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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L Casey Manning, Circuit Court Judge

Case No 2009-CP-40-05911

Howard Hammer — Appellant

v

Shirley Hammer — Respondent

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# FINAL BRIEF OF RESPONDENT

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4 DOES THE CLEAN HANDS DOCTRINE PRECLUDE A PARTY FROM ATTACKING AN ORDER AS VIOLATING PUBLIC POLICY WHEN THAT PARTY RECEIVED BENEFITS UNDER THAT ORDER?

## STATEMENT OF THE CASE

This action below was initiated by Appellant, Howard Hammer, ("Appellant" or "Mr Hammer") as an attempt to circumvent and renege on two Family Court settlements, incorporated into Family Court orders that were voluntarily entered into by Appellant with the advice and assistance of competent domestic counsel (R-p 4) By amended complaint dated November 4, 2009, Appellant sought a

> declaratory judgment and relief in connection with *a certain contract* entered between the parties in May 2008 ("*May 2008 Contract*"), which contract involves, among other matters property located at 320 St James Street Columbia, South Carolina and Plaintiff's retirement (IRA) accounts

Amended Complaint for Declaratory Judgment and/or In the Alternative for Damages (the "Amended Complaint"), ¶ 7 (emphasis added) (R p 14)

The characterization of the May 2008 contract as a "certain contract" is patently misleading as Mr Hammer failed to disclose that the May 2008 Contract was a partial settlement of Family Court litigation that has been pending since September 2, 2005, and, more significantly that the Family Court expressly "adopted, approved, incorporated into, merged, integrated with and made" the May 2008 Contract a court order (R -p 143) Moreover, the Family Court expressly retained "jurisdiction to issue any orders necessary to effectuate the terms of the Agreement " *Id* at 4, ¶ 2 (R- p 143, p 164)

Appellant's amended complaint in this case is an improper collateral attack on a valid and binding order of the Family Court which has exclusive jurisdiction over both the parties and their claims Consequently, the Circuit Court properly dismissed the amended complaint for lack of subject matter jurisdiction (R -p 3)

Respondent, Shirley Hammer ("Respondent' or "Mrs Hammer' ) invoked the jurisdiction of the Family Court on September 2, 2005, seeking an order of separate maintenance and

support, custody, equitable distribution of property and other relief (R -p 137) She filed a Second Amended Complaint on December 6, 2007 seeking a divorce and other relief (Id )

The Family Court litigation was settled in two phases First, the divorce and property settlements were agreed to in May 2008 and made orders by Judge Jones on May 12, 2008 (i e May 2008 Contract) (R- pp 137-181) Second on June 23, 2009, the parties settled issues relating to child custody, visitation, and related issues The Family Court entered its orders approving this Settlement Agreement and Ending the Action on August 19, 2009 (R- pp 115-136)

Beginning in May 2009, Mr Hammer mounted at least five attacks on the 2008 and 2009 Settlement Agreements and Family Court orders

First, on May 4, 2009, Mr Hammer sought to amend, modify, void and set aside the May 12, 2008 order and requested a new trial under Rule 60(b), SCRCP By order of Judge Jones entered September 1, 2009, this motion was dismissed with prejudice, in view of the August 19, 2009 order (R- pp 4-5)

Second, Mr Hammer, *pro se*, filed a motion to withdraw, rescind, and repudiate his consent to the June 23, 2009, Settlement Agreement That motion was denied by order of the Family Court (Judge Rucker) on January 27, 2010 (R- pp 202-207)

Third, on September 4, 2009, Mr Hammer filed a Motion to Reconsider Amend Alter, Modify and/or For a New Trial and Stay of the following four Family Court orders, each dated August 19, 2009 (1) Order for Transfer of Individual Retirement Account, (2) Order Sealing Record, (3) Order Approving Settlement Agreement, and (4) Order (Ending Action) This omnibus motion was denied by Order of Judge Rucker on January 27, 2010 (R- pp 193 199)

Mr Hammer's fourth attack was his collateral attack on the Family Court s May 2008 Order in the Court of Common Pleas, which is the subject of this appeal (R -p 13) In her First Amended Answer, Motion to Dismiss, and Counterclaims to his Complaint, Mrs Hammer asserted, inter alia, three affirmative defenses (1) lack of subject matter jurisdiction (Rule 12(b)(1), SCRCP), (2) failure to state facts sufficient to constitute a cause of action (Rule 12(b)(6), SCRCP) and (3) *res judicata* (Rule 8(c) SCRCP) (R -p 21)

