

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF RICHLAND
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-40-2889

1634 Main, L.P.

Shirley Hammer, a/k/a Shirley Grace
 Hightower, Defendant/Third Party Plaintiff

PLAINTIFF(S)

Howard Hammer, Third Party Defendant
 DEFENDANT(S)

Submitted by: The Court	Attorney for : <input type="checkbox"/> Plaintiff	<input checked="" type="checkbox"/> Defendant
	<input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Shirley Hammer	Howard Hammer	\$\$25,000.00 actual damages \$50,000.00 punitive damages
	1634 Main, L.P.	\$\$25,000.00 actual damages
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

Exhibit A

*Motion to
reconsideration done
Mon/ 2-11-2013*

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-40-0511

Howard Hammer

Shirley Hammer, a/k/a Shirley Grace
Hightower

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: The Court	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

2013 JAN 29 PM 12:27

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (~~format order to follow~~) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

Diaried for _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Shirley Hammer	Howard Hammer	\$20,000.00 actual damages \$60,000.00 punitive damages
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

Copy Sent to Client _____
via email

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS)
Case No. 2009-CP-40-05911 and)
2010-CP-40-2889)

Howard Hammer,)
Plaintiff,)

v.)

Shirley Hammer, a/k/a)
Shirley Grace Hightower,)
Defendant.)

ORDER

-----)
1634 Main, L.P.)
Plaintiff,)

vs.)

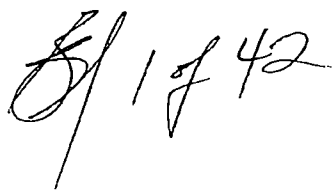
Shirley Hammer, a/k/a)
Shirley Grace Hightower,)
Defendant/Third-Party Plaintiff,)

vs.)

Howard Hammer,)
Third Party Defendant)

2013 JAN 29 PM 12:27
CLERK OF COURT
COURT OF COMMON PLEAS
RICHLAND COUNTY, SC

By order of the South Carolina Supreme Court dated September 7, 2012, Judge James R. Barber, Chief Administrative Judge of the Fifth Judicial Circuit, was ordered to oversee any and all circuit court actions among the parties, to expedite the actions and provide status reports to the Chief Justice every thirty days. At a status conference held by Judge Barber on October 2, 2012, the undersigned was assigned to try the cases. The trial was held, without jury, on October 29 and 30, 2012, and was reconvened on January 15, 2013 for reasons set out below. Judge Barber consolidated the two matters for trial on October 10, 2012. At the trial, Mr. Hammer was represented by Arthur K. Aiken, Esq. in the case of Hammer v. Hammer, Case No. 2009-CP-40-05911)(hereafter referred to as "the contract action."). Until trial, Mr. Hammer represented himself in that litigation. Until trial, Mr. Aiken represented Mr. Hammer only in the case of 1634 Main LP v. Shirley Hammer v. Howard Hammer, Case No. 2010-CP-40-2889 (hereafter



the "1634 action" or "1634 case"), but at trial, Mr. Hammer represented himself and Mr. Aiken did not represent Mr. Hammer in that action. Mrs. Hammer was represented in both actions by Desa Ballard. Susan B. Lipscomb, Esq., represents 1634 Main LP.

For convenience and clarity in the factual findings and discussion below, Howard Hammer may be referred to as "Howard" and Shirley Hammer may be referred to as "Shirley."

Pretrial Proceedings

On Friday, October 26, 2012, the court received a fax transmission (with copies to counsel) from Howard advising that he had discharged Mr. Aiken as his counsel in the 1634 case. The trial commenced the morning of October 29, 2012. At that time, Howard again advised that he had discharged Mr. Aiken as his counsel in the 1634 case but had retained him as counsel in the contract action. Howard stated he was appearing *pro se* in the 1634 case.

Shirley moved that Howard's reply to Shirley's counterclaim in the contract action be dismissed as a sanction for Howard's failure to participate in discovery since Howard failed to respond to any discovery in that action. That matter was taken under advisement pending the trial, and after considering the matter, the motion is DENIED.

I declined to address Shirley's pre-trial motion to dissolve the filed *lis pendens* in the contract action, deferring that matter to the conclusion of trial.

Trial proceeded with the counterclaims in the contract action being tried first¹, followed by the plaintiff partnership's claims in the 1634 case, followed by the counterclaims in the 1634 case. During trial, representation was as indicated above, with Howard representing himself in the 1634 case. The court received testimony from:

¹ Howard's complaint in the contract action was summarily dismissed by Judge Manning, which was upheld by the Court of Appeals by opinion filed June 6, 2012. (See, *infra*). Thus, only Shirley's counterclaims remain pending.

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- Shirley Hammer
- Professor Gregory B. Adams
- Katherine Stokes, CFP
- Mary Nell Degenhart, Esquire
- Timothy E. Madden, Esquire
- Marion Turbeville
- Howard Hammer
- Bernard Ackerman, CPA (via deposition²)

Shirley introduced 32 documents into evidence, without objection. Howard introduced three (3) exhibits, and 1634 Main LP introduced three (3) exhibits. Shirley also requested that the court take judicial notice of the family court proceedings in the matter of Hammer v. Hammer, Case No. 2005-DR-40-2871. As for the transcripts of those proceedings, that motion is denied. Specific documents from the family court proceedings were introduced into evidence without objection and the court has not reviewed or considered any other portion of that record, so the judicial notice issue is moot.

During the hearing convened on January 15, 2013, Mr. Hammer, acting *pro se* in the 1634 matter, moved for a mistrial, but at the conclusion of that hearing, he withdrew that motion. However, by motion dated January 23 and filed January 24, Mr. Hammer again moved for a mistrial, apparently on the basis that he believes the court rendered a decision on the merits of the case before considering all the evidence. Mr. Hammer confirms in his January 23 motion that he had indeed withdrawn his oral motion for mistrial at the conclusion of the January 15 hearing. In his January 23 motion, he attempts to clarify the withdrawal of the motion by stating that he did not intend to fully withdraw the motion. The court concludes that the motion was withdrawn and cannot be re-asserted by later filing of the same or a similar motion. In any event, even if the motion had been properly made, the court would decline the motion for

² The deposition of Mr. Ackerman was taken by agreement in *lieu* of his appearance live for trial. The deposition was introduced into evidence jointly by Ms. Lipscomb and Ms. Ballard.

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mistrial. Mr. Hammer claims that the reconvening of the trial after the completion of the decision-making process was prejudicial error contrary to his and 1634's rights. However, any claimed prejudice is of no import, as the court agrees with Mr. Hammer that Shirley's right to present evidence of attorneys' fees as actual damages ended with the presentation of evidence during the October 29-30 trial. This issue will be discussed below.

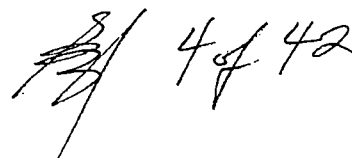
FINDINGS OF FACT³

This matter was heard non-jury. All dispositive trial motions were heard at the conclusion of each case, or marked "heard" at the appropriate time, and argued prior to conclusion of trial. The court heard all the testimony and argument, reviewed the evidence, assessed and determined the credibility of witnesses, and, after having done so, finds and determines that the following facts were proved by the preponderance of the evidence. Any findings made by clear and convincing evidence are so noted.

