

ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Circuit Court

L Casey Manning, Circuit Court Judge

Case No 2009-CP-40-05911

Howard Hammer

Appellant

v

Shirley Hammer

Respondent

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I Did the lower Court err in basing its conclusion of law and findings of fact and resulting dismissal of Appellant's Complaint when the record contained no admissible evidence for the findings of fact upon which the conclusions of law and dismissal were based and where Respondent raised the issue of jurisdiction in his Answer rather than by Motion?

- II Did the lower Court err in finding that the case of Mosley v Mosier, 278 S C 348, 306 S E 2d 624 (1983) was applicable to deny jurisdiction where the parties expressed an intent in their Agreement that the Family Court not have exclusive jurisdiction of the contract at issue between the parties and where dismissal transgressed and denied Appellant Federal and State Constitutional rights to jury trial and due process?

- III Did the lower Court err in its conclusions of law that S C Code Ann § 20-3-690, § 63-3-50 and §§ 63-3-530(A)(2)(25)(30), provided for exclusive Family Court jurisdiction of the instant matter when said Code Sections do not so provide and §§ 63-3-50(A)(2)(25)(30) violates S C Const art III, § 17?

STATEMENT OF THE CASE

The Appellant, Howard Hammer (“Appellant”) filed this action on August 18, 2009, (R p 182) and thereafter on November 9, 2009, filed and served an Amended Complaint For a Declaratory Judgment and/or in the Alternative for Damages, (R pp 13-20) primarily requesting a declaration that a contract entered into between the parties in May 2008 (“May 2008 Contract”) (R pp 166-174) was void *ab initio*, as against public policy in that an integral part of the consideration for the May 2008 Contract was Respondent’s agreement to withdraw and dismiss her criminal complaints against Appellant and, in addition, Respondent required that Appellant agree to an “Order of Protection” not only as to her, but also as to a person, not a party to the contract, and required that Appellant and Respondent execute an Agreement and Release of claims one against the other and that Appellant execute a Receipt and Release in favor of person’s not a party to the Family Court litigation on account of any potential claims by Appellant (R pp 166-174) The May 2008 Agreement in issue contained a final clause stating “this agreement is a binding contract and is enforceable as such under law” (R pp 166, 174, para 14) The alternate causes of action for damages included several, for which Appellant was entitled to trial by jury (R pp 13-20)

On October 01, 2009, Respondent served an Answer, Motion to Dismiss, and Counterclaims Respondent served a First Amended Answer, Motion to Dismiss, and Counterclaims on October 30, 2009 (R p 21) After Appellant served and filed his Amended Complaint (R p 13), Respondent, on November 11, 2001, served a document styled Answer to Amended Complaint, Motion to Dismiss and Counterclaims (R p 30) The primary defense of the Respondent was that the Circuit Court did not have subject matter jurisdiction over any matter related to the Family Court Order, however,

Respondent also alleged defenses of res judicata, laches, waiver, and estoppels, release, another case was pending between the parties, and failure to state facts sufficient to constitute a cause of action (R pp 30-40) Respondent's counterclaims included slander of title, tortious interference with an existing contractual relationship, intentional infliction of emotional distress, abuse of process, invasion of privacy/wrongful intrusion as to contracts to sell and purchase, and malicious prosecution (R pp 30-40) On December 9, 2009, Appellant served his Reply to the Counterclaims

A hearing on Respondent's motion for dismissal as solely set out in the documents entitled Answer, Motion to Dismiss, and Counterclaims, First Amended Answer, Motion to Dismiss and Counterclaims, and Answer to Amended Complaint, Motion to Dismiss and Counterclaims was held by the lower court on March 2, 2010 (R pp 52-100) On March 24, 2010, Appellant served and hand-delivered to the presiding Judge its Motion for compliance with a Family Court Order sealing the record in Family Court and Motion to Strike from Respondent's pleadings and memorandum all references to the Family Court litigation (R pp 214-215) By Order dated and filed April 14, 2010, the court dismissed Appellant's Complaint for lack of subject matter jurisdiction (R pp 3-9)