By order dated April 14, 2010, Judge Manning dismissed Mr Hammer's Amended Complaint for lack of subject matter jurisdiction, but expressly provided that his "order [did] not end the action as to [Mrs Hammer's] counterclaims" (R -p 3) All the counterclaims arise out of Mr Hammer's conduct in July and August 2009 (R- pp 3-9) Mr Hammer moved for reconsideration of this dismissal on April 29, 2010, which was denied by Order of Judge Manning entered May 18, 2010 (R- pp 10-12)

Fifth, on August 25, 2010, Mr Hammer filed a complaint in Family Court seeking substantially similar relief as in the amended complaint that was before Judge Manning (R - pp 182-190) Mrs Hammer moved to dismiss this complaint on the following grounds (i) failure to state facts sufficient to constitute a cause of action (Rule 12(b)(6), SCRCP), (ii) law of the case doctrine and *res judicata* (Rule 8(c), SCRCP), (iii) another action pending between the same parties on the same claims (Rule 12(b)(8), SCRCP), (iv) and lack of subject matter jurisdiction (Rule 11(b)(1), SCRCP) Judge Rucker held a hearing on February 8, 2011, at which he granted the motion from the bench and requested that Mrs Hammer's counsel propose a written order

## ARGUMENT

### I THE CIRCUIT COURT PROPERLY DETERMINED RESPONDENT'S SUBJECT MATTER JURISDICTION DEFENSE

Appellant argues that the court below improperly determined Mrs Hammer's jurisdictional defense because she failed to make a formal motion to dismiss "as required by Rule 7(e) [sic] SCRCP " Initial Brief of Appellant at 8 (hereafter "Appellant's Br ")

Rule 12(b)(6), SCRCP, provides two distinct methods of asserting defenses listed in subsections (1)–(8) of the rule One, every defense must be asserted in a responsive pleading Two, at the option of the pleader, defenses (1)–(8) may be made by pre-answer motion "A motion making any of these defense *shall be made before pleading* " *Id* (emphasis added) If any 12(b)(1)–(8) defense is asserted in a pleading, as in the amended answer below, Rule 12(d), SCRCP, provides that the defenses "shall be heard and determined before trial on the application of any party " Application in this context is a request and not necessarily a formal motion because a motion on any 12(b)(1) defense must be made *before answer*, except as permitted by Rules 12(c) and (h)(2) Consequently, when Rule 12(d) is read in view of Rule 12(b), it is beyond peradventure that any 12(b)(1) defense asserted in an answer must be determined before trial on the application of a party, and the application need not be a formal motion

Most significantly, subject matter jurisdiction may be raised at any time by any means Rule 12(h)(3), SCRCP, explicitly provides

> Whenever it appears by *suggestion* of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the case

*Id* (emphasis added) This rule is exactly the same as the former federal rule [1] One leading federal practice treatise concluded that a formal motion was not required

> Moreover, no formal motion need be made in order to raise the subject matter jurisdiction issue Rule 12(h)(3) provides that the defense may be interposed by informal "suggestion" rather than by motion Since a "suggestion' technically is not a motion, a challenge to the court's subject matter jurisdiction is not subject to the consolidation requirements of Rule 12(g)

5C Charles Allen Wright & Arthur R Miller, Federal Practice and Procedure § 1393, at 539–40 (3d ed 2004) (footnotes omitted)

Moreover, Mr Hammer was on notice that lack of subject matter jurisdiction was asserted in the amended answer,[2] (R -pp 23-24) and had adequate notice of the hearing held by Judge Manning on March 2, 2010, to determine that defense A Roster Notice dated February 2, 2010, plainly stated that a hearing would be held on March 2, 2010 at 3 45 p m Respondent served and filed her memorandum in support of dismissal on February 26th (R -p 41) Appellant failed to submit a memorandum in opposition At various places in his initial brief, Appellant asserts that there was no "evidentiary support in the record for the findings of fact upon which the lower court based its conclusions of law " Initial Brief at 9 Determination of subject matter jurisdiction is a question of law The only "fact" needed to rule on subject matter jurisdiction was the "fact' that the 2008 contract was converted from a private agreement to a family court order Appellant failed to disclose this "fact" to the court and asserts that Respondent was prohibited from disclosing it As argued in Point II below, Respondent not only had a right but also a duty to disclose this "fact "

