue of the timeliness of SH's Motion for Sanctions on May 1, 2013 and held a hearing on the merits of the Motion for Sanctions on May 17, 2013.

The trial court signed an Order (sanctions Order) on June 3, 2013 in which it denied HH's post-trial Motions and awarded \$60,744.30 as sanctions against HH. (R. pp. 54-78) HH's counsel received written notice of the sanctions Order on June 17, 2013. HH filed and served his Notice of Appeal of the merits Order and the sanctions Order on July 17, 2013.

STATEMENT OF THE FACTS

The trial court made it perfectly clear at the beginning of the merits hearing in this matter that the parties were embarking on not a trial but two trials. (Transcript of trials, pp. 418, 444-445, 447, 1726) The procedure described by the trial court called for the Howard Hammer v Shirley Hammer matter to be tried first to conclusion and for the 1634 Main, LP matter to be tried to conclusion. (R. pp. 418, 444-445, 447, 1726) these two cases were not tried as consolidated cases; they were tried separately in series. This initial decision of the trial court is of tremendous importance in the review of this case on appeal.

Early in the merits Order, the trial court makes findings of fact styled Findings of Fact Applicable to Both Actions. (R. pp. 15-16) In that section of the Order, the trial Court states that SH "testified that after their separation, HH (Howard) threatened to engage her in litigation until she was bankrupt." (R. p. 16) this testimony was never uttered by SH during the separate trial of the Howard Hammer v Shirley Hammer case; yet, this becomes the theme of the trial courts review of the evidence in the Howard Hammer v Shirley Hammer case. (R. pp. 446-606)

The sanctions Order has the same fundamental defect. Instead of analyzing the sanctions issues separately for the separate cases, the trial court uses as the basis for its findings on Rule 11 SCRPC sanctions a long series of references to paragraphs from its merits Order some of which are germane to the Howard Hammer v Shirley Hammer case and some of which are germane to

the 1634 Main, LP case. (R. p. 71) this is not a trivial issue at all, since the parties to these cases relied on the trial court's pronouncement that these cases would be tried separately.

SH filed her Motion for Sanctions on January 15, 2013. (R. pp. 179-184) the merits Order concluding the trial of this case was not filed until January 29, 2013. (R. p. 8) SH's Motion for Sanctions was filed exactly two (2) weeks before the filing date of the final Order. This Court held a hearing in this case on January 15, 2013. At the conclusion of that hearing, SH's attorney announced that she was seeking sanctions against Howard Hammer and Arthur K. Aiken and handed up to the Court an unfiled Motion for Sanctions. (R. pp.1784-1803) SH's counsel then handed to the three other attorneys of record one copy of the unfiled Motion for Sanctions. (R. pp.202-210)

In its merits Order, this Court concluded that the SH's January 15, 2013 SCFCPSA claim made in her Motion for Sanctions was premature. (R. pp. 51-52) The Order "denies that claim without prejudice to Shirley's (SH's) right to seek relief under the SCFCPSA after this matter is concluded." (R. p. 52) (parenthetical added). The Order further instructs SH's counsel "to serve a filed copy of the motion upon all other parties and to mail the court a copy of the filed motion." (R. p. 52)

SH did not file a renewed motion for sanctions. Instead, SH's counsel simply mailed all other counsel of record a copy of the Motion for Sanctions that was filed on January 15, 2013. Defense counsel did not make this mailing until February 13, 2013, and the earliest possible date of service of SH's sanctions Motion is February 13, 2013. (R. pp. 179-184)

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING SH ACTUAL AND PUNITIVE DAMAGES ON HER ABUSE OF PROCESS CAUSE OF ACTION BECAUSE THE ACTUAL DAMAGES AWARD WAS FOR FRUSTRATION WHICH IS A SUBSPECIES OF THE EMOTIONAL DISTRESS DAMAGES CLAIM WITHDRAWN BY SH PRE-TRIAL.

A. Introduction to Argument

SH affirmatively withdrew her claim for emotional distress damages on her abuse of process cause of action before the trial. (R. p.85) The trial court awarded actual damages only on SH's abuse of process cause of action, and the trial court awarded those actual damages only for what it termed frustration. (R. pp. 40-44) The trial court erred because frustration damages claims are emotional distress damages claims, all of which were withdrawn by SH before the trial. (R. p. 185) Since the trial court erred in awarding SH any actual damages, the trial court further erred in awarding SH punitive damages.