Appellant received the order on April 20, 2010 and served and filed a Motion pursuant to Rule 59(e), SCRCP on April 29, 2010 (R pp 216-221) The lower court issued its Order Denying Motion to Reconsider on May 18, 2010, which was received by Appellant on May 24, 2010 (R pp 10-12) Notice of Appeal from the Order Denying the Motion Pursuant to Rule 59(e) and the Order dated April 14, 2010 was served on June 17, 2010

ARGUMENT

I

THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT AND BASING ITS CONCLUSIONS OF LAW AND RESULTING DISMISSALS OF APPELLANT'S COMPLAINT ON SAID FINDINGS OF FACT WHERE RESPONDENT FAILED TO PRESENT A PROPER MOTION FOR DISMISSAL ON JURISDICTIONAL GROUNDS UNDER RULE 7(e), SCRPC AND THE RECORD CONTAINED NO ADMISSIBLE EVIDENCE SUPPORTING THE FINDINGS OF FACT UPON WHICH THE CONCLUSIONS OF LAW AND DISMISSAL WERE BASED

When Respondent's Motion for Dismissal came on to be heard the record before the Court upon which a determination on the Motion was to be made contained only the Complaint, Amended Complaint, First Amended Answer, (styled Motion to Dismiss but contained no such Motion) and Counterclaims, Answer to Amended Complaint and Counterclaims (styled Motion to Dismiss but contained no such Motion) and Appellant's Denial Reply to Amended Answer. The lower Court's entire Order is based solely on Respondent's Memorandum of Law and Argument unsupported by any admissible evidence of record submitted by Respondent (R pp 3-9, 41-51, 52-100)

Appellant's action was one for Declaratory Judgment based upon "a certain contract" entered between the parties in May 2008. The Appellant's Complaint alleged that the May 2008 Contract was void *ab initio* as violating public policy for the reason that an integral part of Appellant's agreements in the said contract was Respondent's agreement to withdraw criminal complaints against Appellant and allow the criminal charges to be dismissed (R pp 13-20). The Complaint further alleged that in addition thereto and as a further violation of public policy was that Respondent required Appellant to agree to a "Order of Protection" to a third party not privy to the Contract (R pp 13, 14 para 8). The Agreement in issue also incorporated a provision prohibiting the parties from filing any grievances against any of the parties' attorneys and would, in and of itself, clearly be prohibited by public policy (R p 175). Respondent's Amended Answer joined the issues by alleging that the contract was incorporated into an Order of the Family Court. The Amended Answer was styled Amended Answer,

“Motion to Dismiss” and Counterclaim and purported to incorporate a “Motion to Dismiss” contained in respondent’s original Answer (R p 30) A review of the record reveals that Respondent did not file any Motion to Dismiss pursuant to Rule 7(e), SCRCF but rather merely entered a denial of Appellant’s allegation that the Circuit Court had subject matter jurisdiction Thus, when the matter came on to be heard before the Court, the record contained no separate and distinct Motion by Respondent setting forth the grounds therefore as required by Rule 7(e), SCRCF The Motion was accordingly heard based solely upon an allegation joining *the issues* regarding jurisdiction by the defense raised in the Answer (R p 30) The record contains no evidentiary support for Respondent’s Answer denying jurisdiction (R pp 52-100)

Notwithstanding Appellant’s Motion to Strike, the Court failed to set hearing on said Motion or determine the question of whether the Paragraphs of Respondent’s Answer objected to should have been stricken Rather, the lower Court inadvertently erred and heard Respondent’s Motion to Dismiss, ruling on same as though it was a Motion for Summary Judgment notwithstanding lack of any evidentiary support for it in the record (R pp 52-100, 3-9)