Accordingly, the court below properly resolved Respondent's Rule 12(b)(1) defense

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[1] Since December 1 2009 Federal Rule 12(h)(3) has slightly altered language If the court determines at any time that it lacks subject matter jurisdiction the court must dismiss the action No substantive change was made Whether by suggestion motion application or request of any party or *sua sponte* the court must dismiss if subject matter jurisdiction is lacking

[2] Amended Answer ¶¶ 36 ( This Court lacks subject matter jurisdiction ') 38 39 40, 43 (all asserting Appellant s remedy is in Family Court for various reasons)

## II THE CIRCUIT COURT APPROPRIATELY TOOK JUDICIAL NOTICE OF THE SEALED FAMILY COURT RECORD

Appellant argues that Respondent violated the Family Court Sealing Order by referencing various records, including the Orders resolving the domestic litigation between Mr Hammer and Mrs Hammer, the same parties in the subject appeal He also asserts that Judge Manning improperly based his findings on the Family Court record Both arguments are plainly without merit and should be rejected for three reasons

First, the sealing order expressly provides that the parties may access and use the sealed file in the domestic litigation In this connection, the sealing order states

> Notwithstanding the foregoing, both Plaintiff and Defendant, their respective counsel, the Guardian *ad Litem* and the Court personnel shall be allowed access to this file and the use thereof in this litigation between Plaintiff and Defendant, provided, however, the documentation therein may be used only in connection with this litigation

Order Sealing Record ¶ 3 (emphasis in original)(R -p 215) This provision plainly permits Mr Hammer, Mrs Hammer, their counsel, the Guardian *ad Litem*, and Court personnel to access the sealed file without first obtaining a Court Order [3] Judge Manning found that the case below "is a continuation of a marital dispute still ongoing in the Family Court since September 5, 2005 " (R -pp 10-12) Although the term "this litigation" in paragraph 3 of the Sealing Court might be narrowly and woodenly construed to mean only the Family Court litigation, Judge Manning appropriately rejected this view (R -p 11) The parties to the litigation are exactly the same and the subject matter of the case below—the "certain contract"—was executed in partial settlement of the Family Court litigation, and made an Order of the Family Court

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[3] The immediate prior paragraph states The record herein sealed shall not be inspected opened or otherwise discussed without an appropriate Order allowing any such activity which shall only be issued after due and proper notice *to both Plaintiff and Defendant* and after due hearing *Id* ¶ 2 (emphasis added) Because this provision requires notice to both Mr Hammer and Mrs Hammer it plainly contemplates a third party making the application to inspect and use the sealed record and does not require Respondent to give herself notice of her own contemplated use of the sealed files

Appellant does not, and cannot, deny any of these facts Instead, he argues that the Circuit Court below was not entitled to the truth of these 'facts" because Mrs Hammer failed to obtain permission to reference the Family Court record (R -p 221) If Appellant thought Respondent was in violation of the Sealing Order the appropriate remedy was to ask the Family Court to hold her in contempt under paragraph 4 "any person violating the terms of the Order shall be subject to contempt " (R -p 215) Appellant failed to seek a contempt citation knowing full well that Judge Rucker would find his collateral attack inappropriate and a continuation of the Family Court litigation [4]

Second, as this Court so aptly stated in *Freeman v McBee*, 280 S C 490, 313 S E 2d 325 (Ct App 1984)

> A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records 31 C J S , Evidence, Section 50(1), p 1018-1021 It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case *Montalbano v Automobile Ins Co* , 218 S C 367, 62 S E 2d 829 (1950)

*Id* at 494, 313 S E 2d at 327 Moreover, a court can take judicial notice of its records, files and proceedings for all proper purposes *See South Carolina Department of Social Servs v Jamie C* , 383 S C 221, 227, 678 S E 2d 463, 466–67 (Ct App 2009) (explaining use of Rule 201 SCRE)