Findings of Fact Applicable to Both Actions

1. I found Howard to be very bright and articulate, but his answers to just about every question, including very simple ones, were characterized by obfuscation and degenerated into areas having little to do with the issues germane to the cases. As the fact finder, this court can take into account the demeanor of a witness (including whether the witness is straightforward in answering questions) in determining the witness' credibility. Howard's credibility was tremendously damaged by his demeanor while testifying. His manner of answering questions clearly established that he is intent on using the civil process to unnecessarily and

³ Any finding of fact that should be construed as a conclusion of law is adopted as such, and *vice versa*.



unfairly prolong any and all litigation involving Shirley. He appeared unwilling to respond forthrightly to any questions.

2. Shirley and Howard were married but were divorced by decree entered May 12, 2008. Their family court litigation, outlined below, has been excruciatingly tortuous and is apparently ongoing today. Shirley testified that after their separation, Howard threatened to engage her in litigation until she was bankrupt. Howard did not dispute this testimony. Even if he had disputed it, I find this statement was made and is clear and convincing evidence of Howard's intent to use unmeritorious litigation of any kind to harass and cause financial hardship to Shirley.

Hammer v. Hammer
(The contract action)

3. As noted above, Shirley and Howard were married. They have two (2) minor children. In September, 2005, Shirley left Howard and filed for relief in the family court in Action No. 2005-CP-40-2871 ("the family court action").
4. In May 2008, Shirley and Howard settled all property issues between them in the family court action. The settlement of property issues was achieved by the parties and reduced to a written settlement agreement dated May 9, 2008. (Shirley's Exhibit 15).
5. At a family court hearing on May 12, 2008, Family Court Judge Dorothy Mobley Jones found the settlement agreement to be fair to both of the parties; she approved the settlement agreement, incorporated it into her order and made the terms of the settlement agreement effective as an order of the family court on that date (hereafter referred to as "the property settlement order.") *Id.*

6. Both Shirley and Howard had independent counsel in the family court matter, and both parties agreed to the terms of the settlement agreement and the property settlement order⁴. Judge Jones found that the parties entered into the settlement agreement freely and voluntarily. *Id.*
7. The property settlement order, at page 4, ¶5, required each party to “expeditiously sign all documents and do all things reasonably necessary to effectuate the terms, provisions, and intent of the agreement.” *Id.*
8. Among the terms of the property settlement order was a requirement that Howard transfer his interest in the marital home located at 320 St. James Street (hereafter “320 St. James”) to Shirley, free of any liens or encumbrances. *Id.*
9. On May 20, 2008, Howard executed a general warranty deed transferring all of his interest in 320 St. James to Shirley. (Shirley’s Exhibit 1). The deed was recorded on June 18, 2008 at Book 1439 at Page 1279 in Richland County. *Id.*
10. In the general warranty deed, Howard expressly “releas[ed] and discharge[ed] any and all rights that I may have, or hereafter acquire” in 320 St. James. *Id.*
11. Shirley and Howard also reached a final settlement agreement regarding custody and visitation of their two children at a hearing held in the family court on June 23, 2009. That settlement was also made an order of the family court by Judge John Rucker on August 19, 2009.
12. On June 29, 2009, Shirley listed 320 St. James with a real estate company for sale. (Shirley’s Exhibit 2).

⁴ The parties were also divorced by separate divorce decree also issued on May 12, 2008.

13. Howard filed a *lis pendens* in Richland County against 320 St. James on July 31, 2009. (Shirley's Exhibit 3). He did so with knowledge that Shirley was attempting to sell 320 St. James and with full knowledge that he lacked any interest whatsoever in 320 St. James.
14. Howard did not serve Shirley with a copy of the *lis pendens* nor did he provide notice to her of its filing.
15. Shirley accepted an offer to purchase 320 St. James from Ye Hu and Wei Tan (hereafter "the purchasers") for \$650,000.00 on June 29, 2009. (Shirley's Ex. 2)
16. After their divorce, Howard lived in a house which is approximately one block away from 320 St. James. He became aware of the pending sale and that attorneys Mary Nell Degenhart and Paul Degenhart were representing the purchasers.
17. Shirley had previously conveyed 320 St. James to her mother, Mary Hightower, in an effort to prevent Howard from interfering with the sale. Mary eventually conveyed it back to Shirley. Shirley's deed to her mother was an understandable attempt to get Howard to leave her alone and to distance Howard from any legal interest in the property at issue. In simple terms, it was none of Howard's business what Shirley did with this property, as he had conveyed all of his interest in the property pursuant to the aforesaid general warranty deed.
18. The purchase was scheduled to close at the office of attorneys Degenhart in Columbia on August 17, 2009. Shirley and the purchaser/wife, Ye Hu, appeared at the Degenharts' office and executed some of the closing documents.

19. However, the closing could not be completed at that time because the updated title examination revealed the existence of the *lis pendens* filed by Howard on July 31, 2009. Mary Nell Degenhart explained the cloud on title to Shirley and Ye Hu, and the closing was postponed.
20. Howard filed this contract action *pro se* on August 18, 2009, and either the next day or the day after, tried to steer the purchasers toward purchasing his home instead of 320 St. James, as noted in paragraph 23.
21. The clerk's file does not reflect if or when the pleadings were served on Shirley.
22. Howard and Paul Degenhart had a telephone conversation after the closing fell through during which Paul Degenhart asked Howard to remove the *lis pendens*. Howard refused. The *lis pendens* is still of record and no action to foreclose on it has been commenced.
23. Instead, Howard suggested to Paul Degenhart that the purchasers buy his house instead, and that he (i.e., Howard) would buy 320 St. James. (Shirley's Exhibit 4).
24. Howard also told the Degenharts that there was a leak in the pool at 320 St. James and that there was a dispute regarding an encroachment on the property line. Both assertions were false. Howard made these statements for the purpose of trying to procure a breach of Shirley's contract to sell 320 St. James.
25. Howard had no ownership or other legal or equitable interest in 320 St. James; all of his interest had been transferred to Shirley more than a year earlier as set forth above. The contract action Howard filed against Shirley did not include a claim

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for title of 320 St. James and could not have awarded Howard any interest in 320 St. James.

26. The borrowers lost their financing and were unable to obtain title insurance because of the *lis pendens* filed by Howard.
27. However, through great effort by the Degenharts and others, Shirley was able to obtain title insurance through Investors Title Insurance Company.
28. In order to induce Investors Title to issue the policy, Shirley was required to sign a seller's affidavit which affirmed to Investors Title that "there are no actions now pending . . . which would constitute a lien . . . against the real estate." (Shirley's Exhibit 8). Shirley was required to indemnify Investor's Title for any loss or expense that Investor's Title might incur based on Shirley's representations. Shirley remains liable on that indemnification at present.
29. Since the purchasers lost their financing, Shirley made the decision to salvage the sale by providing owner financing to the purchasers. She received a down payment from the purchaser and financed approximately \$340,000.00 via a note secured by a mortgage with a three-year amortization, with a balloon payment at maturity.
30. After alternative financing was arranged and new title insurance obtained, the rescheduled closing occurred August 20, 2009. During the closing, Howard arrived at the Degenharts' office and delivered a letter which confirmed his suggestion that Shirley's purchasers buy his house, and asserted that he was making considerable financial sacrifice in order to assist Shirley to sell 320 St. James. His explanation for personal delivery of the letter was that he lacked an

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office or clerical assistance and it was easier simply to deliver the letter. He claimed to have no knowledge that Shirley's closing was actually occurring at the precise time he arrived at the Degenharts' office. The court finds this particular testimony not credible and that he calculated his arrival to disrupt the closing.