As the record reveals, all of the findings of the lower Court were based solely and completely on statements of Respondent’s counsel and on her Memorandum of Law, which referenced a sealing Order of the Family Court record (R pp 3-9) The sealing Order required no inspection, opening or otherwise having discussion of the Family Court record without first obtaining an appropriate Order to do so (R pp 214-215) Notwithstanding the Order sealing the record in the Family Court Respondent’s memorandum included portions of said Family Court record (R pp 41-51) The failure of Respondent to properly obtain an Order allowing the record in the Family Court to be offered into the record of the lower Court constituted a denial of Appellant’s right for objection and ruling thereon by the lower Court

It is respectfully submitted that the information and matters pertaining to portions of the Family Court record contained in Respondent’s memorandum were improperly included in the findings of fact by the lower Court Moreover,

after Respondent's oral argument presented matters outside the record of evidence and contrary to the Family Court Order sealing the record in that Court, the Appellant made written Motion that any reference to the sealed Family Court record be stricken and for compliance with the Family Court Order *sealing the record* of the prior Family Court proceedings between the parties

This Motion for Compliance was not ruled upon by the lower Court Rather the lower Court's Order submitted by Respondent upon request of the Court and adopted as the Order of the lower Court now on appeal is replete with procedural and factual information from the sealed Family Court record (R pp 3-9)

Notwithstanding agreement by parties to this litigation that the record regarding any litigation between the parties in the Family Court had been, was and is sealed, the lower Court's Order submitted by Respondent upon request of the Circuit Court Judge and adopted as the Order of the lower Court now on Appeal is replete with procedural and factual information from the Family Court sealed record The lower Court's findings of fact and resulting conclusions of law are likewise based entirely on the sealed Family Court record, which even if it had not been sealed and was subject to admissibility was never entered as part of the record in this litigation

It is axiomatic beyond the need for citation that a Court Order must be based upon findings of fact contained within the record before the Court issuing such Order In the instant matter, not only was there an absence of proper Motion by Respondent upon which a dismissal ruling could have been based, but more significantly Respondent failed to submit any admissible evidence supporting its contentions for dismissal and giving rise to a legal factual basis for the findings of fact and conclusions of law made in the instant matter by the lower Court

It is respectfully submitted that in the absence of evidentiary support in the record for the findings of fact upon which the lower Court based its conclusions of law and granted Respondent's Motion that the same should be reversed and remanded to the lower Court for further proceedings in accord with law

ARGUMENT

II

THE LOWER COURT ERRED IN DISMISSING THE COMPLAINT IN THE INSTANT MATTER FOR THE LACK OF SUBJECT MATTER JURISDICTION ON THE GROUNDS OF MOSLEY V MOSIER, 278 S C 348, 306 S E 2d 624 (1983) WHERE THE CONTRACT AT ISSUE ASSUMING *ARGUENDO* THAT IT HAD BEEN PROPERLY SUBMITTED INTO EVIDENCE TO BE CONSIDERED BY THE LOWER COURT CLEARLY SET FORTH THE PARTIES INTENT THAT THE FAMILY COURT DID NOT HAVE EXCLUSIVE JURISDICTION OVER THE CONTRACT IN THE INSTANT MATTER

Assuming for the purposes of Appellant determination that the contract in issue was properly before the lower Court and is now properly before this Court, an analysis of the said contract preponderates in favor of the conclusion it was the parties' intent that the Family Court did not have exclusive jurisdiction of the Agreement between the parties. Our Supreme Court held in the seminal case of Mosley v Mosier, 278 S C 348, 306 S E 2d 624 (1983) that words of art would, after Mosley, no longer make a distinction in connection with jurisdiction for domestic agreements. Rather jurisdiction would be determined by the intent of the parties concerning that issue.

