

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

RECEIVED

JAN - 7 2015

S.C. Supreme Court

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

Shirley Hammer,

Respondent

**APPELLANTS' RETURN TO MOTION FOR COSTS
PURSUANT TO RULE 222 AND 269**

Appellants 1634 Main, L.P. and Howard Hammer submit this return to Respondent's motion for costs and sanctions made pursuant to Rules 222 and 269, SCACR, said motion having been served on December 29, 2014, 11 days after the remittitur in this case was issued on December 18, 2014. Respondent seeks over \$19,000 in attorney's fees as "an additional award of attorney fees, beyond those

permitted by Rule 222” as stated at paragraph 16 of Respondent’s motion. Appellants assert that Respondent is not entitled to relief under either Rule 269 or 222.

It is axiomatic that any award of attorney’s fees is in derogation of the common law. See, e.g., *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001). Further, where a statute, or in this instance a rule, provides for a monetary penalty, it is penal in nature and it must be strictly construed. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997).

Rule 269 – Frivolous Appeals

Under Rule 269, Respondent seeks attorney’s fees of \$19,272.50 (or another amount to be determined by the Court). She baselessly asserts that the appeal in this matter was intended for the purpose of delay and prejudicing Shirley’s recovery of funds due her (even though she already has acquired property valued at over \$1 million dollars in satisfaction of her \$335,000 in judgments). She further asserts without any foundation or evidentiary support that the appeal was frivolous. Respondent’s Motion, ¶¶ 13, 14.

Rule 269, in part, states:

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

“When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter.” *Wise v. S.C. Dept. of Corrections*, 372 S.C. 173, 642 S.E.2d 551 (2007) (citations omitted). The remittitur was issued on December 18; therefore, it is unnecessary for this Court to even address

the merits of Respondent's Motion as the motion seeking sanctions under Rule 269 should be dismissed as untimely.

Should the Court consider the merits of the motion for attorney's fees as sanctions made under Rule 269, Appellants submit the following argument:

Respondent fails to cite any reference in the record of this matter, or this court's memorandum opinion, which could lead to the conclusion that the appeal was frivolous or intended for purpose of delay. Indeed, Respondent's assertions are mere conclusory allegations unsubstantiated by any factual references or evidentiary support. Not only is Respondent's motion bereft of citation to any delaying or frivolous conduct associated with this appeal, Judge Strickland's January 21 Order specifically approved (and almost invited) an appeal from his order: "While they may seek whatever legal remedies may be available to them by way of appeal, Howard Hammer and 1634 Main LP shall not interfere with the management or sale by Shirley Hammer of the assets transferred herein." R. p. 21. Respondent has not asserted any interference by Appellants with Respondent's management or sale of the building, and there is not any.

Respondent fails to articulate a single argument set forth by Appellants in this appeal that was frivolous. Appellants' jurisdictional argument was supported by Rule 4(c), SCRCP. The fact that it was not accepted by this Court does not make it frivolous. Appellants' arguments that the lower court did not have the authority to make a direct transfer of the property was supported by a full statutory analysis of collection remedies in South Carolina, as well as statutory authority stating that Respondent's remedy was a charging order as to the transfer of partnership and limited liability company interests. The fact that the arguments were not accepted by the Court does not make them

frivolous. Appellants' argument that the lower court improperly awarded sanctions was accepted by this court, and therefore cannot be a frivolous argument.

All of the factual arguments and legal positions set forth by Appellants in this case were well founded and clearly warranted under the existing law. It is notable that neither in her brief nor in this motion did Respondent cite any direct authority for the proposition that a court has the authority in an execution against property to make a transfer of a judgment debtor's real property to satisfy a judgment. In fact, in the only case found by the undersigned in which it was done, the case was reversed by the Court of Appeals on other grounds, and the issue was not addressed.¹ Given that the decision in this case is a memorandum opinion and has no precedential value, the lower court's authority to take such action still is an open question under our jurisprudence; therefore, an appeal of this undecided and novel issue could not be frivolous.

As an alleged consequence of the appeal, Respondent makes a naked claim outside the record and unsubstantiated by any evidence or affidavit that she lost a contract of sale of the transferred property because of the time the appeal took.

During the appeal, Shirley entered into a contract to sell the real property; the contract included a provision which tied the date of the sale to this Court's anticipated ruling on the then-pending appeals by Howard. Respondent's Motion, ¶ 7.

* * *

The positions advanced by Howard and 1634 Main LP in this appeal had no merit. These proceedings were intended to, and did, cause delay for the purpose of prejudicing Shirley and delaying her ability to recover the funds due to her. The sale of the property which was planned to make Shirley [whole?] has now been lost and the possibility of recovery by Shirley of the judgments due her is now more remote than at any time

¹ *A Fast Photo Express, Inc. v. First Nat'l Bank of Chicago*, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006).

during the pendency of the appeal. Not only was Howard's appeal intended to delay and prejudice, it did both. Respondent's Motion, ¶ 13.

Assuming that a prospective purchaser elected not to proceed to closing, there is clearly no development or evidence of the purchaser's reasons other than respondent's counsel's unsubstantiated statements.

The conclusion of Respondent's argument that the appeal caused the loss of the sale is illogical: (1) the appeal was already pending when she entered into the contract of sale, and (2) what responsible seller would ever tie a closing date to a decision of this Court even when the appeal was to be handled on an expedited basis? That is just asking for failure, and apparently Respondent, or her buyer, misjudged the time which would be required to complete the appeal. Further, it is not even clear from Respondent's motion that the length of the appeal had any impact on the buyer's decision not to close. Paragraph 11 of the Respondent's Motion states that the closing deadline was January 6, 2015, 19 days after the remittitur was issued.

Respondent asserts that the appeal was motivated by a desire to delay a sale of 1634 Main St. As Respondent knows, Appellants had no knowledge of the terms of a contract of sale and a possible contingency related to the length of the appeal because Respondent refused to provide a copy of the contract to Appellants' counsel. See Exhibit A attached hereto (Affidavit of Counsel). Therefore, the appeal could not have been intended to prejudice the sale (other than its natural effect if this Court would have reversed the transfer of property by Judge Strickland; but the appeal was already pending when the contract was executed).