Rule 201, SCRE, plainly contemplates judicial notice of records from other courts To be subject to judicial notice, a fact must be such that "its accuracy may be ascertained by reference to readily available sources of indisputable reliability " *Bowers v Bowers*, 349 S C 85, 94, 561

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[4]Moreover Mr Hammer s appeal only delays the inevitable At some point if his complaint is allowed to go forward he will have to introduce that certain contract upon which he bases his request for relief and admit that it is part of the Family Court Order — or he will have to continue to deceive the court by presenting "a contract that he would claim is separate and apart from the Family Court Order As is already evident that certain contract is the settlement agreement that was incorporated into and made a part of the Family Court order that he presently demands remain sealed By insisting that the Order remain sealed he attempts to prevent this Court from determining the deception he is practicing upon both this Court and the circuit court

S E 2d 610, 615 (Ct App 2002) (citation omitted) [5] Unquestionably, Family Court records meet the Rule 201(b) SCRE standard Moreover it has been noted that "the most frequent use of judicial notice is in noticing the content of court records" *Colonial Penn Ins Co v Coil*, 887 F 2d 1236, 1239 (4th Cir 1989) Rule 201(c) even permits a court to take judicial notice *sua sponte* Accordingly, the Court below properly took judicial notice of the Family Court orders in determining that it lacked subject matter jurisdiction

Third, as recognized by Judge Manning, Appellant Mr Hammer "created the necessity that [the Court below] have access to, and take notice of the Family Court filings in the parties' related domestic case" (R -p 11, ¶ 4) Additionally, it has long been established in American procedure that

> [w]hen one party introduces and reads from a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject

*Tappan v Beardsley*, 77 U S 427, 435 (1870) When Appellant brought his purported declaratory judgment action on the 2008 Contract, Respondent had not only the right, but a duty, to inform the court below that it was no longer a contract between the parties, but was a Family Court Order enforceable only by contempt As argued in Point IV herein below, Mr Hammer does not come to court with clean hands He benefitted from the so-called "certain contract" and then, when it suited his purpose not to perform his concomitant obligations, he collaterally attacked the "contract" in the

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[5] *See Maverick Momentum L L C v M S S Supply Co* 2006 WL 3192273 (S C Com P May 9 2006) in which Circuit Judge Alison Renee Lee took judicial notice of records from the United States District Court for the Western District of Washington See also United States v Vann 630 F 3d 431 437–38 & n 3 (2010) (Rehearing En Banc Granted Jan 6 2011) (noting that the Fourth Circuit may take judicial notice of state court records not part of the record before the district court) (citing *Loavar v de Santibanes* 430 F 3d 221 224 n 2 (4th Cir 2005) (taking "judicial notice of the records of a court of record ) *Colonial Penn Ins Co v Coil* 887 F 2d 1236, 1239 (4th Circ 1989) (noting that courts of appeals may properly take judicial notice of state court proceedings that were not part of the record before the district court))

Circuit Court without disclosing its true nature No court can fairly adjudicate a dispute when a party hides the true facts and nature of its claims as Appellant attempted to do below As established in Point III, the Circuit Court does not have subject matter jurisdiction over a Family Court order dividing and allocating what is indisputably marital property Without resorting to the sealed Family Court record, the Circuit Court would have had no basis to determine subject matter jurisdiction was lacking Appellant opened the door to the sealed record by collaterally attacking the Family Court Order with his declaratory judgment action, and Judge Manning appropriately closed the door to the Circuit Court by finding a lack of subject matter jurisdiction

## III THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION

### *A The Family Court Has Exclusive Jurisdiction over the Issues Raised in the Amended Complaint*

In relevant part S C CODE ANN § 63-3-50 provides

> (A) The family court has exclusive jurisdiction
>
> > (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 (emphasis added),
> >
> > (25) to modify or vacate and 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,

(B) Notwithstanding another provision of law, the family court and the probate court have concurrent jurisdiction to hear and determine matters relating to paternity common-law marriage, and interpretation of marital agreement, except that the concurrent jurisdiction of the probate court extends only to matters dealing with the estate, trust and guardianship and conservatorship actions before the probate court

Moreover, S C CODE Ann § 20-3-690 provides that "[t]he *family courts of this State have subject matter jurisdiction over all contracts relating to property* which is involved in a proceeding under this article *and over the construction and enforcement of those contracts*" *Id* (emphasis added) The term 'this article" in § 20-3-690 refers to divorce and settlement agreements in South Carolina