In the instant case, the intent of the parties that they at the very least contemplated if issues arose in connection with their agreement that the Circuit Court would have concurrent jurisdiction and that the Family Court would not have exclusive jurisdiction arises by reason of the following facts

- a That the contract submitted by Respondent at paragraph 15 of same provided that said contract was a binding one and, as such, was enforceable at law (R pp 166, 174)
- b That said contract inured to the benefit of the assigns and successors of the parties over whom the Family Court would not necessarily have jurisdiction (R pp 166, 173)
- c That the said contract included releases from and to two (2) parties other than the litigants over whom the Family Court would have no jurisdiction (R pp 166-181)
- d That the said contract included releases from two (2) parties other than the litigants, which releases if presented as a defense in any litigation,

would give rise to the right of a jury trial, not be afforded in Family Court (R pp 166-181)

Moreover the law supports Appellant's contention that the lower Court erred in dismissing Appellant's Complaint for the reason Hazel v State, 377 S C 60, 659 S E 2d 137 (2008), In the Matter of Shaquille O'Neal, 385 S C 243, 684 S E 2d 549 (2009) Furthermore, as to causes of actions 2 through 7 for Tort, Breaches of Contract, etc , even if an intent had not been indicated, as it has been, for concurrent, if not exclusive jurisdiction in the Circuit Court, the failure to permit Appellant to proceed on those causes of action transgressed and denied Federal and State Constitutional right to jury trial and due process

It is respectfully submitted for the foregoing reasons and in accord with the applicable law the lower Court should be reversed and the case remanded for further proceeding in the Court of Common Pleas

ARGUMENT III

THE LOWER COURT ERRED IN ITS CONCLUSIONS OF LAW THAT S C CODE ANN §§ 20-3-690 AND 63-3-50 PROVIDED FOR EXCLUSIVE FAMILY COURT JURISDICTION OF THE INSTANT MATTER WHEN THOSE SOUTH CAROLINA CODE SECTIONS DO NOT PROVIDE THE FAMILY COURT EXCLUSIVE JURISDICTION IN THE UNDERLYING CASE AND §§ 63-3-50(A)(2)(25)(30) VIOLATE SOUTH CAROLINA CONSTITUTION ART III § 17

Appellant's first cause of action in the Amended Complaint is one for declaratory judgment that a certain contract between the parties involving property located in Richland County and Appellant's IRA account was void *ab initio* as against public policy, on the basis, *inter alia* that part of the consideration was one for an improper *quid pro quo*, i e the transfer of property and mutual releases for Appellant's agreement to dismiss certain criminal charges against Appellant and the parties' mutual agreement not to file grievance complaints against any lawyer representing either of them (R pp 13-20)

The starting point in analyzing Respondent's Pleading below, to the extent the same can be considered one for dismissal for lack of subject matter jurisdiction is a determination of the definition of "subject matter jurisdiction" In Hopkins v Harrell, 352 S C 517, 574 S E 2d 747 (2002), the South Carolina Court of Appeals (J Goolsby) set forth that definition of subject matter jurisdiction as follows

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong

The Common Pleas Court clearly has the power to hear and determine cases to which the proceedings in this instant matter belong pursuant to several sections of the Declaratory Judgments Act S C Code Ann § 15-53-20, provides that

*"Courts of record within their respective jurisdictions have **power to declare rights, status** and other legal relations*

S C Code Ann § 15-53-30, provides that

*That any person interested under a deed will **written contract, or other writing constituting a contract** or whose **rights, status or other legal relationships are effected** by a statute municipal ordinance contract or franchise **may have determined any question** of construction or **validity** arising under the instrument statute ordinance contract or franchise and **obtain** a declaration of rights status or other legal relations there under*

And most notably S C Code Ann § 15-53-90 of the Declaratory Judgments Act provides

*When a proceeding under this chapter involves the determination of an issue in fact such issue may be tried and determined in the same manner as issues of fact are tried and determined of other civil actions in the court in which the proceeding is pending All existing **rights to jury trials are hereby preserved***

The gravamen of Appellant's first cause of action is whether a certain contract between the parties involving property in Richland County and Appellant's IRA account, among other things should be declared void as being against public policy because part of the consideration was Respondent's agreement to dismiss certain criminal charges

brought by her against the Appellant (R pp 13-20) Respondent admits that she entered into an agreement with Appellant and further admits that as part of the consideration of that agreement she withdrew criminal complaints against the Appellant (R pp 30-40)