Respondent fails to point out that the appeal was expedited with the consent of Appellants (Exhibit B attached hereto). The appeal lasted only seven and one-half

months from the date of filing the appeal (May 2) to the issuance of the remittitur (December 18), and only three and one-half months from execution of the contract (August 26) to the remittitur.²

Respondent also fails to point out that 15 days before Respondent entered into the contract of sale for the property, that Appellants sought to pay her the full amount she claimed was owed on the judgments (including the now reversed sanctions), but Respondent added \$100,000 to her claim unless Appellants would execute a release. Exhibits A and B. Four other times while the appeal was pending, Appellants sought to pay the judgments, the sanctions and Respondent's claimed incidental expense. Respondent is entitled to, payment of her judgments. Appellants acknowledge this, tried to pay them, but were refused on five occasions. Despite being offered full payment of her judgment, plus all additional sums which Respondent claimed she was owed, Respondent now seeks sanctions against Appellants who were ready to end this appeal, not prolong it.

² What is undeveloped in Respondent's motion is that perhaps the buyer had a purchase restriction which could not be satisfied even with an expedited appeal, in which case the contract should not have been executed by the Respondent seller; perhaps the Respondent through no fault of the Appellants underestimated the time the appeal would take; perhaps the Respondent did not make full disclosure to the buyer; perhaps the contract had a "free look" due diligence period and the buyer just decided not to pursue the purchase; perhaps the buyer's business plan changed; perhaps the buyer could not obtain financing; perhaps the buyer experienced a downturn in business or revenues; or perhaps The fact is, Respondent's counsel does not represent the buyer and she cannot speak for the buyer as to why the buyer elected not to close. Neither the Appellants, nor this Court knows why the transaction did not close because the motion contains only bare unsubstantiated allegations by Respondent's counsel. **AND**, appellants had no input, control, or knowledge of Respondent's absurd agreement to possibly condition the contract to a date this Court might issue a ruling - "the contract included a provision which tied the date of the sale to this Court's anticipated ruling" - said ruling date being another matter over which Appellants have no control or influence.

Respondent has not presented the Court with the contract of sale, any other evidence of the terms of a contract, or the reasons the contract might not close other than counsel's interpretations of the state of mind of a third party. Instead, Respondent relies upon the history of Mr. Hammer's conduct to buttress her claim for sanctions. That history has and had nothing to do with the present appeal and its merits. Further, Judge James has already sanctioned the Appellants in this case for their conduct in the underlying litigation in the amount of \$162,777.17. This prior conduct, the subject of sanctions already, should not be a basis to consider sanctions for the instant appeal, particularly when Appellants secured a reversal of the sanctions issued by Judge Strickland. Sanctions arising from this appeal should rise or fall from this appeal, which was clearly not frivolous.

Respondent inaccurately asserts that the Appeals were "plainly frivolous" because Mr. Hammer failed to file responsive pleadings in the supplementary proceedings, and therefore, none of his appellate arguments were preserved. Respondent's Motion, ¶ 14. This new argument is completely out of left field, and patently inconsistent with the Record and Respondent's Brief.

First, no responsive pleading needs to be filed by a judgment debtor in supplementary proceedings. Any requirement to do so is not cited by Respondent because there is none. Supplementary proceedings are not governed by Rule 12, SCRPC, providing for a responsive answer or motion. They are governed by Title 15, Chapter 39 of the South Carolina Code and there is no requirement for a responsive pleading by a judgment debtor.

Second, of the three arguments presented by Appellants (lack of authority to transfer, sanctions, and improper service of process), Respondent did not assert in her brief, nor did this court find, that any argument was unpreserved. In fact, all were preserved:

As to the Court's authority to transfer property:

Mr. Aiken: Yes, sir. And then, as to the second matter, which is the judicial transfer of ownership to Mrs. Hammer, with all due respect, Your Honor, under the series of statutes concerning supplemental proceedings, which is SC Code Section 15-39-310 and following, I don't see any grant of authority to you to just make a naked transfer of real property. I don't think you have that power, Judge. And like I say, I say that will all due respect, but I don't think you do under the statutes. Now, as far as your entering an order now for execution on that real property, the problem with that is that real property is owned by a limited partnership in which individuals other than Mr. Hammer have interest, including Mr. Hammer's children.

R. p. 331, ll. 5 – 19. (Transcript of the January 9 hearing from which the January 21, 2014 order issued)

As to sanctions: A question arose at oral argument about preservation of the sanctions argument, and Respondent's counsel acknowledged that the argument had been preserved in Appellants' Rule 59 motion (which is the first time it could have been raised since Respondent never filed a motion for sanctions). R. p. 46. Not only did Respondent's counsel acknowledge that the argument was preserved, this Court reversed the award of sanctions, implicitly finding that it was preserved.

As to improper service of process: In Respondent's Brief at page 16, she admits that before any hearing in the supplementary proceedings that Appellants filed a Motion to Dismiss based on improper service of process. See also, R. pp. 33 – 36 (motions to dismiss by Hammer and 1634 Main).

Respondent presents redacted time records of her counsel and counsel's staff. She has failed to present any evidence of the reasonableness of the fees. She presents time for clerical staff for such tasks as transferring telephone calls, receiving and distributing mail, making notes of the argument from this Court's video portal, and preparation of the Bill of Costs under Rule 222. The time records also include proceedings in the lower court, settlement negotiations, and an alleged fee of a contract attorney of \$4,262.50 for which no detail is presented to determine what services were provided or whether they were reasonable. Just as Respondent's motion should fail for, untimeliness and inadequate proof, this Court should not be put to the task of determining as a factual matter the reasonableness of Respondent's fees when it cannot be done from the records presented in her motion.

Respondent is not entitled to any sanctions under Rule 269, and her motion should be denied.