Plainly, each claim and related issues raised in the circuit court amended complaint has already been heard and determined by the Family Court, which had exclusive subject-matter jurisdiction under S C CODE ANN § 63-3-50 (2), (25), (30), and under § 20-3-690, S C CODE ANN (1976, as amended)

The First and Fourth Causes of Action for a Declaratory Judgment in Appellant's complaint assert that the May 2008 Family Court Order is void as against public policy These issues were heard by the Family Court and rejected by orders of January 27, 2010 (R- pp 190-215) As described above, these Orders rejected Mr Hammer's post-trial attack on the June 2009 Settlement Agreement and August 19th Order Approving the Settlement Agreement and Order Ending the Action (R- pp 190-215) The August 19, 2009 Order ending the action expressly reaffirmed the May 12, 2008, Order as later modified by the August 19, 2009 Order (R -pg 101), Consequently, the May 2008 and the August 19, 2009, orders are both indivisible and indistinguishable

Accordingly, Mr Hammer's public policy attack was already heard, determined, and rejected by the Family Court as follows

> Defendant argues the agreement is contrary to public policy, and makes other general allegations of material misrepresentations by Plaintiff Settlement agreements in Family Court are not contrary to public policy, in fact, they are encouraged Upon careful review of the agreement approved by this Court, there are no provisions which cause this Court public policy concerns Defendant presented no credible or independent support for his allegations regarding material misrepresentations

Family Court Order Regarding Defendant's *Pro Se* Motion, January 27, 2010, at 4 (R- p 205)

The Second, Third, Fifth, and Sixth causes of action in Mr Hammer's complaint to the circuit court complaint all relate to disposition of the marital home, to transfer of Mr Hammer's IRA account, and to other matters intrinsically related to the domestic relations litigation within the exclusive jurisdiction of the Family Court

All of the property settlements in the May 2008 and June 2009 Settlement Agreements are in connection with the divorce proceeding The law in this State expressly grants subject matter jurisdiction to the Family Court over the construction and enforcement of all these contracts (S C CODE ANN § 20-3-690) and exclusive subject matter jurisdiction over all "marital litigation between the parties" S C CODE ANN § 63-3-50 (A) (2) Significantly Appellant makes the fallacious assumption that he has a contract claim He does not It is well established that when a settlement agreement is incorporated into a Family Court Order, it loses its contractual character, and the only permissible remedy for breach of its terms is contempt *See e g*, *Emery v Smith*, 361 S C 207, 214, 603 S E 2d 598, 601 (Ct App 2004)(merging an agreement into an order transforms 'it from a contract between the parties into a decree of the court") Thereafter, the agreement, as part of the court order, "is fully subject to the Family Court's authority to interpret and enforce its own decrees" *Id*, 603 S E 2d at 602 (*citing Terry v Lee* (*Terry I*), 308 S C 459, 419 S E 2d 213 (1992)(stating that the Family Court has

*exclusive jurisdiction* to determine the rights of the parties under an agreement incorporated into a Family Court decree) (emphasis added)

### B *The Circuit Court Did Not Have Concurrent Jurisdiction Over Claims Asserted in the Amended Complaint*

S C CODE ANN § 63-3-50(B), quoted above, plainly demonstrates that when the legislature grants concurrent jurisdiction, it does so explicitly This provision provides for concurrent jurisdiction by the family and probate courts to hear and determine matters relating to paternity, common-law marriage, and marital agreements *only if these matters are relevant to pending probate court actions* involving estate, trust, guardianship, and conservator matters

Significantly, there is no similar provision for concurrent jurisdiction in the circuit court over the claims raised by the amended complaint

### C *Unless a Settlement Agreement Unambiguously Denies Continuing Jurisdiction, a Family Court Has Exclusive Jurisdiction to Modify and Enforce its Order by Contempt*

In the seminal case of *Moseley v Mosier*, 279 S C 348, 306 S E 2d 624 (1983), our Supreme Court, reversing and clarifying ambiguous and inconsistent prior authority, expressly held that once a settlement agreement is approved by the Family Court, it may be enforced by the court's contempt powers unless the settlement agreement expressly denies the court continuing jurisdiction *Id* at 353, 306 S E 2d at 627 ("With the court's approval, the terms become a part of the decree and are binding on the parties and the court However, unless the agreement unambiguously denies the court jurisdiction, the terms will be modifiable by the court and enforceable by contempt ")