31. The closing occurred and title to the property was transferred to Shirley's purchasers. Had the closing occurred without Howard's interference, Shirley would have received \$618,922.95 net proceeds from the sale. Because of Howard's interference, the net proceeds Shirley received at closing were \$277,272.79. As noted above, the difference was financed by Shirley. Shirley invested the net proceeds she received from the sale.
32. Service of the pleadings in the contract action upon Shirley occurred sometime in September, 2009, very soon after Howard was unsuccessful in stopping the sale of 320 St. James. Shirley retained counsel and filed a motion to dismiss, answer and counterclaims on October 5, 2009⁵.
33. In addition to filing the summons and complaint in the contract action, Howard began filing motions in family court seeking to set aside the property settlement order. His efforts were unsuccessful at the trial level, but the issue is currently on appeal to the South Carolina Supreme Court.
34. Howard then retained attorney Susan Lipscomb, who filed an amended complaint dated November 4, 2009, in the contract action. Subsequent amended pleadings followed.

⁵ As set forth, *supra*, the clerk's file does not include an affidavit of service reflecting when Shirley was served with the summons and complaint in the contract action.

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35. Shirley's motion to dismiss Howard's contract action was heard by Circuit Judge Casey Manning on March 2, 2010. In his order dated April 14, 2010, Judge Manning ruled that Howard's contract action related to the family court settlement and that the circuit court did not have jurisdiction over Howard's contract claims.⁶
36. Howard appealed that order to the South Carolina Court of Appeals. By opinion dated July 12, 2012, the Court of Appeals affirmed Judge Manning's ruling. *Hammer v. Hammer*, 399 S.C. 100, 730 S.E.2d 874 (Ct.App. 2012). Howard filed a petition for rehearing, which was denied by the Court of Appeals on August 23, 2012. No further appellate proceedings occurred, and Judge Manning's order is now final.⁷
37. Included in the Court of Appeals' decision is discussion of an argument still being advanced by Howard to the undersigned that the circuit court had jurisdiction to enforce the settlement agreement between the parties which led to the property settlement order. The Court of Appeals expressly rejected Howard's argument, but Howard continues to argue the point.

⁶ Howard's complaint alleged that Shirley breached "a certain contract" but he did not disclose what that contract was. The contract he referred to was actually the 2008 family court settlement agreement and order approving it. He resisted disclosing that information to the circuit court. Eventually, he used the contract action to attempt to collaterally attack the 2008 family court order, based on "public policy" grounds. He contended that the agreement as confirmed by the 2008 family court order violated public policy because he obtained Shirley's agreement therein to ask the solicitor to *not pro se* charges brought in 2008. He obtained this concession in the agreement, from which he benefitted, while at the same time negotiating a similar concession in the 2009 family court settlement agreement and order for separate charges brought in 2009.

⁷ The finality of this order was noted by Judge Barber at a status conference in this matter held on October 2, 2012. Howard could have sought a writ of certiorari from the South Carolina Supreme Court, and he had 30 days within which to do so after the Court of Appeals' denied rehearing. Rule 242(c), SCACR. Howard's counsel was unable to advise at the status conference on September 14, 2012 whether Howard would seek certiorari from the Supreme Court to review the decision of the Court of Appeals. See Supreme Court status report of Judge Barber dated October 11, 2012, which is a part of the clerk of court's file in both the contract action and the 1634 action.

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38. During the trial of the instant case, Howard continued to argue that this court had jurisdiction to revisit the validity of the 2008 property settlement agreement, relying on *Moseley v. Mosier*, 279 S.C. 353, 306 S.E.2d 624 (1983). This issue has already been addressed by Judge Manning and the Court of Appeals and the court does not address the argument further, except to say that the Court of Appeals did discuss and reject Howard's *Moseley v. Mosier* argument. Howard's argument that the Court of Appeals' discussion of *Moseley* was dicta is absolutely without merit.
39. Howard's contract action against Shirley had no merit and was brought to harass Shirley when no legal basis existed for the claim. The filing of the *lis pendens* was frivolous and had no legal merit.
40. I find by clear and convincing evidence that Howard's conduct was reprehensible in the sense that he, as an attorney, was aware that bringing the contract action in a forum that had no subject matter jurisdiction was totally improper, and especially in the sense that he was aware that filing the *lis pendens* on property he had deeded over a year prior was totally unfounded.
41. I find by clear and convincing evidence that Howard's filing of the *lis pendens* was reprehensible because he well-knew he had no claim to the property. Hand-in-hand with the filing of the *lis pendens* was Howard's attempt to have the purchasers buy his house instead of Shirley's house; this was reprehensible because it was a ridiculous and frivolous solution to a problem he created by his own actions, and his suggestions that the pool leaked and that the back fence

encroached on a neighbor's property were further calculated to subvert a legitimate closing of that sale.

42. I find by clear and convincing evidence that Howard's filing of the *lis pendens* was calculated to be done just as Shirley's sale of the house at 320 St. James was slated to close, and in that sense she was in a financially vulnerable position.

43. I find by clear and convincing evidence that Howard was aware of the frivolity of his conduct, and while he did not try to conceal it in the traditional sense, he did cloak his conduct under the guise of trying to attack a family court order in circuit court. I find by clear and convincing evidence that the duration of Howard's conduct has been relatively long lasting, and specifically, that his conduct continued from the time he filed the *lis pendens* on July 31, 2009 and filed this action on August 18, 2009, and through the time Judge Manning dismissed his action in April, 2010, and only ending with the Court of Appeals' decision. The *lis pendens* against 320 St. James is still in effect because Howard has refused to cancel it, as discussed below.

44. Shirley has incurred attorneys' fees and costs in the defense of the action and in pursuit of counterclaims. She testified that she has incurred attorneys' fees and costs in the amount of \$175,445.00 for representation in the two actions. However, at trial, she did not break out the specific costs of each action, or identify which fees were for defense of the claims filed against her and which were for prosecuting the counterclaims. The court is unable to conclude, based on the presentation of evidence at the October 29-30 trial, what fees and costs were incurred for what reason. At a subsequent hearing on January 15, 2013, Shirley's

attorney presented an "Affidavit of Attorneys' Fees and Costs" for this action and the 1634 action, in which counsel attempted to break out the fees and costs between the defense of the contract and 1634 actions and the pursuit of counterclaims.

45. Any recoverable attorney fees and costs for defense of the contract action (insofar as Shirley's claim for abuse of process is concerned) ended at the latest when Judge Manning's order was affirmed by the Court of Appeals. Shirley agrees she is not entitled to recover attorney fees incurred for her prosecution of her counterclaims against Howard. The court convened the January 15, 2013 hearing to allow presentation of evidence on the breakout of fees and costs, and Shirley's sole evidence was the aforesaid affidavit. Howard and 1634 objected to the hearing being held on the ground that the court had concluded the trial on October 30, 2012 and that it would be improper to re-open the record for additional trial evidence. I agree. Any issues pertaining to an award of fees and costs will be left for resolution upon the filing and hearing of any motion made by Shirley under the South Carolina Frivolous Civil Proceedings Sanctions Act.
46. Shirley has sustained damages for frustration as a result of having to defend Howard's claims in this action and as a result of having to combat the *lis pendens*. These damages are assessed and based on the level of frustration that, in my view, would be incurred by a reasonable person as a basic human response to being forced to defend baseless legal claims and is not predicated on any pre-existing emotional condition of Shirley. In my view, Howard is unable to entertain the thought that his relationship with Shirley is over, and he has chosen to resort to

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commencing and continuing a baseless *lis pendens* and baseless litigation in a completely improper forum for reasons that are nothing but abusive. Even during his trial testimony, he would not admit under questioning by his own attorney, Mr. Aiken, that he and Shirley were divorced. Instead, Howard testified that even though a divorce decree was entered in 2008, he felt the decree was invalid because the final hearing was held and the decree was entered during a time the divorce action was technically stayed. This is but one example of the logic employed by Mr. Hammer at every turn to keep the litigation waters churning. Shirley has been faced with the prospect of having to combat a frivolous *lis pendens* which almost cost her the sale of her home. She was forced to litigate Howard's contract action after Howard was unsuccessful in using the *lis pendens* to stop the sale. The contract action against her continued for almost three years until the Court of Appeals affirmed Judge Manning's decision in July 2012. The court concludes that any reasonable person would be frustrated at being hounded by meritless litigation for such a long period of time.