Rule 222 – Costs on Appeal

Under Rule 222, SCACR, Respondent seeks \$2,221.44 in costs. Rule 222 states, "When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court." Appellants would assert that the verbiage of this rule would make it unusual that costs be awarded to either party where the lower court's order is "affirmed in part and reversed in part" as set forth in this Court's Memorandum Opinion No. 2014-MO-045 ("the Memorandum Opinion"). Under Rule 222, subject to intervention by the Court, costs "shall" be taxed against appellant if an appeal is affirmed and against respondent if reversed. Contrasting this mandate to the rule's language that costs "shall be allowed **only** as ordered by the appellate court"

in a case with mixed results implies that the taxing of costs in this situation is not perfunctory, but is, in fact, an act to be exercised with discretion.

In the Memorandum Opinion, this Court affirmed the transfer of property, disposed of a jurisdictional argument, and reversed an award of sanctions; therefore, no costs should be taxed against Appellants as they prevailed, at least in part, on the appeal. Prior to the adoption of the Appellate Court Rules, the Supreme Court held in equitable matters (as this Court found the supplementary proceedings to be) that where a judgment was modified that Respondent was not entitled to costs. See *Sullivan v. Latimer*, 43 S.C. 262, 21 S.E. 3, 3 (1895), where the Court stated:

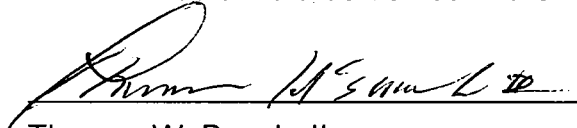
So, in the case at bar, the plaintiffs, Charles M. Sullivan and Thomas J. Sullivan, have succeeded in modifying the judgment appealed from, and, although all their grounds of appeal were not sustained, some of them were, and, thus they became "the prevailing parties."

We submit that the holding in *Sullivan* is applicable to the instant case and the request for costs under Rule 222 should be denied.

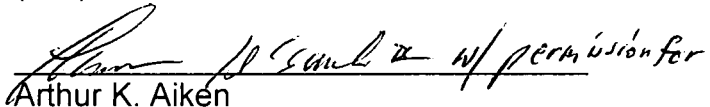
Conclusion

This court should not award any costs or sanctions to Respondent. This Court spoke in issuing its Memorandum Opinion and in denying the Petition for Rehearing. At no time did the Court ever intimate that Appellants' arguments were frivolous under the applicable law. The fact that Respondent might have lost a sale of the transferred property is, in fact, most likely due to factors she created or due to the circumstances of the buyer. Certainly there is no evidence presented that Appellants had any part in the drafting or termination of the contract of sale. Neither Appellants nor this appellate court can determine the factual reasons why the sale was not consummated since

Respondent's motion is essentially unsubstantiated and conclusory statements by counsel. Coupled with the scarcity of any reliable facts upon which this court could base a decision and casting doubt on the reliability of the motion, are the simply inaccurate arguments posited by Respondent, with no citation to the record or legal authority, (1) that Appellants should have filed responsive pleadings in supplementary proceedings and (2) that Appellants failed to preserve their appellate arguments. The lower court specifically authorized an appeal from its January 21 Order, and not one of the three arguments advanced by Appellants were frivolous or intended for delay. In point of fact, Appellants' counsel has spent significant time preparing a response to this motion, including the Rule 269 motion, filed after the remittitur was issued and over which the Court now has no jurisdiction. It is submitted that the value of the time responding to the Rule 269 motion far exceeds the costs to which Respondent might be entitled under Rule 222, and costs should not be taxed against Appellants. Respondent's motions under both Rules 222 and 269 should be denied in their entirety.



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ATTORNEYS FOR APPELLANTS

January 7, 2015



STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: 2009-CP-40-05911
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Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

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v.

Howard Hammer,

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Appellant,

v.

Shirley Hammer,

Respondent

**AFFIDAVIT OF APPELLANTS' COUNSEL
ON APPELLANTS' RETURN TO MOTION FOR COSTS
PURSUANT TO RULE 222 AND 269**

Personally appeared before me, Thomas W. Bunch, II, who being duly sworn,
doth state:

1. I am one of the attorneys appearing on behalf of Appellants 1634 Main, L.P. and Howard Hammer in the appeal the January 21, 2014 Order of the Honorable

Joseph M. Strickland which (1) transferred certain real and personal property interests of the Appellants to the Respondent in satisfaction of approximately \$335,000 in judgments owed to Respondent, and (2) awarded sanctions in favor of Respondent against Appellant Hammer of approximately \$55,000. I will refer to the cases from which Judge Strickland issued the January 21 Order which was appealed as the Supplementary Proceedings Cases.

2. This appeal concluded with the filing on November 6, 2014 of this Court's Memorandum Opinion 2014-MO-0045, and the denial on December 18, 2014 of Appellants' Petition for Rehearing, at which time the remittitur was issued.
3. The Memorandum Opinion affirmed the transfer of property by the Master in Equity, affirmed that the Master had personal jurisdiction over the Appellants in Supplementary Proceedings, and reversed the award of sanctions because Mr. Hammer was not given an opportunity to respond before they were imposed by the Master (giving Respondent leave to raise this issue in the subsequent accounting proceeding related to the sale of the property.)
4. I have been admitted to the bar of this state for over 30 years, having been admitted on May 16, 1984. Since 1984 I have engaged in the practice of law in Columbia, S.C. with Robinson, McFadden & Moore, P.C. I have a "preeminent" "av" rating by Martindale-Hubbell. <http://www.martindale.com/Thomas-W-Bunch-II/1585803-lawyer.htm> I have spoken at judgment collection seminars sanctioned by the South Carolina Bar for continuing legal education credit. Because of my experience in commercial matters and in particular my experience in lien enforcement matters, Mr. Hammer retained me in December, 2013 to represent

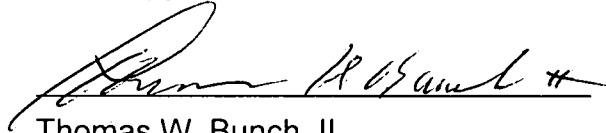
him and some of his limited liability company interests in a foreclosure case brought by Shirley Hammer to enforce judgments entered against him and 1634 Main, LP in the above captioned cases. The foreclosure action was separate suit initiated in November 2013 while the Supplementary Proceedings Cases were pending, but before Judge Strickland issued his January 21, 2014 Order in the Supplementary Proceedings Cases. After the January 21 Order, Mr. Hammer asked that I become involved in the appeal in the Supplementary Proceedings Cases. On July 25, 2014, I noticed my appearance on behalf of Appellants in the above captioned appeals.

