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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
Tracking Number 2010-164067

Howard Hammer — Appellant

v

Shirley Hammer — Respondent

FINAL REPLY BRIEF OF APPELLANT

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Appellant initially respectfully addresses and calls to the Court's attention matters present in Respondent's statement of the case, which were and are outside the evidence of record before the lower court Appellant also respectfully notes that there appears to be a pattern of unnecessarily harsh characterizations towards Appellant personally, unsupported by the actual record before the lower court and potentially offensive to the Oath of Office and required Rules of Conduct

AS TO MATTERS PRESENTED IN THE STATEMENT OF THE CASE AND BRIEF OUTSIDE SCOPE OF TRANSCRIPT OF RECORD

Respondent's statement of the case, argument and memorandum in the lower court on its motion to dismiss repeatedly refer to a separate and distinct Family Court action between the parties It is a matter of record and undisputed that the Family Court case was the subject of a motion for and the issuance of an order ***sealing the record*** therein (R pp 214-215)

The order sealing the record in the Family Court specifically provided that the ***sealed record*** was not to be "inspected, opened, **or otherwise discussed without an appropriate order** " The sealing order further provided that any inspection or discussion of the case could be only " **after due and proper notice to Plaintiff and Defendant and after due hearing"** (R pp 214-215)

In the instant case before this court, there is absence of any evidence in the record of any attempt to give notice of and/or properly move as required by the sealing order for an order permitting discussion of the Family Court case Moreover, the record before the lower court is devoid of any proper request for judicial notice accompanied by proper submission of matters for which judicial notice might have been requested

Accordingly, it is respectfully submitted that all references in Respondent's brief to all matters from the sealed records in the lower court are improper as not only not being a

part of the record before this court but more disturbingly violative of a Court Order Sealing a Record in order to protect the legitimate private interest of the parties to the case and "safeguard" the parties' **"and their children"** The matters presented regarding the Family Court case are therefore not specifically addressed herein The Appellant reiterates the position(s) set forth in its initial Brief and particularly its contention that the Order of the lower court is without foundation on any matters of competent evidence presented before the lower court and based solely upon statements of Respondent's counsel and her memorandum of law which itself was violative of the Court's Order sealing the Family Court record

REPLY ARGUMENT

Respondent urges in its Argument I that Appellant failed to inform the court that the 2008 contract was converted from a private agreement to a family court order Apparently, Respondent has failed to perceive that it is Appellant's position that the 2008 Contract retains its contractual nature in all respects by reason of the parties intent to do so, as set forth in the Contract Mosley v Mosier, 279 S C 348, 306 S E 2d 624 (1983) Appellant asserts that Respondent was prohibited from disclosing the Contract without taking proper steps in accord with the Sealing Order Further, Appellant urges that it was incumbent upon Respondent to take appropriate steps to allow the presentation of evidentiary matter to the lower court, and Respondent's failure to do so resulted in premature dismissal by the lower court without having the benefit of proper an evidentiary foundation

Respondent urges without explanation in its Argument II that a portion of the sealing order allowing access to the file and use thereof by the parties, their counsel, and significantly the court personnel somehow should be interpreted to allow use of the court ordered sealed record, apparently in any and all forums involving litigation between the

parties Such interpretation totally ignores the significant prohibition against use of matters in the record without **"proper notice to [both parties] and after due hearing"** The interpretation offered by Respondent is at best strained beyond the bounds of reasonable construction The Respondent's theory seems to rest on the view (a) that the term "this litigation" means any litigation in any forum between the parties, and, (b) that the subject matter in the instant case is precisely and totally the same as the subject matter in the case below Without any evidence of support in the record, Respondent presents to this Court that "Appellant does not and cannot deny that the contract between the parties was made an order of the family court " Respondent fails to recognize that regardless of whether it was made an order of the court that the intent of the parties was that it retain its contractual nature Respondent then attempts to cloud the issues by alleging that Appellant's actions prevented the Circuit Court from having the true facts before it To the contrary, Appellant's position is and has been that the lower court was entitled to the true facts, but that the true facts must have been developed and produced in accordance with the requirements of law In the instant case this required development of a complete record in accord with the mandate of the sealing order so that the lower court could have such full record before it made its decision As to the contention that the parties to this litigation are "exactly the same" in regard to the Sealing Order, Respondent overlooks and ignores that although the main parties may be the same, the protection of the Sealing Order also extends to the children of the parties who are not a part of the instant case If Respondent or her counsel actually had any concern for the lower Court to have the truth of all facts, to the issue before the lower Court, they could have followed the requirements of the Sealing Order by proper Motion Rather, in what appears to be an effort to give the appearance in this Court that the full record of the Family Court

would have supplied pertinent and relevant evidence supporting Respondent's position, Respondent attempts to shift the blame of their failure to take proper required action to supply any such evidence, by complaining of Appellant's failure to seek a Rule to Show Cause In so doing Respondent ignores the uncontroverted evidence and transcript of record by which there is an absence of any basis for the lower Court's ruling Respondent also ignores that the alleged violation of the lower Court's Sealing Order carries with it the potential of breach of other provisions of SCRCP They also overlooked the present remedy of a Protective Order now being invoked by Appellant