47. The court first noted its finding of damages in the form of frustration in a December 2012 memorandum to the parties outlining the court's preliminary factual and legal determinations and then placed this finding in a proposed order, not yet signed at the time of the hearing of January 15, 2013. At the January 15, 2013 hearing, Howard proffered the testimony of Russell Bergmann, an expert in the field of psychology and psychotherapy. He was asked only one basic question, that being "What is 'frustration'?", and testified that "frustration" is an "emotion" or an "emotional response". Howard and 1634 argue that since Shirley

withdrew at trial all her claims for “emotional distress”, she cannot recover damages in the nature of “frustration”. The court finds it interesting that Howard and 1634 have contended (and in fact Howard moved for a mistrial on this ground) that it was improper for the court to reconvene the hearing to address *attorneys’ fees* as an element of actual damages because the evidentiary record had been closed, but at the same hearing chose to introduce evidence to rebut this court’s proposed finding of actual damages in the form of *frustration*. These two components of actual damages (attorneys’ fees and frustration) have no real relationship to one another, and Howard’s attempt to couch the Bergmann testimony as pertaining to attorneys’ fees is of no avail. In any event, the court has determined in paragraph 47 above that its consideration of additional evidence presented after October 30 would be improper. Therefore, the court will also not entertain the additional evidence in the form of Dr. Bergmann’s testimony, and it is in the record as a proffer only. Even if properly introduced, the court concludes that Dr. Bergmann’s characterization of “frustration” as an emotion or an emotional response does not have any bearing upon Shirley’s entitlement to recover damages for frustration in her abuse of process cause of action.

1634 Main LP v. Shirley Hammer v. Howard Hammer

(The 1634 action)

48. Any findings above pertaining to the 1634 litigation are incorporated herein by reference.
49. SH5, LLC was the general partner in 1634 Main LP. Howard was the sole member of SH5, LLC. Thus, he controlled the general activities of 1634.

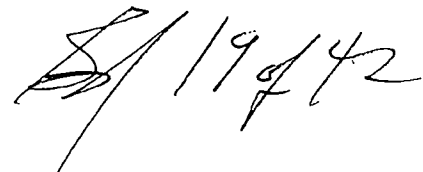
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50. The 2008 property settlement order also required that as part of the property division, Howard would receive “[a]ny interest of either party in the office building which houses Howard Hammer’s law office . . . and in any business entity related to this building” subject to any existing liens. (Shirley’s Exhibit 15). The property in question was an office building located at 1634 Main Street in Columbia.
51. Prior to 2002, the real estate located at 1634 Main Street had been owned by a South Carolina limited partnership called 1634 Main LP (hereafter referred to as “1634” or “1634 LP” or “the limited partnership”).
52. Shirley had become the owner of eight percent (8%) of the limited partnership in 2000 and 2001, via transfers of interest from Howard’s parents, Henry and Eleanor Hammer. (1634 Main LP’s Exhibit 1). Shirley never owned more than 8% of the limited partnership. Howard and some of his family members owned the remainder of the limited partnership.
53. In 2002, Shirley purchased a 52.75% interest in real property at 1634 Main Street in Columbia (an office building) owned by the limited partnership. (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 Shirley was executed by Howard, 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 (Agreement of Limited Partnership). In short, there is no doubt that Howard was 1634 Main LP.

54. During their marriage, Howard and Shirley employed Bernard Ackerman, CPA, as the accountant for filing their joint tax returns. They filed jointly as a married couple for 2005 and 2006.
55. Howard was the exclusive source of information provided to Ackerman for preparation of the parties' joint tax returns.
56. Ackerman also prepared the tax returns for the limited partnership. The information provided to Ackerman for the limited partnership came exclusively from Howard and from Marion Turbeville, a principal with Danville Business Advisors, (hereafter "Turbeville") which managed the 1634 building at Howard's request.
57. Ackerman never received any information or instruction from Shirley regarding the personal or limited partnership tax returns. No finding herein is to be construed as remotely implying that Mr. Ackerman did anything improper.
58. Sometime while dealing with the 2005 limited partnership tax returns, Howard instructed Ackerman to change Shirley's percentage ownership in the tax returns of the limited partnership to reflect that she owned 56.8% of the limited partnership. (Shirley's Exhibit 19). This was inaccurate, and it is persuasive to the court that there is no writing to support the transfer of any additional partnership interest to Shirley. Also, there is no written evidence, whether in the form of a bill of sale, certificate, partnership minutes, or memoranda, indicating that the transfer of an additional interest was ever made or was intended to be made.

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59. Howard contends that Shirley was supposed to convey her 52.75% interest in the real property located at 1634 Main Street back to the limited partnership as part of their marital tax planning. There is nothing in writing to support this conclusion. I find no such agreement on Shirley's part existed.
60. The court concludes that the transfer of the additional partnership interest to Shirley did not occur. There is no evidence, other than Howard's uncorroborated and suspect testimony, that the transfer was supposed to occur. If this transfer occurred, or was supposed to occur, it could have and should have been addressed in the family court in the property settlement order. At the least, it could have been evidenced through appropriate record-keeping channels such as minutes of the limited partnership.
61. Shirley authorized Ackerman to electronically file the 2005 and 2006 joint personal tax returns by signing a form in which she attested that the contents were correct. Those joint tax returns contained K-1s from the limited partnership (also prepared by Ackerman) indicating that Shirley owned 56.8% of the limited partnership.
62. These returns were inaccurate because Shirley owned only eight percent (8%) of the limited partnership for the time period for which the 2005 and 2006 tax returns were applicable. Shirley never owned more than eight percent (8%) of the limited partnership.
63. While Shirley's signing of the electronic filing authorization indicated not only that she had reviewed the tax returns, but also that she had confirmed their accuracy, her failure to discover and correct the erroneous K-1 reflecting that she

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owned 56.8% does not make it true. The court concludes she owned an 8% interest and that she had tendered that interest as early as October 29, 2009 or November 5, 2009. This tender will be discussed below.