5. The appeal and the petition for rehearing in these cases were advanced on meritorious grounds. They were not intended for delay. They were not frivolous as shown, in part, by the Court actually reversing the sanctions award. Paraphrasing from Appellants' petition for rehearing, this appeal and the petition for rehearing were pursued on my firm conviction as an "officer of the court" that the January 21 Order as well as the Memorandum Opinion misinterpreted the unambiguous language of the execution statutes and the statutory scheme for collection of judgments. It is and was my opinion that the January 21 Order and the decision affirming the order have and will continue to cause Appellants damage over and above their judgment obligations, and that they will adversely affect the administration of justice in South Carolina.
6. If I were today advising a judgment creditor who wished to take ownership of real property and personal property consisting of partnership and limited liability company interests by a direct transfer from a court, I would advise the judgment

creditor that: (1) I cannot discern any statutory basis for such a transfer; (2) in fact as to the personal property transfers the statutes provide only for a charging order followed by a foreclosure of the lien provided by a charging order; (3) the only case law precedent for such a transfer is unpublished and cannot be relied upon as a basis for such a transfer; (4) the judgment creditor is accepting significant risk for what should be a court sale of the property; and (5) the judgment creditor would face a meritorious appeal if the transfer was made.


7. If I were advising a judgment debtor today who was served with a rule to cause for supplementary proceedings by a private process server who has not been authorized by the Court to serve the process, I would advise that a plain reading of Rule 4, and the lack of contrary authority, creates a meritorious legal issue as to the validity of the service.
8. Prior to the briefing and arguments in these appeals, on five occasions I communicated offers to Respondents counsel to fully pay the judgments and all additional amounts which Respondent claimed were due to her including the \$55,000 in sanctions. The source of funds for that payment was a loan to made to Appellant Hammer by a family member. The only string attached to those offers was that Judge Strickland would need to vacate the transfer of property and rescind the January 21 Order. It is at the very least inappropriate, in my opinion, for Respondent to assert she is entitled to payment of sanctions for this appeal when the foreclosure case, the Supplementary Proceedings Cases, and all appellate proceedings related to this litigation could have ended months ago by full payment to Respondent.

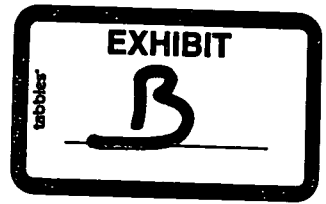
9. By way of further evidence in this matter, I requested on more than one occasion that Respondent's counsel share with me the Contract of Sale related to 1634 Main Street. On August 26, 2014 Respondent's counsel notified me that the seller and buyer signed a contract of sale on that day, and she further stated without explanation: "I am not going to provide a copy of the contract."



Thomas W. Bunch, II
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SWORN to and subscribed before me
this 7th day of January, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission expires: 6-1-21



STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 28 2014

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

S.C. Supreme Court

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

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APPELLANTS' RETURN TO MOTION TO EXPEDITE APPEAL

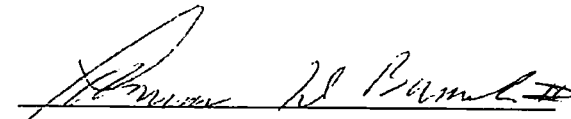
Appellants 1634 Main, L.P. and Howard Hammer submit this return to Respondent's Motion to Expedite Appeal. Appellants have no objection to an order expediting this appeal and they embrace the opportunity to have the lower court's order fully reviewed and this appeal promptly heard. As will be shown in Appellants' briefs, the Master-in-Equity committed multiple errors of law by (1) directly transferring real property to Respondent when the statutory scheme would have required a sale of

the property, (2) transferring the interests in a limited partnership and limited liability company when the statutes provide only for charging liens on those interests, (3) transferring the interests of a minor without bringing the minor before the court, (4) awarding sanctions without notice or evidence, (5) and even assuming jurisdiction over the supplementary proceedings when Appellants were not served in accordance with the applicable rule of civil procedure.

Appellants look forward to a full review of the order of the lower court which has given Respondent plenary authority of Appellants' most significant asset, ordering Respondent to sell it and placing no control over the Respondent and the expenses she incurs which are destroying Appellants' equity in the property. In fact, recognizing that they are in a no win situation if this court were to actually affirm the lower court's order, Appellant Hammer arranged for a loan from his brother to pay the judgment in full. However, Respondent refused to accept the payment unless she could extract extra-judicial relief outside of the judgments she holds. Despite being paid in full, Respondent, in addition, last demanded a general release or an additional \$100,000.00 payment without a release. The loan arrangements are set forth in an Amended Petition for Writ of Supersedeas attached as Exhibit A, and Respondent's extra-judicial demand is set forth in Respondent's counsel's email dated July 15, 2014, which is attached as Exhibit B. The lower court has not set scheduled a hearing on the Amended Petition for Writ of Supersedeas.

