

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Case No.: 2009-CP-40-8705

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Carolyn Mitchell Powell.....Appellant,

v.

Ashlin Blanchard Potterfield; J. Michael Taylor;  
and Taylor/Potterfield,.....Respondents.

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**RESPONDENTS' PETITION FOR REHEARING**

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## **PETITION FOR REHEARING**

Pursuant to Rule 221(a), SCACR, the Respondents respectfully request that the Court grant a partial rehearing in this matter. Specifically, the Respondents request that the Court rehear and alter the reversal of “summary judgment on [the Appellant’s] malpractice claim as it pertains to her loss of court-ordered separate maintenance and support.” In making this petition, the Respondents submit that the Court overlooked or misapprehended the following points:

(1) The issue of damages based on a claimed loss of temporary separate maintenance and support during the Family Court litigation was not preserved for review by this Court.

(2) The record does not support any conclusion that Powell most probably would have received an award of separate maintenance and support.

(3) The record does not support any conclusion that an award of separate maintenance and support most probably would have created a more favorable result for Powell.

The Respondents set forth their specific arguments and authorities related to those grounds in the following brief.

## **STATEMENT OF THE CASE**

This appeal arises from a legal malpractice action brought by the Appellant Carolyn Mitchell Powell against the attorneys who initially represented her in a divorce. Powell filed a Summons and Complaint in the Court of Common Pleas for Richland County on December 11, 2009. [R. pp. 66-84.] Along with the Complaint, Powell filed an affidavit from Gregory B. Adams pursuant to S.C. Code § 15-36-100.

The Complaint named as defendants Ashlin Blanchard Potterfield, J. Michael Taylor, and Taylor/Potterfield, as well as Golden, Taylor, Potterfield & Barron; Reid Smith; and Price, Bird & Smith, P.A. [R. pp. 66-84.] Before any of the defendants answered, Powell filed a stipulation

of dismissal as to the firm of Golden, Taylor, Potterfield & Barron. [R. p. 64.] The remaining defendants all filed timely Answers in February 2010. [R. pp. 111-131.]<sup>1</sup> Discovery efforts began shortly thereafter.

In early April 2010, Powell identified Gregory B. Adams as an expert witness. [R. p. 1658.]<sup>2</sup> Some ten months later, Powell served supplemental discovery responses in which she also listed H. Grady Brown as an expert. [R. p. 1717.] On September 12, 2011, Powell provided the Respondents with a copy of a report by Brown. In that report, Brown stated:

[M]y review of the depositions and the exhibits was limited to a determination of whether or not the Taylor/Potterfield Law Firm failed to take action or took inappropriate action with respect to their representation of Ms. Powell. My review was not in any way intended to determine the nature or extent of any damages Ms. Powell may have incurred as a result of the representation by the Taylor/Potterfield Law Firm.

[R. p. 1833 (emphasis added).]

Brown's deposition took place on November 16, 2011. Brown testified he was offering no opinions concerning Powell's claimed damages. [R. p. 512.] Brown never expressed any opinion that Powell most probably would have obtained a better result in the divorce action had the alleged breaches not occurred. Powell later submitted an affidavit by Brown, but it was also silent on those points. [R. pp. 1614-1626.]

On October 5, 2010, the circuit court filed a Consent Scheduling Order. [R. pp. 2-3.] The court later entered an Amended Scheduling Order on November 23, 2011. The Amended Scheduling Order established a dispositive motions deadline of March 30, 2012. [R. pp. 26-27.] It also required that "Plaintiff shall identify any additional expert witnesses by February 13,

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<sup>1</sup> Powell later stipulated to the dismissal of the defendants Reid Smith and Price, Bird & Smith, P.A. [R. p. 64.]

<sup>2</sup> Powell withdrew Adams as an expert in November 2011, before re-identifying him on January 9, 2012.

2012, and shall simultaneously provide the experts' resumes together with the opinions as to which they are expected to testify." [R. p. 26 (emphasis added).] The parties had agreed to the provisions of the Amended Scheduling Order prior to submitting it for consideration. [R. p. 33.]