64. During 2005, Howard caused to be transferred from the limited partnership significant amounts of cash to himself and others, including a payment to himself on December 29, 2005 (after Shirley first filed for relief in the family court), in the amount of \$59,062.50. (Shirley's Exhibit 26).
65. During the calendar year 2005, Howard received, at a minimum, cash payments from the limited partnership of \$131,299.00, despite owning only a fractional interest. (Shirley's Exhibit 26(b)).
66. Also during 2005, under Howard's sole direction, the limited partnership went from having significant cash on hand to suffering a loss of more than \$150,000.00. (Shirley's Exhibits 26, 26(b) and 31).
67. At Howard's direction, Ackerman continued to prepare tax returns for the limited partnership through 2010.
68. Each tax return for the limited partnership from 2005 through 2010 erroneously reflected that Shirley owed 56.8% of the limited partnership. Howard signed the return for the limited partnership from 2005 through 2010 knowing that the ownership interest for Shirley was not supported by any documentation and that it was incorrect.
69. Shirley was represented at the time of the 2008 property settlement order by attorney Timothy Madden, Esq. Mr. Madden prepared a quit-claim deed to transfer Shirley's interest in the real estate located at 1634 Main Street to Howard.

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He also prepared an assignment to Howard of any and all interest Shirley had in the limited partnership.

70. Shirley executed these documents at a meeting the parties had at the courthouse on or about November 5, 2009. Madden delivered the transfer documents to Howard's attorney, but Howard refused to accept the documents and they were returned to Madden.
71. A few days later, on November 10, 2009, Turbeville sent Howard copies of proposals from various vendors to do repair and/or maintenance work to the building at 1634 Main, "[p]ursuant to our most recent meeting." (Shirley's Exhibit 23).
72. Howard discussed with Turbeville possible sources of funds for the repairs. Howard said he was financially unable to contribute (either in his capacity as a limited partner of the limited partnership or sole member of general partner SH5, LLC), but he discussed giving a confession of judgment to the limited partnership. Howard took no action to prepare, execute, or deliver a confession of judgment for his own admitted share of the expense and instead focused his efforts on having Shirley sued for her alleged share.
73. Howard, in his capacity as the sole member of SH5, LLC, the general partner of the 1634 Main LP, prepared a memo on November 12, 2009 to "all limited and general partners of 1634 Main LP" making a "formal demand for payment" based on the estimates provided by Turbeville on November 10, 2009. (Shirley's Exhibit 23). The memorandum shows copies being sent to Howard Hammer,

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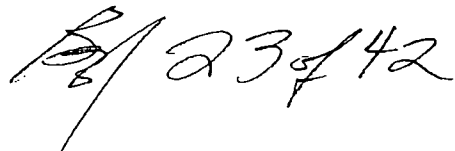
Shirley Hammer, SH5, LLC (in which Howard was the sole member), and David Hammer, who is one of the Hammers' minor children.

74. Shirley claims she did not receive this memorandum or any other demand for contribution from the limited partnership or any agent of the limited partnership. Whether she did or did not is not germane to the following findings.
75. Howard advised Turbeville that since Shirley owned 56.8% of the limited partnership, 1634 should retain counsel to sue Shirley for the money she owed for repairs. At the time, he knew Shirley did not own but 8% and that she had tendered that interest to him. Howard did not suggest that he or SH5, LLC be named as defendants in the action to recover the repair funds. Howard suggested to Turbeville that his own attorney, Susan Lipscomb, might handle the case, obviously knowing she would not sue him or SH5, LLC. Turbeville retained Lipscomb to file suit on behalf of 1634 Main LP seeking a contribution from Shirley for 56.8% of the funds needed to repair the building. Nothing herein should imply that Ms. Lipscomb has conducted herself improperly.
76. On April 30, 2010, sixteen days after Judge Manning dismissed Howard's claims in the contract action, 1634 Main LP filed suit against Shirley seeking to require Shirley to pay \$88,040.00 toward repairs of the building located at 1634 Main. This amount was clearly based on Howard's false representation to both Turbeville and Ackerman that Shirley was responsible for 56.8% of the limited partnership's repairs, although she owned only an 8% interest in the limited partnership, which she had tendered to Howard, but which he had rejected.

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Howard instigated the suit to continue to harass Shirley and to financially burden her, because he could not entertain the thought that the relationship was over.

77. Howard did not provide Turbeville with any information for Turbeville to understand Howard's true motives. I find beyond any doubt that it was Howard's intent that the 1634 case be brought to further harass Shirley and to attempt to obtain an unfair financial advantage since Howard's claim against her in the contract action had been dismissed. As noted above, he had warned Shirley that he would bankrupt her.
78. Shirley counterclaimed against the limited partnership and filed a third party action against Howard.
79. Howard has occupied a portion of the building at 1634 Main Street continuously for all relevant time periods. Howard and/or his law firm paid rent of approximately \$60,000.00 per year to the limited partnership in 2005, 2006, 2007, and in rent in a small amount in 2009 and 2011. Howard paid no rent, although he occupied office space, throughout 2008, 2010, and at least through May, 2012. (Shirley's Exhibit 31).
80. Howard testified that for some period of time he occupied less office space than others, and suggested some portion of the rent due should be paid by someone else who shared his office space for a period of time. However, he did not deny that he owed rent to the limited partnership for several years. I conclude that Howard arranged for 1634 to commence this action against Shirley on baseless grounds, while not ensuring that an action was brought against himself or SH5, LLC for their *pro rata* share of the repairs. It is clear that one reason the

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partnership did not have sufficient funds on hand to pay for repairs was because Howard himself was not paying rent due the partnership. Howard then arranged for Shirley to be sued for her supposed share of repair costs while making sure he was not sued for his share. This clearly and convincingly establishes that Howard's and 1634's purpose in initiating this action was to harass Shirley over a partnership interest she had tried to convey to Howard in accordance with the family court order.

81. Shirley's interest in 1634 Main Street and in the limited partnership effectively terminated (at least for the purposes of 1634 collecting a repair assessment) no later than November 5, 2009, when the deed and partnership transfer documents were tendered to Howard's counsel. The fact that Howard rejected the court-ordered tenders does not alter the fact that the tenders were made. It would be patently unfair for Shirley to be charged with responsibility for repairs to the building almost six months **after** she had duly tendered her interest in the real estate and the limited partnership to Howard.

82. Because Shirley's interest in the real estate and the limited partnership had been tendered as noted above, the action brought against her by the limited partnership had no merit, was frivolous, and was brought to harass Shirley when no legal basis existed for the claim. (Exhibit 16)

83. The 1634 action was timed by Howard to extract money from Shirley or to harass her while a valid family court order was in place on the issue of her interest in the real estate and the limited partnership.

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84. After the property settlement order in family court in May, 2008, the parties continued to have issues pertaining to the children, etc. Through June, 2009, Howard tried to get the May 2008 property settlement agreement and order voided, vacated, and rescinded.
85. In May 2009, Judge Dorothy Mobley Jones had a hearing on that issue and denied Howard relief from the bench, but no written order was issued.
86. Howard continued to file proceedings in the family court attempting to invalidate the property settlement order, and a hearing was held on October 27, 2009. Judge John Rucker issued his order from that hearing and affirmed the agreement.
87. Howard and Shirley were again in family court in January, May, August, and September of 2010. By order dated September 24, 2010, Judge Rucker ordered, *inter alia*, that the parties do all things necessary to complete "the transfer from [Shirley] to [Howard] of the interest in the law office building and related entity." Of course, Shirley had previously attempted to do just that.
88. The chronology of events in family court and in the circuit court contract action is compelling evidence that the 1634 action was brought at Howard's behest to continue his harassment of Shirley and to try to collect maintenance money for real and/or personal property that Shirley had, in obedience to the family court order, tried to convey to Howard.
89. In my view, the timing of Turbeville's November 10, 2009 memo, which was orchestrated by Howard and addressed only to Howard (which Howard claimed was forwarded by Howard to himself, Shirley, and their minor son David on

November 12, 2009), was not coincidental. (Shirley's Exhibit 23). It was just after Shirley's attempted tender of November 5, 2009.