Having agreed to expedite this appeal, Appellants would be remiss in allowing Respondent's counsel's irrelevant and inaccurate factual assertions in the motion to remain unanswered in this record. At paragraphs 9 and 10 of her motion, Respondent

raises the issue of Appellant Hammer's health and the automobile he was recently driving. Respondent's comments are intended for nothing more than inflammatory purposes. The first comment regarding Mr. Hammer's health, and the statement from his cardiologist that Mr. Hammer should avoid court appearances, is an obvious attempt to parade before the court the status of Mr. Hammer's child support payments as Respondent acknowledges that Mr. Hammer's health is irrelevant to proceedings before this court since he is represented by counsel and no court appearance is required by Mr. Hammer in briefing these matters. The second comment concerning Mr. Hammer driving a new Porsche automobile is simply inaccurate. In fact, a mechanic loaned Mr. Hammer a 13 year old Porsche to drive while Mr. Hammer's Subaru was being repaired. It is this counsel's intention to stick to the facts in the record and the facts relevant to this appeal.



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ATTORNEYS FOR APPELLANTS

July 28, 2014



STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Howard Hammer)
 Plaintiff/Petitioner)
)
 v.)
)
 Shirley Hammer a/k/a Shirley Grace Hightower,)
 Defendant/ Respondent)

IN THE COURT OF COMMON PLEAS

CASE NO.
 2009-CP-40-05911

MOTION AND ORDER INFORMATION FORM
 AND COVER SHEET

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 1634 Main, L.P.,)
 Plaintiff/Petitioner)
)
 v.)
)
 Shirley Hammer a/k/a Shirley Grace Hightower,)
 Defendant/ Respondent)
)
 v.)
)
 Howard Hammer,)
)
 Additional Defendant on Counterclaim/Petitioner)

IN THE COURT OF COMMON PLEAS

CASE NO.
 2010-CP-40-2889

2014 MAY 23 PM 4:11
 DEPT. OF SOCIAL SERVICES

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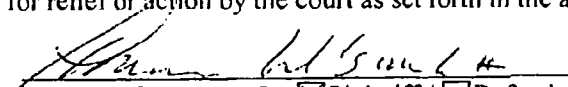
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information
 Nature of Motion: Amended Petition for Writ of Supersedeas
 Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion Type
 Written motion attached
 Form Motion/Order --
 I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant

March 5, 2014
 Date submitted

SECTION III: Motion Fee

PAID - AMOUNT: \$25.00

- EXEMPT: Rule to Show Cause in Child or Spousal Support
(check reason) Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCP)
 Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
 Other:

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
 Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

MOTION FEE COLLECTED: _____

CONTESTED - AMOUNT DUE: _____

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

Howard Hammer,
Plaintiff/Petitioner,

vs.

Shirley Hammer a/k/a Shirley Grace Hightower,
Defendant/Respondent,

) **COURT OF COMMON PLEAS**
) **FIFTH JUDICIAL CIRCUIT**
) Case No.: 2009-CP-40-05911
)

) **AMENDED PETITION OF**
) **HOWARD HAMMER FOR A**
) **WRIT OF SUPERSEDEAS WITH**
) **ANNEXED MEMORANDUM IN**
) **SUPPORT**

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

1634 Main, L.P.,
Plaintiff/Petitioner,

vs.

Shirley Hammer a/k/a Shirley Grace Hightower,
Defendant/Respondent,

vs.

Howard Hammer,
Additional Defendant on Counterclaim/Petitioner

) **COURT OF COMMON PLEAS**
) **FIFTH JUDICIAL CIRCUIT**
) Case No.: 2010-CP-40-2889
)

) **AMENDED PETITION OF**
) **HOWARD HAMMER AND 1634**
) **MAIN, LP FOR A WRIT OF**
) **SUPERSEDEAS WITH ANNEXED**
) **MEMORANDUM IN SUPPORT**

REC'D
MAY 23 PM 4:11
JANETTE M. HODSON
C.P. & D.S.

TO: ALL OTHER COUNSEL OF RECORD

PETITION

Your Petitioners, Plaintiff/Third-Party Defendant, Howard Hammer (HH) and the Plaintiff, 1634 Main, LP (1634 Main) (collectively petitioning parties) hereby petition, in accordance with Rule 241 SCACR, and Rule 62, SCRCP, for a writ of supersedeas as follows:

PARTIES

1. Petitioner, Howard Hammer (HH), is a judgment debtor to Respondent, Shirley Hammer (SH), in both of the cases captioned above.

2. Petitioner, 1634 Main, LP (1634 Main), is a judgment debtor to Respondent, Shirley Hammer (SH), in case number 2010-CP-40-2889.

3. Respondent, SH, is a judgment creditor of HH in both of the cases captioned above, and she is a judgment creditor of 1634 Main in case number 2010-CP-40-2889

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this Petition under Rule 62 SCRPC and Rule 241 SCACR, and this Court has personal jurisdiction over the Respondent.

5. Venue is proper in this Court.

FACTUAL ALLEGATIONS

6. Petitions for Writs of Supersedeas were previously filed in these cases on March 5, 2014 with copies being served on all non-moving parties and provided to the Honorable Joseph M. Strickland. At that time the Judgments in the above captioned cases were on appeal, and those appeals were set for oral argument before the South Carolina Supreme Court on March 6, 2014.

7. After oral argument, the South Carolina Supreme Court affirmed the judgments by an unpublished opinion filed March 19, 2014.

8. While these cases were on appeal, this Court presided over supplementary proceedings arising from the judgments.

9. In the supplementary proceedings, this Court entered an Order on January 21, 2014 ("the January 21 Order") in which this Court, inter alia, ordered transfer of real property known as 1634 Main Street (building) from HH and 1634 Main to SH.

10. HH and 1634 Main are informed and believe that on or about January 21, 2014, this Court executed and delivered to SH, a Deed (“the January 21 Deed”) making the transfer of 1634 Main St. alleged in Paragraph 9 above, and that SH has recorded the deed.

11. HH and 1634 Main are informed and believe that this Court’s January 21, 2014 Deed (Deed) is void under Rule 62(a) SCRPC because it was executed, delivered, and recorded within ten (10) days of this Court’s Order entered on January 21, 2014.