B. The withdrawal of emotional distress actual damages claims includes frustration damages.

There are no South Carolina cases directly on point on the issue of whether emotional distress includes frustration; however, there are cases from which an answer to this issue can be divined. The first South Carolina case with any extensive discussion of emotional distress damages is Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) in which this Court first recognized the tort of intentional infliction of emotional distress. In the Ford opinion, this Court cites extensively and with approval Restatement (Second) Torts § 46 (1978). 276 S.C. at 162, 276 S.E.2d at 778-779. Most importantly for this case, the Ford opinion cites and approves Restatement (Second) of Torts § 46 cmt. j. (1978). 276 S.C. at 162, 276 S.E.2d at 778, 779.

Restatement (Second) of Torts § 46 cmt. j. (1978) states, in pertinent part - “[e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous

shock or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” In the merits Order, the trial court describes the frustration of SH “at being hounded by meritless litigation.” (R. p. 26) This level of frustration qualifies as a highly unpleasant mental reaction as that phrase is used in the definition of emotional distress in Restatement (Second) of Torts § 46 cmt. j. (1978). The South Carolina authorities trend toward the view that emotional distress damages include the frustration damages that SH suffered according to the merits Order.

The trial court attempted to justify its award of frustration damages in the face of the withdrawal of all claims for emotional distress damages by citing language in Huggins v. Winn-Dixie, Greenville, Inc. 252 S.C. 353, 166 S.E. 2d 297 (1969). (R. p. 44) In Huggins, an abuse of process case, this Court approved damages in the form of “humiliation and other mental suffering or injury to feelings.” 252 S.C. at 363, 166 S.E.2d at 301 (citation omitted). The merits Order emphasizes the language “injury to feelings” which shows that the trial court concluded that this language justified an award of frustration damages notwithstanding the withdrawal of emotional distress damages. (R. p. 44) The trial court erred in this conclusion because an injury to feelings is synonymous with the highly unpleasant mental reaction made part of the definition of emotional distress by Restatement (Second) of Torts § 46, cmt. j. (1978)

Having withdrawn her claim for emotional distress damages, SH was not entitled to recover any damages for emotional distress. The trial court erred in awarding SH any damages for frustration because under South Carolina law, frustration damages are a subspecies of emotional distress damages to which SH had no claim because of her pretrial withdrawal of that claim. (R. p. 185) Having presented no admissible evidence of any damages other than emotional

distress damages, SH was not entitled to any award of actual damages in this case. The trial court erred in making any award of actual damages to SH in this case.

C. Since the trial court erred in awarding SH any actual damages, it also erred in awarding SH any punitive damages.

“In order to sustain a verdict for punitive damages, there must be an award of actual damages.” Carroway v Johnson, 245 S.C. 200, 201, 139 S.E.2d 908, 910 (1965); citing, Cook v Atlantic Coastline R. Co., 183 S.C. 279, 190 S.E. 923 (1937). Since the trial court erred in awarding SH any actual damages, it also erred in awarding SH any punitive damages.

II. THE TRIAL COURT ERRED IN AWARDING SH ANY SANCTIONS UNDER THE SCFCPSA BECAUSE SH DID NOT MEET THE DEADLINE FOR MAKING HER MOTION FOR SANCTIONS UNDER THAT STATUTE.

A. The January 15, 2013 Motion for Sanctions is a nullity.

The SCFCPSA states, in pertinent part, that “[A]t the conclusion of a trial and after a verdict for or against damages has been rendered . . . , upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.” S.C. Code § 15-36-10(C)(1). A SCFCPSA motion for sanctions can be made only after a verdict for or against damages has been rendered.

A pre-verdict SCFCPSA motion is a nullity. The statute refers to a motion of the prevailing party. Until there is a verdict, there is no prevailing party. The procedural section of the SCFCPSA provides for thirty (30) days to respond to a sanctions motion. S.C. Code § 15-36-10(D). If pre-verdict SCFCPSA sanctions motions were effective, the statute could require the non-moving party to respond to a sanctions motion even before a verdict had been rendered in the main case. The only logical response to the text of the SCFCPSA is to declare all pre-verdict SCFCPSA sanctions motions nullities. SH’s pre-verdict Motion for Sanctions is a nullity.