90. As found above, at the time he instructed Turbeville to initiate the 1634 action against Shirley, Howard knew that Shirley had tendered her partnership interest to Howard in November, 2009 in accordance with the family court order. He also knew that Shirley owned only 8% of the limited partnership at the time of that tender.

91. Marion Turbeville and Danville Business Advisors acted in good faith when taking steps to sue Shirley in the 1634 action. They apparently had no knowledge that Shirley had tendered her interest in the real property and the limited partnership in accordance with the family court directives. Mr. Turbeville only knew what Howard told him.⁸

92. Howard provided Turbeville with false information regarding Shirley's interest in the limited partnership.

93. Howard's claim that Shirley was obligated to deed her interest in 1634 Main Street to the limited partnership in exchange for a larger limited partnership interest for tax reasons is not supported by any written instrument. If there were any such instrument, that could have been addressed by the family court during the property settlement litigation and in any resulting order.

94. While Howard and Turbeville testified that Howard discussed providing an offer of judgment for his share of the repair costs, no offer of judgment has ever been

⁸ Although not necessary for my conclusion, I observe that limited partnership law and the limited partnership agreement did not allow the limited partnership to sue Shirley, or any limited partner, for repairs. When asked during cross-examination to find authority in the agreement for suing Shirley for repairs, Turbeville testified that he was unable to find any provision in the limited partnership agreement allowing Shirley to be sued for repairs.

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acted upon by the limited partnership or Howard, demonstrating further that the action against Shirley, instigated solely by Howard, was a sham attempt to collect a debt Shirley did not owe and was an attempt by Howard to harass Shirley. Again, he had warned her he would bankrupt her.

95. Shirley has established by clear and convincing evidence that Howard's conduct, and that of the limited partnership acting through Howard, was willful, wanton and in reckless disregard for Shirley's rights.

96. I note that Mr. Turbeville's conduct, and for that matter Ms. Lipscomb's and Mr. Aiken's conduct, was in no way objectionable in my view of the evidence, and any award of punitive damages in either action should not reflect adversely upon their involvement.

97. I find by clear and convincing evidence that the actions of Howard and the limited partnership were reprehensible in the sense that the actions were calculated to begin when Judge Manning dismissed Howard's claim in the contract action and were a continued effort to harass Shirley and to attack one or more family court orders in an obviously improper forum.

98. I find by clear and convincing evidence that these actions have been long lasting, *i.e.*, from at least November 10, 2009 to now, and both Howard and the limited partnership were aware of the wrongfulness of their conduct.

99. I find by clear and convincing evidence that Howard acted to conceal the wrongful nature of his conduct by withholding necessary information from Marion Turbeville regarding Shirley's tender of her interest in the real estate and in the limited partnership.

100. I find by clear and convincing evidence that Howard acted in reckless disregard of Shirley's rights by misrepresenting to Turbeville that Shirley had a majority interest in the limited partnership, when she never had more than an 8% interest, which, as Howard already knew, had been tendered by Shirley to Howard.

101. I find by clear and convincing evidence that Howard concealed from Marion Turbeville that Shirley's transfers to Howard of her interest in the real estate and the limited partnership resulted in Howard owning all of the real estate and the majority of the partnership, such that suit against Shirley would be an unavailing effort in comparison to what Howard would owe by virtue of his majority ownership in the limited partnership and his exclusive ownership of the real estate.

102. Shirley has incurred attorneys' fees and costs in the defense of the 1634 action, which continued through trial and continue at present. However, the court is unable to ascertain what amount of fees and costs incurred were for the defense of this action.

103. Shirley has also sustained actual damages for frustration as a result of having to defend against the claim filed against her by Howard in this action. These damages are assessed and based on the level of frustration that would be incurred by a reasonable person and not on the basis of any pre-existing emotional condition of Shirley. The 1634 action was filed on April 30, 2010, only sixteen days after Judge Manning dismissed the contract action. Shirley's understandable relief at the dismissal of the contract action was indeed short-lived, and she again

This is understandably very frustrating, and Shirley's frustration at having to combat continuous baseless legal claims has been deep and ongoing since the 1634 action was commenced against her. To paraphrase Shirley's trial testimony, Howard just wouldn't leave her alone. The court has not doubt that Howard will not leave her alone. The findings above in paragraphs 46 and 47 as to the court's general consideration of damages in the form of frustration and the court's findings pertaining to the testimony of expert witness Dr. Bergmann are incorporated herein by reference.

CONCLUSIONS OF LAW

Hammer v. Hammer, Case No. 2009-CP-40-05911
The Contract Action

104. Abuse of Process: 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 process not proper in the conduct of the proceeding. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *Id.*
105. Howard's ulterior purpose is established by virtue of his attempt to purposefully prevent closing of the sale of 320 St. James to purchasers and to avoid the family court agreement in an improper forum.
106. Howard's bringing of the contract action and the *lis pendens* to subvert the transaction with the purchasers, to prevent the sale, to avoid the family court agreement or to gain some leverage against Shirley in the family court constitutes an ulterior purpose that supports a claim for abuse of process.

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107. Typically, the focus of an abuse of process claim is upon the improper use of process after it has been issued. The improper purpose usually takes the form of coercion to obtain a collateral advantage. *Hainer v. American Medical Intern., Inc.* 328 SC 128, 492 SE2d 103 (1997); *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 730 S.E.2d 340, 398 S.C. 528 (Ct. App.)

108. However, our courts have also noted an abuse of process action may lie if a party prosecutes an entire cause of action for collateral purposes. See *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 73, 567 S.E.2d 251, 255 (Ct.App.2002).

109. Here, Howard not only initiated and continued the contract action and he *lis pendens* without any good faith belief that his claims were valid, but he also tried to use the *lis pendens* to entice the buyers to back away from buying 320 St. James.

110. Howard's actions in filing the *lis pendens* and attempting to subvert a valid contract of sale through the circuit court proceedings are a perversion of that process.

111. Invasion of Privacy: Shirley Hammer does not have a valid claim for invasion of privacy. No evidence in the record supports a valid cause of action for invasion of privacy.

112. Intentional Interference with a Contract: To establish intentional interference with a contract one must show: (1) the existence of the contract; (2) the other party's knowledge of the existence; (3) the other party's intentional

procurement of the breach of the contract; (4) the absence of justification and (5) resulting damage. *D. R. Horton, Inc. v. Wescott Land Co., LLC, supra.*

113. Circumstantial evidence establishes that Howard had knowledge of the existence of the contract (*i.e.*, hand delivery of the letter at the exact time of closing and filing of the *lis pendens* when the closing was approaching and filing the contract action the day before closing).

114. In my view, Howard did everything he could to procure a breach of the contract; however the breach did not occur because the parties proceeded to closing, albeit with modified terms (owner financing instead of bank financing).

115. Even if there was a breach by virtue of the changed financing arrangement, resulting damages have not been proven by the greater weight of the evidence. There is no evidence that Shirley invested the proceeds she did receive at closing in a manner consistent with the investments upon which the certified financial planner based her projections and opinions. Also, there is no evidence as to what return Shirley received on the proceeds she did invest. Also, Shirley received interest on the amount she financed for the purchasers of her home, and I cannot conclude by the greater weight of the evidence that this interest return, combined with the return she realized on investment of the net proceeds was less than the return the certified financial planner projected if there had been no owner financing and all of the proceeds had been realized at closing. I conclude the certified financial planner's testimony was also speculative. While damages need not be proven to a mathematical certainty, the amount of damages awarded by a fact finder may not be based upon speculation, surmise, or conjecture.