In light of the Family Court Order sealing the record, which requires that the lower Court not consider any matters related to any action between the parties in the Family Court and/or any reference to any such matters, there is no admissible evidence in the record from which the Court can legitimately determine any fact other than the Appellant's allegations and Respondent's admissions that a certain contract was entered between the parties, the terms of which included as consideration an agreement by Respondent to withdraw criminal complaints in exchange for certain consideration from the Appellant (R pp 30-40)

Applying S C Code Ann § 15-53-20, § 15-53-30, and § 15-53-90, together with the definition of "subject matter jurisdiction" as set forth in Hopkins, it is manifestly clear that the lower Court had the *power to declare the rights* and particularly the *status* of the alleged contract, further the lower Court had the *power to hear and determine* the question of the *validity* of the contract referenced in the complaint and whether or not that contract violated public policy especially in view of the parties agreement that part of the consideration of the contract on Respondent's part was the agreement to withdraw criminal complaints against the Appellant in exchange for certain consideration provided by the Appellant Moreover, Appellant's right to a *jury trial is preserved* and can only be afforded through the Court of Common Pleas

Accordingly based on the foregoing, it is respectfully submitted that Respondent's Pleading for dismissal for lack of subject matter jurisdiction as to Appellant's first cause

of action should have been denied and the lower court erred in dismissing the Appellant's Amended Complaint

In the alternative if Respondent's Pleading is viewed for judgment on the pleadings under Rule 12(c), SCRCP it must be denied under the well established rule that a 12(c) motion can only be sustained where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. A Judgment on the pleadings is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the Appellant would entitle Appellant to judgment. Lydia v. Horton, 343 S C 376, 540 S E 2d 102 (Ct App 2000)

The pleadings in the lower court allege several causes of action which, if resolved in the Appellant's favor, would have entitled Appellant to judgment. Applying the holding in Lydia along with the well settled principal that all properly pleaded factual allegations are deemed admitted for purposes of considering a Motion for judgment on the pleadings Baker Hospital v. Fireman's Fund Ins. Company, 314 S C 98, 441 S E 2d 822 (1994), required that Respondent's Pleading, if it be one under Rule 12(c), SCRCP, also be denied.

AS TO APPELLANT'S REMAINING CAUSES OF ACTION

It is clear beyond the need for citation or analytical discussion that having set aside all references to any matters and any facts presented to the lower Court pertaining to any Family Court litigation between the parties as the Court was required to do pursuant to the Family Court Order sealing the record of any proceedings between the parties in the Family Court, that the allegations of Appellant's remaining causes of action clearly give rise to jurisdiction by the lower Court on numerous grounds not the least of

which is that all of the causes of action entitle Appellant to the right of jury trial which right is only affordable through the Court of Common Pleas

It is of significance to note that S C Code Ann § 63-3-50, which provides the certain instances where the Family Court has exclusive jurisdiction and which is relied upon most heavily by Appellant, does not give the Family Court exclusive jurisdiction in actions related to contracts between the parties. The section provides exclusive jurisdiction in the following circumstances

(2) to hear and determine actions for divorce a vinculo matrimonii, separate support and maintenance, legal separation, and in other marital litigation between parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorney's fees, if requested by either party in the pleadings,

(25) to modify or vacate any order issued by the court,

(30) to make any order necessary to carry out and enforce the provisions of this title, and to hear and determine any questions of support, custody, separation, or any other matter over which the court has jurisdiction, without the intervention of a jury, however, the court may not issue an order which prohibits a custodial parent from moving his residence to a location within the State unless the court finds a compelling reason or unless the parties have agreed to such prohibition, (emphasis added)

S C Code Ann § 63-3-50

As set forth hereinabove the Family Court has jurisdiction over matters to carry out and enforce the provisions of its title only on matters that do not require the intervention of a jury

The Amended Complaint in the instant case states claims which are brought and are triable *by intervention of a jury* (R pp 13-20). Accordingly, it is respectfully

submitted for the reasons set forth above as cause of action for declaratory judgment, and for the further reason as set forth herein as to the remainder of Appellant's causes of action the Respondent's Pleading for dismissal on either grounds set forth and particularly on the grounds of subject matter jurisdiction should have been denied