Both the 2008 and 2009 Settlement Agreements and related Family Court orders expressly and unambiguously vested with the Family Court jurisdiction to enforce the orders and

agreements *See* May 2008 Order at 4, ¶ 2 (R- p 143), 2009 Order Ending Action at 8, ¶¶ 7 and 9 (R- p 108)

Accordingly, under *Moseley*, the Family Court, and only the Family Court, has continuing subject matter jurisdiction over the claims raised by the Amended Complaint *Moseley v Mosier* 279 S C 348, 306 S E 2d 624 (1983)*See also Swentor v Swentor*, 336 S C 472, 478–79, 520 S E 2d 330, 334 (1999)(holding that even in the face of an agreement to arbitrate, the Family Court does not lose jurisdiction)

Moreover, our Supreme Court expressly held that the Family Court, and not the Circuit Court, had exclusive jurisdiction over whether military retirement benefits could be deemed community property under a California divorce decree *Terry v Lee* (Terry I), 308 S C 459, 419 S E 2d 213 (1992) The parties were married in 1945, and were granted an Interlocutory Judgment of Divorce in 1967, which incorporated the parties' property settlement The husband was in the United States Navy, and at the time of the 1967 divorce, military retirement benefits were not divisible as martial property After a change in federal law, the wife instituted anaction in a Richland County Court of Common Pleas in 1990 seeking a division of military retirement benefits The Supreme Court held that under S C CODE ANN § 20-7-420(2) (now recodified as § 63-3-50(A)(2)) that the Family Court had exclusive jurisdiction as follows

> Separate actions to determine property rights will be considered "other marital litigation" under Section 20-7-420(2)—thereby vesting exclusive jurisdiction in the family court-if the relief sought is incidental to the decree of divorce *See Sims v Sims*, 290 S C 190, 348 S E 2d 835 (1986), *Zwerling v Zwerling*, 273 S C 292, 255 S E 2d 850 (1979), Brown v Brown, 295 S C 354 368 S E 2d 475 (Ct App 1988), *Eichor v Eichor*, 290 S C 484, 351 S E 2d 353 (Ct App 1986)

*Terry*, 308 S C at 461, 419 S E 2d at 214

If litigation over property rights under a 1967 California settlement incorporated in a California decree is considered within the exclusive jurisdiction of the Family Court, then *a fortiari* the litigation below must also be within the exclusive jurisdiction of the Family Court under current S C CODE ANN § 63-3-50(A)(2) which contains the exact same language as the predecessor statute

Appellant's arguments to the contrary are fundamentally flawed and must be rejected In his Statement of Issues on appeal "II" and at pages 10 and 11 of his Initial Brief, Appellant incredibly asserts that "the parties expressed an intent in their Agreement that the Family Court not have exclusive jurisdiction ," and that because the agreement contained provisions concerning third parties, the Family Court lacked exclusive jurisdiction First, any reasonable reading of the 2008 and 2009 agreements amply refutes the suggestion that the parties expressly rejected family court exclusive jurisdiction Paragraph 2 of Judge Jones' May 12, 2008 Order plainly states "This Court retains jurisdiction to issue any orders necessary to effectuate the Terms of the Agreement (R -p 173) More significantly, the so-called "contract" (Partial Settlement of Outstanding Issues), which the parties entered into prior to adoption by the Family Court unequivocally provides

(i) "This Order shall remain in full force and effect unless terminated by a subsequently issued order of the *Family Court* " (R -p 172, ¶ 8(F) (emphasis added)), and

(ii) "When this settlement is approved it shall be enforceable through the contempt powers of the *Family Court* " (R -p 174, ¶ 14 (emphasis added))

Consequently, it cannot be said, as Appellant cavalierly asserts, that the parties expressly denied continuing Family Court jurisdiction to enforce the terms and conditions of the Order

Second, Mr Hammer s Circuit Court Amended Complaint related only to the rights and obligations of Mr Hammer and Mrs Hammer, and did not concern any third parties Whatever jurisdiction may lie in the Family Court with respect to the rights and obligations of third

parties, it is abundantly clear that the case below is exclusively related to the rights and obligations of Appellant and Respondent, and no one else