116. Slander of Title: The filing of a *lis pendens* is absolutely privileged in South Carolina, “even when a party files a *lis pendens* which is motivated by some malicious intent.” *Pond Place Partners Inc. v. Poole*, 351 S.C. 1, 32, 567 S.E.2d 881, 897(Ct. App. 2002). As observed by the Court of Appeals, the proper avenue of relief is through a cause of action for malicious prosecution or abuse of process. *Id.*
117. While it is absolutely clear that Howard filed the *lis pendens* with malicious intent, that is not sufficient to invalidate the privilege afforded under state law insofar as a slander of title action is concerned, but is pertinent to the abuse of process claim.
118. Even if there were no privilege present here, Shirley has failed to prove all elements of slander of title by the greater weight of the evidence. To maintain an action for slander of title, one must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to the plaintiff’s title and (5) that caused special damages (6) as a result of diminished value of the property in the eyes of third parties. *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct.App. 1995).
119. Shirley has not established elements (5) and (6). I find no evidence of special damages as a result of diminished value of the property in the eyes of third parties, as Shirley has failed to prove by the greater weight of the evidence that she sustained any damages as a result of diminished value of the property in the eyes of any third party.

120. In her abuse of process claim, Shirley is awarded actual damages in the amount of \$20,000.00 for the frustration she experienced as a result of Howard's abuse of the system in the filing of the *lis pendens*. The finding of actual damages is based on upon what a reasonable person would experience in the way of frustration and is not based upon any pre-existing fragile mental state, and there is no evidence of such a pre-existing condition. The findings above in paragraphs 48 and 49 are included herein by reference. In *Swicegood v. Lott*, 379 S.C. 346, 665 SE2d 711 (Ct. App. 2008), the Court of Appeals noted the Supreme Court's holding in *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 166 SE2d 297 (1969) pertaining to an award of actual damages for harm resulting to the plaintiff in the form of humiliation and other mental suffering, *or injury to feelings*. In *Swicegood*, the court upheld an actual damages award based on testimony from the plaintiff about the degree of frustration, embarrassment, and humiliation he experienced as a result of the defendant's abuse of process. In my view, whatever one calls the assault on Shirley's feelings, an award of damages in this case has basis in the law. 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.

121. As a result of the factual findings set forth above, Shirley is also entitled to recover punitive damages against Howard. Shirley has established by clear and convincing evidence that Howard's actions were reprehensible and in willful, wanton and reckless disregard of Shirley's rights. S.C.Code Ann. § 15-33-135 (Supp.1999); *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996). The test

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for determining whether a party's conduct was willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the plaintiff's rights. *Rogers v. Florence Printing Company*, 233 S.C. 567, 106 S.E.2d 258 (1958). This is established by not only clearly and convincingly, but also beyond doubt.

122. It is that present consciousness of wrongdoing that justifies the award of punitive damages. Punitive damages are awarded to vindicate the rights of the plaintiff and to deter the defendant and others from committing the same or similar conduct in the future. *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). Shirley has established her entitlement to punitive damages by clear and convincing evidence.

123. Before awarding punitive damages, the court undertakes to employ the test articulated by our Supreme Court in *Mitchell v. Fortis Ins, Company*, 385 S.C. 570, 686 SE2d 176 (2009). As this case was tried without a jury, this evaluation will be done at this stage even though many of the relevant factors are also applied at the post-judgment stage. An evaluation of the considerations set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 SE2d 350 (1991) is also appropriate, as these considerations are still pertinent: (1) defendant's degree of culpability, (2) duration of the conduct, (3) defendant's awareness or concealment, (4) existence of similar past conduct, (5) likelihood the award will deter the defendant and others from similar conduct, (6) whether the award is reasonably related to the harm likely to result from the conduct, (7) the defendant's ability to pay, and (8)

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any other factors deemed appropriate. The *Fortis* court observed the *Gamble* factors are still relevant to a due process analysis of a punitive damages award, but only insofar as they add substance to the guideposts set forth in *BMW v. Gore*, 517 U.S. 559 (1996). Under *Gore*, the court is required to analyze the degree of reprehensibility of the defendant's conduct, the disparity between the actual and potential harm sustained and the punitive damages award, and the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. Under *Fortis*, insofar as the reprehensibility of Howard's conduct is concerned, the court must consider whether (1) the harm caused was physical as opposed to economic, (2) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others, (3) the target of the harm had financial vulnerability, (4) the conduct involved repeated actions or was an isolated incident, and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. Though the harm Howard caused was not physical, Shirley has undoubtedly been harmed in the form of incurring substantial fees and costs and in the form of the frustration at having to combat Howard's tactics at every turn, while obviously being concerned he would carry out his objective of bankrupting her. Shirley urges the court to also take into account the harm that *could have* been realized by Shirley if Howard's abuse of process bore fruit. The evidence is clear and convincing that if Shirley had not prevailed at the summary judgment stage, the attorneys' fees and frustration she could have experienced would have been overwhelming, and could have resulted in a financial hole from which she could have taken years to escape. Howard's

conduct was no doubt in reckless disregard for Shirley's rights to a peaceful existence as noted above. She was financially vulnerable. Howard's conduct was repeated, intentional, consistent, and grounded in malice toward Shirley. The reprehensibility of Howard's conduct and Howard's awareness of the conduct are beyond doubt. He will simply not leave her alone. This court cannot sit by and allow the process to be abused in the manner set out above and not impose an award that will (1) serve to deter Howard and others from engaging in an onslaught of vexatious and unfounded litigation and (2) vindicate Shirley's right to conduct her life in peace and free from figuratively having to look over her shoulder while in a never-ending vortex of litigation. Further, the award must bear a relationship to the nature and extent of the conduct and the harm caused, including the actual damages award made. *Id.* Here, the court concludes the award imposed bears an appropriate relationship to the nature and extent of the harm caused by Howard and his overall conduct. The court must also consider, as a mitigating factor, any other penalty that may have been imposed for the conduct involved. The court must also consider whether the award of and the amount of punitive damages may deprive Howard of any profits derived from his improper conduct and whether any ill-gotten profits should be awarded to Shirley. Lastly, the court must note as a fact finder that any punitive damage award must be limited to punishment and may not affect economic bankruptcy and to that end, must consider the defendant's ability to pay; however, the economic bankruptcy factor is not an absolute bar to an award of punitive damages. *Id.* The court is compelled to conclude that the award should be mitigated somewhat because

Howard's conduct has resulted in disciplinary action against by our Supreme Court. To this point, the court knows of no "ill-gotten profits" Howard has realized through his conduct, except perhaps in the subjective form of his own perverted satisfaction that he has prolonged and abused the process in his attempt to harass and potentially bankrupt Shirley.

124. The court finds by clear and convincing evidence that an award of \$60,000.00 in punitive damages is proper, though perhaps low in light of Howard's conduct. This amount bears a 3:1 ratio to the actual damages award and in my view satisfies constitutional concerns in that regard. The court is aware of no reported cases addressing the issue of punitive damages assessed in an abuse of process action against a vexed former spouse, who is also an attorney.