12. HH and 1634 Main further contend that the January 21 Order directing the transfer of property is flawed because, inter alia, the Court failed to set and SH failed to post a bond as required by S.C. Code Ann. §18-9-130(A)(2) for the transfer of the property while the appeal was pending.

13. Further, contrary to the 10 day stay of Rule 62(a) and since the transfer by deed alleged in Paragraph 10 above, SH and her confederates changed the locks to the building at 1634 Main St. without prior notice to HH, and inappropriately deprived HH of access to the building except during unreasonably abbreviated intervals.

14. In addition to their refusal to give HH access to his offices, files, and belongings within the building, SH and her confederates gave HH an arbitrary deadline of Thursday February 14, 2014, to remove his possessions, property and furnishings from the building, but then refused to grant sufficient access to the property so that HH could meet the so-called deadline.

15. On February 3, 2014, HH and 1634 Main timely filed Motions to Alter or Amend Judgment under Rule 59(e) that were directed at this Court’s Order entered on January 21, 2014. Those motions were denied by Judge Strickland. HH and 1634 Main have filed an appeal of the denial of these motions and the January 21 order.

16. Despite the pendency of the appeal of the underlying judgments, Judge Strickland's January 21 order transferred the property interests described in paragraph 9 above in satisfaction of, at that time, the non-final judgments. Said order also directed SH to sell the transferred property, and thereafter account to the Court for the proceeds of sale.

17. After the ruling by the Supreme Court and the judgments becoming final, SH provided an accounting of sums she contended were owed to her by HH including the judgments, \$55,385.70 awarded by Judge Strickland in the January 21 Order, and other sums SH contended would be due to her by said order. The amount provided by SH was \$439,619.91.

18. By letter dated May 6, 2014, SH belatedly acknowledged that a bond was required for conveyance of the property. She notified Judge Strickland that she was readying the property for sale, and expected an offer of sale "shortly."¹ She notified the court that it was necessary for the court to determine the amount of an appeal bond (sic) which SH needed to post, presumably under S.C. Code Ann. § 18-9-130(A)(2) which states that "A plaintiff may not enforce a sale of property after a notice of appeal is filed without giving an undertaking or bond to the defendant, with two good sureties, in double the appraised value of the property or double the amount of the judgment."

19. Thereafter, on May 19, 2104 SH filed a Motion for Appeal Bond in which she represented that 1634 Main St. recently appraised for \$1,450,000.00. SH has not provided a copy of that appraisal to either the Court or HH, although her counsel has also represented to counsel for HH and 1634 Main that 1634 Main St. appraised for \$1,475,000, or \$25,000 more than the representation made to the court by SH's motion.

¹ Now, more than two weeks later, no offer has been made on the property.

20. In response to SH's counsel's May 6 letter to Judge Strickland, HH notified Judge Strickland on May 8, 2014 that he would pay the \$439,619.91 amount in satisfaction of the judgments, and dismiss the appeal of the January 21 Order upon the property being restored to the ownership of record prior to entry of the January 21 Order and subsequent deed(s). SH declined the offer of full payment of all amounts owed to her according to the accounting provided by her counsel, and continues to request a bond for her to sell 1634 Main St.

21. Thereafter, SH increased her accounting to \$461,120.58. Although HH disputes both accountings, his counsel notified counsel for SH that HH would pay the \$461,120.58 in satisfaction of the judgments, and dismiss the appeal of the January 21 Order upon the property being restored to the ownership of record prior to entry of the January 21 Order and subsequent deed(s). SH will not accept the payment unless HH will make non-monetary concessions not included in the judgments and the January 21 order. Alternatively, HH and 1634 Main notified the Court at a status conference on May 19 that they had no objection to the sale of the property for the alleged listing price of \$1,475,000.00.²

22. SH contends that she is required to sell the building by the January 21 Order which is not final and is on appeal, but she is willing to forego such contention in exchange for conditions and concessions outside the court proceedings.

23. HH is prepared to pay the amounts owed to SH on the judgments and this court's January 21 Order, is prepared to dismiss the appeal of the January 21 order, and is prepared to end the litigation related to the judgments in these cases. Alternatively, HH is agreeable to SH selling the building at the appraised value of \$1.475 million (or \$1.450 million if that is what it

² Like the appraisal, SH has not provided the court or HH with a copy of the listing agreement.

actually is). Conversely, SH apparently wishes to continue the litigation despite being made whole.

24. The granting of these Petitions is necessary to bring this litigation to a close, conserve judicial and the parties' resources, and to avoid forfeiture of HH's property.

25. A more detailed description of the grounds and the legal basis for this Petition is set forth in the Memorandum annexed to this Petition

WHEREFORE, HH and 1634 Main pray that this Court grant this Petition by (1) allowing HH to fully pay the amounts properly owed to SH, declaring void the Master's deed dated January 22, 2014, to SH, and any transfers made thereafter, and by vacating its January 21 Order; or (2) permitting the sale of the property at the alleged list price of \$1.475 million.

MEMORANDUM IN SUPPORT

ARGUMENT

I. INTRODUCTION

The above are actions in which SH sought supplementary proceedings to enforce Judgments in her favor and against HH and 1634 Main. The Judgments that are the subjects of these actions have been affirmed by the South Carolina Supreme Court. This Court heard the supplementary proceedings on May 30, 2013, June 4, 2013, August 12, 2013 and January 9, 2014 (collectively hearings). The subject Order which was entered on January 21, 2014, provides for a transfer by deed of all right title and interest of HH and 1634 Main in 1634 Main, LP, real property commonly known as 1634 Main Street in Columbia, SC and SH5, LLC (transferred

property).³ On January 21, 2014, this Court executed and delivered a Master's Deed making these transfers. The transfers in the January 21 Order and in the Master's deed by-passed the statutory safeguards that should have been afforded to not only the judgment debtors, but also others who had interests in the property transferred who were not joined in any proceeding. Those parties should have been joined or at a minimum given notice to protect their interests in the due course of a sale of the property. Now, HH is prepared to pay the amounts owed to SH and conclude these cases, but SH refuses to accept the payment.