Moreover, Respondent's reliance on Freeman v McBee, 280 S C 490, 313 S E 2d 325 (Ct App 1984) as well as South Carolina Department of Social Services v Jamie C , 383 S C 221, 678 S E 2d 463 (Ct App 2009) is misplaced The instant case does not involve a case where a court is taking judicial notice of "its own records" Furthermore, even if judicial notice were discretionarily allowed, which has not been decided in South Carolina, the specific requirement of "due and proper" notice and a full hearing would be rendered meaningless by Respondent's contention

Appellant respectfully urges that the matters raised in Respondent's Initial Brief support Appellant's contention of a lack of proper evidence for the issuance of the Order of Dismissal and Appellant's further contention that the issue of the validity of the contract at issue should have been determined by development of proper evidence including if necessary appropriate Motion to permit introduction of relevant documentary evidence from the Family Court record *prior* to a determination on the jurisdictional issue

It is worthy of emphasis that the action in the lower Court was one for Declaratory Judgment Clearly, it is black letter law that the lower Court had jurisdiction to entertain

such action It is equally clear, in order to entertain Respondent's Motion, the establishment of a full record was required The development of such full record would not only have afforded the lower Court a basis upon which to make any jurisdictional ruling, but would also have promoted the interest of judicial economy The Declaratory Judgment sought by Appellant was expected to have established and by the record of the full contract entered between the parties and submitted as part of Respondent's designation of matter to be included in the record of Appeal (Judge Jones' Order/Decree filed May 12, 2008, to which the certain contract that would be an issue is attached) establishes that such contract is violative of public policy on its face on account of several reasons, to wit the requirement that the parties not bring grievance actions against their attorneys, the requirement of an Order of Protection against Appellant without any basis in fact and/or law and the expected evidence that the contract required the payment of monies for the withdrawal and/or request for withdrawal of fraudulent criminal charges If all or any of the above provisions and/or matters set forth above were a part of the contract that would ultimately have been at issue and which Respondent now desires to have placed in the record on Appeal before This Court, it could readily have been determined that the "certain contract" was violative of public policy and void under the laws of our State Whitlock v Creswell, 190 S C 314, 2 S E 2d 838 (1939)

Further, contrary to Respondent's assertion that Appellant attempts to delay the inevitable, by attempting to "deceive"[1] the Court, Appellant's intention was and is to follow the requirements of law by laying proper foundation and receiving proper permission upon

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[1] This is one example of many instances throughout Respondent s Brief offensive to the Oath of Office requirement of civility

due hearing for the introduction of appropriate documentary evidence The Appellant is desirous of a declaration of the validity of the contract To that end and in the interest of judicial economy the Appellant welcomes the opportunity for an Order from this Court permitting appropriate submission of evidentiary matters along with appropriate briefing and determination by this Court of the validity of the contract at issue or determination *su sponte* based upon Respondent's submission in its designation of record on Appeal of the contract at issue A determination of the validity of the contract would settle the various other issues raised by Respondent

Respondent's underlying premise, permeating its entire brief and specifically set forth in Argument III (a) is that once a settlement is incorporated into a family court order the agreement loses its contractual nature is an inaccurate interpretation of family court law Respondent rests its conclusion on Emery v Smith, 361 S C 207, 603 S E 2d 598 (Ct App 2004) The reliance on Emery is misplaced The parties in Emery specifically requested that the agreement in that case lose it contractual nature

Respondent's Argument IV amounts to an admission of Appellant's contention that the 2008 Agreement is void as against public policy She necessarily admits that part of the consideration for the 2008 Agreement was her agreement to dismissal of criminal charges against Appellant, which were, on information and belief, fraudulently made and consideration for payment to her of huge sums of money, among other things, to which she was not entitled Even if the doctrine of unclean hands applied in this case, and it does not because this is an action at law, Respondent is the party to which the doctrine would apply The doctrine does not apply for the further reason that the 2008 Agreement is void as against

public policy and is void *ab initio* It is a nullity from inception and as a nullity from inception should not have been approved by the lower court

Although Respondent reaped substantial monetary and other benefits from the void agreement, dismissal of criminal charges is solely within the discretion of the Solicitor They were dismissed as not properly supported by the evidence As to Respondent's reference to a document dated October 19, 2009, that document is not, was not and should not be in evidence and is irrelevant, particularly in light of Respondent's admission Further Respondent's assertion of unclean hands, if accurate, would apply if at all, equally to both parties

For the foregoing reasons and those set forth in Appellant's Initial Brief, in accord with the law and evidence, or in this case, lack thereof, Appellant respectfully submits that the Orders in the lower court be reversed and the matter remanded to the lower court for further proceedings, or in the alternative that, in the interest of judicial economy and fairness, this court *sua sponte* review the 2008 Agreement and determine that the Agreement is void ab initio as violative of the established public policy of the State of South Carolina

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PROOF OF SERVICE

I, Susan Batten Lipscomb, attorney for Appellant, do hereby certify that on September 7, 2011, a copy of the Final Reply Brief 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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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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