CONCLUSIONS OF LAW
1634 Main LP v. Shirley Hammer v. Howard Hammer

125. The cause of action asserted by the limited partnership against Shirley is one for declaratory judgment. (See amended complaint dated June 9, 2010). As discussed above in the findings of fact, Shirley no longer owns any interest in the limited partnership, and has not owned any interest in the limited partnership since before this action was filed. For that reason, the limited partnership is not entitled to any relief on its declaratory judgment action against Shirley.⁹ Howard is the sole member of SH 5, LLC, which is the general partnership of 1634. Howard's refusal to accept the November 2009 tender does not leave Shirley open to liability for any share of the repairs sought by 1634.

⁹ Although not necessary to my conclusion, I observe that limited partnership law and the limited partnership agreement would not allow Shirley to be sued for repairs.

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126. The facts supporting Shirley's counterclaim and third party claim for abuse of process against the limited partnership and against Howard, as set forth above, have been established by the preponderance of the evidence. Her claims for conversion and civil conspiracy were pleaded in the alternative, in the event it was determined that she continued to own some interest in the real property and/or the limited partnership. Since the court has determined her interest in the real property and the limited partnership ended in 2009, it is not necessary to address the claims for conversion or for civil conspiracy.

127. Abuse of Process: The 1634 suit was timed by Howard to extract money from Shirley or to harass her while valid family court orders were in place regarding her interest in the real estate and the limited partnership, and after she had tendered her interest in both to Howard.

128. Throughout the litigation of this matter, both Howard and the limited partnership, through Howard, have continued to advance the claim set forth in the complaint for declaratory judgment and the amendments thereto, knowing full well that Shirley did not owe any money to the limited partnership. As discussed above, Howard's push for continued litigation against Shirley in this action has been undertaken for an ulterior purpose, primarily to attempt to escape his obligations under the family court orders and to generally harass her and obtain an unfair financial advantage. As noted above, Howard did advise Shirley that he would bankrupt her. The court is satisfied that there is clear and convincing evidence that Howard sponsored and propelled this litigation so there could be one more front on which he could attack Shirley without legal or factual

justification and attempt to accomplish his goal of harassing her and bankrupting her.

129. Shirley has incurred damages for frustration as a result of having to defend against the declaratory judgment action advanced by the limited partnership. Because the limited partnership brought this action at the behest of Howard, Shirley is entitled to recover damages for abuse of process against both the limited partnership and against Howard individually. All findings above pertaining to the frustration issue are incorporated herein by reference, and the court finds that a reasonable person in Shirley's position would be greatly frustrated at being faced with the prospect of being sued over a baseless claim for repair expenses when there was no justification for the claim.

130. The court concludes that a reasonable person in the place of Shirley would be justifiably frustrated by Howard's and the limited partnership's perversion of the process for illegitimate reasons and that she is entitled to actual damages on her counterclaim and third party complaint in the amount of \$25,000.00 against Howard and 1634 Main LP, jointly and severally.

131. Using the framework set forth in *Gore, Gamble, and Mitchell v. Fortis, supra*, discussed above in paragraphs 124-126, Shirley is also clearly and convincingly entitled to recover punitive damages against Howard individually. The elements the court must consider in determining the amount of punitive damages are set forth above and are incorporated herein as if repeated verbatim, and the specifics of the analysis pertaining to an award against Howard are incorporated herein by reference, as his conduct has been very similar in both

cases. In addition, the court is disturbed by Howard's use of Mr. Turbeville and Danville Business Advisors in his quest to harass Shirley and carry out his mission of financially ruining Shirley. Reprehensibility is established on that basis and on the basis that it is apparent Howard concealed from Turbeville the fact that Shirley had tendered her interest in the partnership. The activities of 1634 through Howard against Shirley have been long-term through today, as the unfounded assessment notice was issued in November 2009. Assessing an award of punitive damages against the partnership is a cumbersome thing, since the partnership's liability for these damages is wholly the result of the actions of Howard, which actions are to result in a punitive damages award against Howard, so the court concludes any punitive award against 1634 would be improper. Howard's motives for his machinations in the contract action and as the puppet-master in this action are for the most part the same, i.e., to engage Shirley in baseless litigation in his effort to harass her and bankrupt her. The court takes into account as a mitigating factor the fact that Howard has been disciplined. Again, the court will not sit by and allow Howard's efforts to go unpunished. The court finds by clear and convincing evidence that an award of punitive damages against Howard in the amount of \$50,000.00 is proper.

132. The award is 2:1 in ratio to the joint and several actual damages award against Howard and 1634 and therefore would survive constitutional scrutiny in my view. The court is not aware of any reported cases involving similar facts and conduct.

Shirley's Claims under S.C.Code Ann. Section 15-36-10, et seq.

[Handwritten signature] 40 of 42

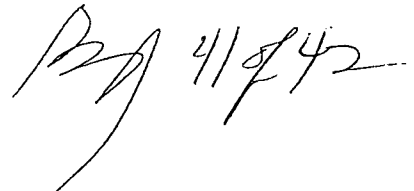
133. At the conclusion of the January 15, 2013 hearing, counsel for Shirley asserted a claim under the South Carolina Frivolous Civil Proceedings Sanctions Act (SCFCPA), S.C.Code Ann. Section 15-36-10. The SCFCPA is not a factor at this stage as the very terms of the Act do not apply until the post-trial stage and such claims must 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.

Shirley's Motion to Dissolve *Lis Pendens*

134. Shirley asks the court to dissolve the *lis pendens* which encumbers 320 St. James. As indicated above, Shirley remains liable on the indemnification agreement she signed with Investor's Title at the time she sold 320 St. James.

135. A *lis pendens* remains valid for a period of five years. S.C.Code Ann. §15-11-50. The court may order a *lis pendens* cancelled after the action which supported it is "settled, discontinued, or abated. . ." Section 15-11-40. In the absence of a court order, the *lis pendens* may be cancelled only by the person who filed it. *Id.*

136. The court has concluded that the *lis pendens* was filed maliciously and has no legal merit, and consequently, the *lis pendens* must be dissolved. The Richland County Clerk of Court is directed to cancel the *lis pendens* filed by

A handwritten signature in black ink, followed by the date "4/1/42". The signature is stylized and appears to be "M. J. [unclear]".

Howard on July 31, 2009, as required by Section 15-11-40 and is to update all records accordingly.


CONCLUSION

Based on the findings of fact set forth above and the conclusions of law, IT IS ORDERED:

- A. The Richland County Clerk of Court is directed to cancel the *lis pendens* filed by Howard on July 31, 2009, as required by Section 15-11-40, and is to update all records accordingly.
- B. Shirley is awarded actual damages against Howard for abuse of process in the contract action, Case No. 2009-CP-40-05911, in the amount of \$20,000.00 actual damages, and is awarded the sum of \$60,000.00 in punitive damages against Howard.
- C. The claim for declaratory relief by 1634 Main LP in Case No. 2010-CP-40-2889 is denied.
- D. In her abuse of process claims in 2010-CP-40-2889, Shirley is awarded actual damages against 1634 Main LP and Howard Hammer, jointly and severally, in the amount of \$25,000.00, actual damages. Shirley is awarded the sum of \$50,000.00 in punitive damages against Howard only.
- E. The court will entertain any motions made under S.C Code Section 15-36-10, et seq. in accordance with the court's comments above. A hearing date will be set by the court.

IT IS SO ORDERED.

January 28, 2013



George C. James, Jr., Circuit Judge