II. RULE 241, SCACR

Rule 241(c)(1), SCACR, provides that any party may move for a supersedeas as to matters which are not stayed on appeal such as enforcement of money judgments, judgments directing the sale or delivery of possession of real property, etc. (Rule 241(b)). The rule further provides that the court may not only grant or lift a stay of the matters which have been decided, but that the court may also "order other affirmative relief upon such terms and conditions as are deemed appropriate." 241(c)(3). The procedure for obtaining a supersedeas is to first apply to the lower court except in extraordinary circumstances. Rules 241(d) and 205, SCACR. Thus, the Circuit Court has jurisdiction over these petitions and the matters contained herein, including the requested relief.

III. THE PURPOSES OF A WRIT OF SUPERSEDEAS.

The writ of supersedeas serves one main purpose and three subsidiary purposes. First, the main purpose of writ is "to stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal." Graham v. Graham. 301 S.C. 128, 130, 390 S.E.2d 469, 470

³ Counsel for SH represented to this Court more than once that the property transferred had a value of between \$900,000 and \$1,000,000.

(1990) (quoting, 4A C.J.S. Appeal & Error § 662 at 494-95 (1957)). Second, the preservation of the status quo serves the subsidiary purpose of preserving to the appellant “the fruits of a meritorious appeal where they might otherwise be lost to him.” Graham, 301 S.C. at 130, 390 S.E.2d at 470 (quoting, 4A C.J.S. Appeal & Error § 662 at 494-95 (1957)). Third, the writ may be granted “to preserve the jurisdiction of the appeal.” Rule 241(c)(2) SCACR. Fourth, the writ may be granted “to prevent a contested issue from becoming moot.” Rule 241(c)(2) SCACR.

IV. THE STATUS QUO TO BE PRESERVED BY SUPERSEDEAS IS THE POSITION OF THE PARTIES BEFORE THIS COURT EXECUTED AND DELIVERED THE DEED TO 1634 MAIN ST. BECAUSE THAT DEED IS VOID AND SHOULD NOT HAVE BEEN DELIVERED TO SH.

“No execution shall issue on a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry.” Rule 62(a) SCRCR. By executing and delivering the Master’s Deed on the same date as the January 21 Order, this Court undertook proceedings for enforcement of the January 21, 2014 Order. Thereafter, SH undertook enforcement of the order by locking HH out of 1634 Main St. within the same 10 day period. The Master’s Deed is void because it was executed and delivered within ten (10) days of the entry of the January 21, 2014 Order. The proper status quo to be preserved by supersedeas is the position of the parties before the execution and delivery of the Master’s Deed.

V. SUPERSEDEAS IS NECESSARY TO PRESERVE TO THE PETITIONERS THE FRUITS OF A MERITORIOUS APPEAL.

“The Supreme Court ... may reverse the judgment, decree, or order appealed from..., and the judgment shall be remitted to the court below to be enforced according to law.” S.C. Code § 18-9-270. “When the judgment is reversed or modified the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.” S.C. Code § 18-1-140. Reversal of the judgment in this case will require restoration to HH and 1634 Main of all

property lost by the January 21 Order. In other words, all property lost by HH and 1634 Main as a result of the January 21 Order will have to be restored to him if the Order is reversed.

The Order requires the execution and delivery to SH of a deed granting her fee simple absolute title in the building. The day after the Order was entered, this Court executed and delivered the fee simple absolute Deed to SH. Of course the Deed gives SH title sufficient to support transfer of the building in fee simple absolute to another. Transfer to a third party makes recovery of title to the building by HH on a successful appeal problematic. This risk to HH's right to recover title to the building is not theoretical. SH has formed a limited liability corporation, and she has transferred title to the building to that corporation. Further, she asserts that she has "three prospects who are ready, willing and able to purchase the building" even though she has refused to divulge their identity or present a contact of sale. Nor, does she detail how she determined the prospects' readiness, willingness or ability to purchase the building. SH Motion for Appeal Bond.

The January 21 Order authorizes SH to sell the building, and by that Order, she has apparent ownership and right to sell the building. The Order further provides that SH has no duties to HH with respect to any sale of the building. The Order incorporates no provisions for protecting HH's rights should he win the appeal. Therefore, a supersedeas is essential to protect HH's interest in the building in case the judgment is reversed. Otherwise, there is a grave risk that HH will be deprived of the fruits of a successful appeal.

VI. SUPERSEDEAS IS NECESSARY TO PREVENT THE CONTESTED ISSUES IN THE APPEAL FROM BECOMING MOOT.

The issues in the appeal in these cases contest the ownership of SH of transferred property. Indeed, the arguments raised by HH and 1634 Main, if successful, will require an outright reversal of the January 21 Order and will void the transfers of the real and personal

property interest of HH and 1634 Main. For the reasons more fully discussed above, the authority given SH by the January 21 Order threatens to deprive HH and 1634 of their right to recover the building in case their appeal is successful.

VII. GRANTING THE REQUESTED RELIEF MOOTS ALL OWNERSHIP AND APPELLATE ISSUES, MAKES SH WHOLE, AND PRESERVES HH'S INTERESTS

By granting these petitions and the relief requested by HH and 1634 Main, the issue of SH's void ownership of the transferred property and the possibility of further void transfers being made by SH can be avoided. Granting of these petitions promotes judicial economy by mooting further proceedings at the Circuit Court in these cases and the appeal pending at the South Carolina Supreme Court. Granting these petitions saves the parties thousands of dollars in mounting legal fees. Permitting payment by HH and making SH whole is a far better alternative than continuing litigation and stripping HH and 1634 Main of their property. Alternatively, authorizing a sale of the property at the price of \$1.475 (or even \$1.45) million makes SH whole and provides HH and 1634 Main recovery of their equity in 1634 Main St.