Moreover, Appellant's purported declaratory judgment action is not justiciable To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy *Sunset Cay LLC v City of Folly Beach*, 357 S C 414, 423 593 S E 2d 462, 466 (2004) In *Polin v Polin*, 295 S C 129, 367 S E 2d 433 (Ct App 1988), a case materially indistinguishable from this case, this Court found that the plaintiff's public policy argument was not a justiciable controversy The plaintiff in *Polin* appealed from the denial of his motion for a new trial in a divorce action The motion was based in part on his allegation that the settlement agreement entered between the parties and incorporated into the final divorce degree was void as against public policy because it contained a release of third persons from civil and criminal claims arising out of the marriage

This Court expressly declined to address the public policy question on the grounds that no such claim against a third person had been asserted "Therefore," the court held, "the issue is not ripe and a decision by this court would be purely advisory " *Id* at 130–31, 367 S E 2d at 434 Recognizing that a court "cannot render a declaratory judgment in the absence of an actual justiciable controversy," the Court of Appeals affirmed the Family Court s order *Id*

*Polin* is controlling in this case with respect to Appellant's declaratory judgment claim and his claim for damages based on the allegedly void contract In his Amended Complaint, Appellant advances vague, conclusory public policy arguments but presents no facts sufficient to establish the existence of an actual justiciable controversy Nowhere in the Amended Complaint does Appellant allege that he has asserted specific claims against Respondent or any third parties, or even that he would assert such claims were it not for the releases contained in

the May 2008 Order Presumably, Appellant does not suggest that the numerous criminal claims against him, released by Respondent in the May 2008 Order, should be reinstated and pursued Accordingly, the public policy issue is not ripe for review and is therefore non-justiciable

### *D Even Under Pre-*Moseley *Law, When a Circuit Court Could Have Concurrent Jurisdiction Over Domestic Settlements, the Family Court Would Have Had Exclusive Jurisdiction*

It is well-settled in South Carolina law that when courts have concurrent jurisdiction, the subject matter jurisdiction of the court first acquiring jurisdiction is exclusive *McDonald v McDonald*, 276 S C 573, 281 S E 2d 109 (1981) In affirming a circuit court order dismissing a complaint for lack of subject matter jurisdiction, the Supreme Court held

> Here, action involving the same parties, substantially the same issue (the parties' respective interests in the marital residence), were pending in the family court and circuit court, courts of concurrent jurisdiction *The family court acquired jurisdiction first therefore it acquired exclusive jurisdiction to hear all further proceedings in the case See Tucker v Tucker*, 264 S C 172, 177, 213 S E 2d 588 (1965)(emphasis added)

*Id* at 575, 281 S E 2d at 110 Accordingly, even if the circuit court had concurrent jurisdiction, which it plainly did not under current law, the family court would have exclusive subject matter jurisdiction because it acquired jurisdiction on September 2, 2005, almost four years before Appellant filed his complaint in this case It is noteworthy that Appellant assiduously avoided any mention of *McDonald* both in the court below and in his initial brief in this Court

### *E Appellant's Jury Trial Argument Is Without Merit*

Appellant asserts at various places in his Initial Brief that exclusive family court jurisdiction over the amended complaint violates his constitutional right to a jury trial The Seventh Amendment to the U S Constitution, guaranteeing the right to trial by jury in federal

civil trials when the value in controversy exceeds twenty dollars, has never been applied to the states See *McDonald v Chicago*, 561 U S ___, 130 S Ct 3020, 3035n 13 (2010) (seventh amendment not incorporated into the 14th Amendment's due process clause) Accordingly, in civil matters, states are free to structure their judicial systems to exclude trial by jury South Carolina's family court system is one such example Consequently, Appellant's jury trial argument is flawed and must be rejected

## IV APPELLANT IS NOT ENTITLED TO RELIEF BECAUSE HE BENEFITTED FROM THE SETTLEMENT WHICH HE NOW ATTACKS

In *First Union Nat l Bank of S C v Soden*, 333 S C 554, 568, 511 S E 2d 372, 379 (Ct App 1998), this Court observed that the doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party The doctrine is applied in Family Court litigation *See Bodkin v Bodkin*, 388 S C 203, 221, 694 S E 2d 230, 240 (Ct App 2010)(noting that the Family Court found Husband had unclean hands) "Unclean hands" is an equitable doctrine A complaint for a declaratory judgment can be either legal or equitable *See South Carolina Dept of Transportation v Horry County*, 391 S C 76, 81, 705 S E 2d 21 (2011) Appellant, having benefitted in several respects from the agreement he attacks, acted unfairly and to the prejudice of Respondent