B. This trial court denied SH's January 15, 2013 SCFCPSA Motion for Sanctions in the merits Order.

The merits Order concludes that SH's SCFCPSA claim was premature and "denies that claim without prejudice to Shirley's (SH's) right to seek relief under the SCFCPSA after this matter is concluded." (R. p. 52) (Parenthetical and emphasis added). This text shows that the trial court denied SH's pre-verdict SCFCPSA Motion for Sanctions without prejudice to her right to make a proper post-verdict motion. SH neither renewed nor re-filed her pre-verdict SCFCPSA Motion for Sanctions after she received the merits Order entering judgment in her favor. The pre-verdict Motion, which is the only motion for sanctions that SH ever made, was denied by the trial court in the merits Order.

C. SH's Motion for Sanctions was not timely made.

Our state has "established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." Pittman v Republic Leasing Company, Inc., 351 S.C. 429, 432, 570 S.E.2d 187, 190 (Ct. App. 2002). In Pittman, the Court of Appeals addressed the issue of the limitations period applicable to SCFCPSA claims. The moving party in Pittman made its motion for sanctions almost two months after final judgment. Vacating the trial court's award of sanctions, the Pittman court "refuse[d] to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment." Pittman, 351 S.C. at 432, 570 S.E.2d at 189-190.

The Court of Appeals followed Pittman with Ex parte Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004). In Ex parte Beard, the moving party made his SCFCPSA motion for sanctions almost six months after the main case was dismissed with prejudice. The trial court dismissed the SCFCPSA motion for sanctions as untimely. The Ex parte Beard court affirmed

the trial court's dismissal of the SCFCPSA motion for sanctions based on the holding that "a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." Ex parte Beard, 359 S.C. at 357, 597 S.E.2d at 838.

Both Pittman and Ex parte Beard analogize SCFCPSA motions for sanctions to the post-trial motion to alter or amend under Rule 59(e) SCRCF. Pittman, 351 S.C. at 432, 570 S.E.2d at 189, Ex parte Beard, 359 S.C. at 358, 597 S.E.2d at 838. Rule 59(e) SCRCF states that "[a] motion to alter or amend a judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." (emphasis added) Since the Court of Appeals has twice recognized that motions made under Rule 59(e) SCRCF are the closest analog to SCFCPSA motions for sanctions, it stands to reason that they should have the same limitations period.

In this case, this Court mailed the filed merits Order from Sumter on January 29, 2013 to all counsel of record. SH's counsel must have received written notice of the merits Order by January 31, 2013 at the very latest. With January 31, 2013 as the beginning date of the limitations period, the limitations period ran on February 11, 2013, two days before SH's counsel served SH's Motion for Sanctions. The trial court erred in granting SH's SCFCPSA Motion for sanctions because it was untimely made.

III. THE TRIAL COURT ERRED IN AWARDING SH SANCTIONS UNDER RULE 11 SCRCF WHEN IT USED AS PART OF ITS BASIS FINDINGS FROM THE COMPANION CASE THUS MAKING IT IMPOSSIBLE TO DISCERN FROM THE SANCTIONS ORDER THE ACTUAL BASIS FOR THE SANCTIONS IN THIS CASE.

In orders granting Rule 11 SCRCF sanctions, trial courts must "describe the conduct determined to violate the Rule and explain the basis for the sanction imposed." Runyon v Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The sanctions Order violates this rule by referencing in a group findings from both companion cases. (R. p. 71). This defect makes it

impossible to discern the specific conduct for which HH is being sanctioned in this case. The trial court erred in awarding sanctions under Rule 11 SCRPC because of these defects in the sanctions Order.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

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

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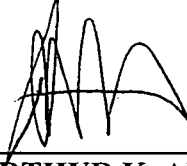
Howard Hammer.....Third-Party Defendant on Counterclaim/Appellant

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

I hereby certify that I served Howard Hammer's 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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