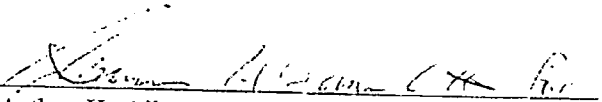
CONCLUSION

For the reasons set forth above, this Court should (1) allow HH to fully pay the amounts properly owed to SH, cancel the deed transferring the property to SH, and vacate its January 21 Order, or (2) order the sale of the property to the ready, willing and able prospect for at least the appraised value of the property.

Signature block on following page

Respectfully submitted,

AIKEN & HIGHTOWER, PA

By: 

Arthur K. Aiken

2231 Devine Street, Suite 201

Columbia, SC 29205

Phone: 803-799-5205

Fax: 803-799-5206

Email: art@aikenandhightower.com

Thomas W. Bunch, II

ROBINSON, MCFADDEN & MOORE, P.C.

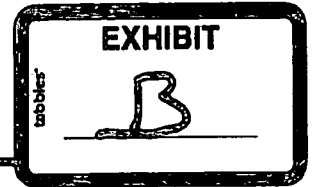
Post Office Box 944

Columbia, SC 29202

(803) 779-8900

ATTORNEYS FOR THE PETITIONERS

May 23, 2014



Thomas W. Bunch, II

From: Desa Ballard <desab@desaballard.com>
Sent: Tuesday, July 15, 2014 1:29 PM
To: Thomas W. Bunch, II
Cc: mara@desaballard.com; Mara Ballard; Beth Cogan
Subject: RE: Hammer settlement; 1634 Main

Importance: High

I've gone back through our communications about this and given it a great deal of thought. We have the contract from the purchaser and Shirley will be signing it tomorrow.

Our position has always been that any settlement with Howard requires a full general release from Howard for Shirley (for which she would reciprocate if you wish). Your refusal to include a release as part of the settlement discussion is a deal breaker.

I did not re-do the settlement documents as I said I would because of the issue of the release. In one last effort to settle, however, I have authority to do this:

Cash payment to Shirley (via our office) of \$50K by close of business tomorrow (7-16) and an additional \$500,000.00 no later than 7-23-2014 (close of business) and a full general release from Howard. Consent to remand and unwind the transfers from Strickland order.

Or –

Cash payment to Shirley (via our office) of \$100K by close of business tomorrow (7-16) and an additional \$550,000.00 no later than 7-23-2014 (close of business) with no release from Howard. Consent to remand and unwind the transfers from Strickland order.

If this is acceptable, I'll have the documents to you by noon tomorrow.

db

Desa Ballard
Ballard & Watson
Attorneys at Law
Telephone 803.796.9299
Facsimile 803.796.1066
E-mail: desab@desaballard.com, copy to mara@desaballard.com

From: Thomas W. Bunch, II [<mailto:TBunch@robinsonlaw.com>]
Sent: Friday, July 11, 2014 3:14 PM
To: Desa Ballard
Subject: RE: Hammer settlement; 1634 Main

Desa,

You have indicated that Shirley is unwilling to guarantee Howard any amount from the sale of the property. Although I understand your position, our offer was intended to hold firm on the accountings you have provided since those continue to go up while the sale price goes down. This brings into play the validity of the alleged expenses and the commercial reasonableness of the sale if we cannot settle. Without settlement, it further brings into play the bond amount, whether Shirley could even get a bond, and whether a buyer could secure a marketable title. Of course, if Howard prevails on appeal, which he should, then the plot really twists.

In light of these uncertainties and significant issues, and the mounting costs for our respective clients, Howard is agreeable to approving the sale at \$1.195mm. Shirley's recovery from the sale would be \$530m which includes payment of the 5% real estate commission. Liens existing at the time of the transfer (January 21) would be paid, and the balance would be paid to Howard.

All of this assumes that the buyer pays the full sales price of \$1.195mm. If the buyer discovers something in its due diligence and wants a price reduction, we would have to assess the significance of that issue and agree on how that reduction should be allocated. I would like to be more definitive on this issue, but don't have a better way to handle it now. We are open to suggestions. Maybe the contract can be drawn tightly enough so that there can be no price reduction, but that is up to the current owner of the property.

As for the appeal, you can let that ride its course, or you can seek to stay it. I'm not sure why you would want the possibility that Judge Strickland's order could be reversed looming over a sale, but that is also your call.

If the sale goes through and this agreement is followed by SH, we would dismiss the appeal if no decision has been rendered. There would be no need for a release or indemnity related to what has transpired as to 1634 Main for the last six months as Judge Strickland's order would be the law of the case, and we are not willing to give broad release you previously sent over.

Tommy

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 28 2014

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

S.C. Supreme Court

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

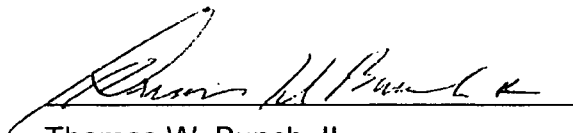
Shirley Hammer,

Respondent

PROOF OF SERVICE

I do hereby certify that on **July 28, 2014**, I caused to be served Appellants' Return to Respondents' Motion to Expedite in the captioned matter via hand delivery to the following individual(s) addressed as follows:

Desa Ballard, Esquire
Ballard & Watson
226 State Street
West Columbia, SC 29169


Thomas W. Bunch, II

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Joseph M. Strickland, Master-In-Equity
James F. Barber, Jr., Supervising Circuit Court Judge
Case No.: Case No.: 2009-CP-40-05911
Case No.: 2010-CP-40-02889

Appellate Case No. 2014-000965

1634 Main, L.P.

Appellant

v.

Shirley Hammer,

Respondent

v.

Howard Hammer,

Appellant,

and

Howard Hammer

Appellant,

v.

Shirley Hammer,

Respondent

CERTIFICATE OF SERVICE

This is to certify that I, Amy L. Westbrook, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below **Appellants' Return to Motion for Costs Pursuant to Rule 222 and 269** in the foregoing matter by hand delivery to the following address:

Desa Ballard, Esquire
Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169

Dated at Columbia, South Carolina this 7th day of January, 2015.


Amy L. Westbrook