By attacking the 2008 Family Court Order as violating public policy, Mr Hammer engages in the sheerest form of hypocrisy He insisted on, and received, the benefits of that 2008 order,[6] which he now wants to disavow Further, more than one year after the 2008 settlement and family court order that he now attacks, Mr Hammer entered into another settlement, which

[6] For example pursuant to the 2008 Family Court order he insisted that Mrs Hammer convey certain real estate to him, which he then sold to a third party (Does Appellant propose to return that property to Mrs Hammer if granted the relief he seeks? Will his purchaser be willing to accommodate?)

was incorporated into a family court order of June 2009 That agreement once again called for the dismissal of additional criminal charges that were pending against him Thus, in 2009, he continued to participate in the very same settlement behavior—insisting on the dismissal of criminal charges against him—that he claims is inappropriate and against public policy under the 2008 order

Perhaps more egregious, two months *after* he initiated this lawsuit, Mr Hammer, his attorney, and an assistant solicitor signed a document (R-p 213) dated October 19, 2009, which stated that the criminal charges against him were dismissed pursuant to the June 2009 family court order and settlement [7] Thus, even while he was claiming in the court below that the May 2008 Family Court Order was invalid for public policy reasons because it included a recommendation that criminal charges against him be dismissed, he was insisting on and acting upon the very same provision in the June 2009 Family Court Order and settlement

According to Mr Hammer, the Family Court orders are valid and do not violate public policy while he is receiving his benefits under those orders, however, once he has obtained those benefits, he claims those orders are invalid so that he does not have to perform his obligations

To allow this egregious and bad faith attack on the 2008 Family Court order, on which he has, himself, relied to his benefit, would be to open a Pandora's box for all Family Court litigants No Family Court order would be final or could be relied on Instead, any litigant could receive the benefits of the order, but when it came time for the litigant to perform his or her obligations under the order, he or she could then run to the Circuit Court and attempt to

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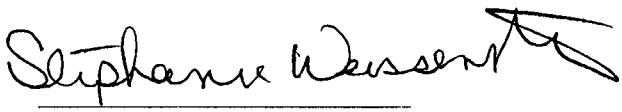
[7] The 2009 family court order confirmed the 2008 Family Court order and partial settlement agreement except to the extent the 2009 order modified it The October 19 2009 document contains a misrepresentation about the position of Mrs Medlin a victim who was not represented in the creation or execution of that document

overturn the Family Court If Appellant is allowed to do this now, every litigant in Family Court will have a roadmap to disrupt the entire Family Court system That is precisely why the legislature made Family Court jurisdiction exclusive in S C CODE § 63-3-50

## V CONCLUSION

Respondent requests that the Order of Judge Manning dismissing the amended complaint for lack of subject matter jurisdiction be affirmed in all respects

Respectfully submitted,



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Columbia, South Carolina
July 5, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L Casey Manning, Circuit Court Judge

Case No 2009-CP-40-05911

Howard Hammer — Appellant

v

Shirley Hammer — Respondent

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**CERTIFICATE OF COUNSEL**

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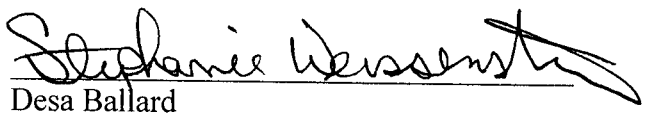
Counsel for Appellant hereby certifies that the Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules



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July 5, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
L Casey Manning, Circuit Court Judge
Case No 2009-CP-40-05911

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Howard Hammer,

Appellant,

vs

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

Respondent

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CERTIFICATE OF SERVICE

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The undersigned certifies that she has, this date, caused to be served a copy of the **Final Brief of Respondent** upon opposing counsel in this matter via by regular U S mail delivery with sufficient first class postage affixed, addressed as follows

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July 5, 2011