Assuming *arguendo* the lower Court was not constrained and limited as set forth herein by the Order of the Family Court sealing the record of any litigation between the parties in the Family Court and assuming further, *arguendo*, that the lower Court could have correctly entertained evidence and information from any prior Family Court litigation between the parties and assuming further *arguendo* that the agreement attached to Appellant's brief below was proper and could be considered, the lower Court would still have had appropriate jurisdiction including subject matter jurisdiction in this case

The South Carolina Supreme Court case of Mosley v Mosier, 279 S C 348, 306 S E 2d 624 (1983) specifically sets forth that the Family Court has exclusive jurisdiction of an approved settlement agreement unless the agreement itself evidences an indication by the party that jurisdictions can lie elsewhere Even assuming *arguendo* that this Court could review the agreement submitted by Respondent, contrary to the Order Sealing the Record, such review would clearly manifest and indicate an intention on the part of the parties for the Family Court *not* to have exclusive jurisdiction over any dispute arising out of any agreement between them Again assuming *arguendo* this Court could consider the last paragraph of the Agreement, paragraph 15, the same provides "*This agreement is a binding contract and is enforceable as such under law* (R pp 166-181, 174) This paragraph is preceded by a statement that the agreement if approved is enforceable though the contempt powers of the Family Court The provision of paragraph 14 would

negate the necessity of the final paragraph quoted hereinabove unless the parties had intended that the Family Court would not have exclusive jurisdiction (R pp 166-181, 174)

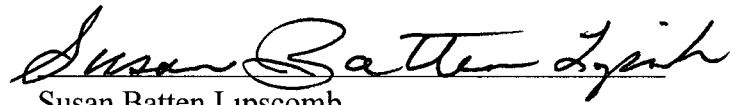
Additionally, the contract by its terms inures to the benefit of heirs and assigns over which the Family Court would not have any exclusive jurisdictional rights (R pp 166-181, 173) And finally the contract incorporates certain releases of claims involving parties other than the Appellant and Respondent over whom the Family Court would again not *necessarily* have jurisdiction in connection with any matters arising out of any such release of claims If, for example, an action was brought in Circuit Court against any third party referenced in the agreement, the third party could not legitimately defeat the right of a jury trial on any such action merely by claiming a release nor could the Family Court have any jurisdiction under any circumstances over the third party or any such action by Appellant or Respondent against any third party

The agreement also incorporates an agreement of the parties not to “file any lawsuits, complaints or *grievances* against the other or any agents or assigns of the other ” (R pp 166-181, 175) The prohibition against filing any grievances necessarily relates to either of the parties attorneys and would in and of itself be an agreement clearly prohibited by public policy

CONCLUSION

In conclusion, the Order of the lower Court dismissing the Appellant’s Amended Complaint should be reversed and the matter remanded to the lower court for proceedings

(Signature to follow)



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Respondent

PROOF OF SERVICE

I, Susan Batten Lipscomb, attorney for Appellant, do hereby certify that on September 7, 2011, Appellant's Certificate of Counsel Pursuant to Rule 211, SCAR was served on counsel of record by causing a copy to be placed in the U S Mail postage prepaid addressed as set forth below

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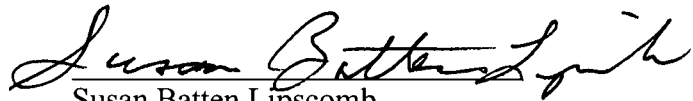
v

Shirley Hammer

Respondent

APPELLANT'S CERTIFICATE OF COUNSEL PURSUANT TO RULE 211, SCACR

The undersigned attorney for Appellant certifies that the Final Brief of Appellant and Final Reply Brief comply with Rule 211(b), SCACR



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PROOF OF SERVICE

I, Susan Batten Lipscomb, attorney for Appellant, do hereby certify that on September 7, 2011 Final Brief of Appellant was served on counsel of record by mailing a copy to them by United States Mail, postage prepaid, addressed as set forth below

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