After all but one of the relevant depositions had been taken, the Respondents filed a summary judgment motion on December 27, 2011. The parties then completed the final deposition (of Cantzon Foster, Powell's final divorce attorney) on January 26, 2012. [R. p. 31.] By the time that deposition was concluded, the parties had been conducting discovery for almost two years.

Powell did not identify any additional experts or other opinions by February 13, 2012. Shortly after that deadline passed, the Respondents filed an amended summary judgment motion. [R. p. 1546.] On March 5, 2012, the Respondents filed an affidavit from Ken Lester in support of their motion. Powell responded by filing an affidavit from Brown, her primary expert.

The Respondents' summary judgment motion came before the Honorable R. Knox McMahon on March 16, 2012. After conducting a full hearing, Judge McMahon took the motion under advisement. Roughly one month later, he issued an order granting summary judgment. [R. pp. 28-43.] The stated basis was a finding that Powell had failed to present sufficient evidence of damages stemming from the Respondents' alleged malpractice. [R. p. 43.] The judge also found that Powell's claims for breach of fiduciary duty and breach of contract were duplicative of, and subsumed by, the malpractice claim, and that summary judgment was not premature. [R. pp. 28-43.]

On May 11, 2012, Powell served a Rule 59(e) motion, which the court filed on May 15, 2012. [R. p. 1559.] The motion essentially asked the judge to reconsider and reverse his

previous decision. [R. p. 1559.] The judge denied that motion in an order filed on July 19, 2012. Powell then commenced this appeal.

This Court held oral arguments on January 8, 2014. At that hearing, Powell's attorney claimed the alleged malpractice caused the following damages to Powell: (1) a lower equitable division/settlement, (2) loss of an award of permanent alimony, and (3) loss of an award of separate maintenance and support during the divorce litigation. Powell had not raised or discussed the arguments regarding separate maintenance and support in the trial court or in her appellate briefs.

On March 19, 2014, this Court filed an unpublished, per curiam opinion (No. 2014-UP-114) in which it affirmed the trial judge's decision in all respects but one. The Court reversed summary judgment only "on [Powell's] malpractice claim as it pertains to her loss of court-ordered separate maintenance and support." [Opinion, p. 7.] The Respondents have now timely petitioned this Court for a rehearing of that one ruling.

### **STATEMENT OF THE FACTS**

After obtaining a complex, substantial settlement from her husband in a divorce action, and testifying in family court that the settlement was reasonable, the Appellant Carolyn Powell ("Powell") sued her former attorneys, claiming that but for their alleged malpractice she would have gotten a better settlement. After she was unable to adduce any evidence to this effect, however, the circuit court granted summary judgment to the Respondents.

Powell married Conrad Powell ("Conrad") in 1988, and the couple had two daughters. [R. p. 1495.] In June 2003, Powell suspected Conrad of committing adultery and approached attorney Ashlin Potterfield about representation. [R. p. 207.] At this meeting Potterfield gave Powell documents containing advice for potential clients. One of these documents, captioned

“To Prospective Clients: Please Read This First,” included these statements: “MS. POTTERFIELD STRONGLY RECOMMENDS NO DATING ON THE PART OF HER CLIENTS DURING THE PENDENCY OF ANY DIVORCE ACTION... An Adulterous spouse cannot be granted alimony in South Carolina.” [R. p. 1811 (emphasis in original).]<sup>3</sup> Powell formally retained Potterfield in September 2003. However, the Powells did not separate until early January of 2004. [R. pp. 898-899.]

On August 27, 2004, Potterfield filed a complaint in Richland County Family Court, stating causes of action for separate maintenance, custody/child support, alimony, discovery, and attorney’s fees. Conrad answered and counterclaimed for equitable division of the marital estate. There followed a period of often rancorous negotiations between counsel for the parties with regard to housing and support for Powell and the children. These were complicated by evidence that Powell altered the amounts on checks made out to her by Conrad, and endorsed Conrad’s name to checks made out to him. [R. pp. 250-254.]

Nevertheless, Conrad paid considerable amounts of money to Powell during the litigation process to cover her expenses as well as those of their daughters. According to documents from the Family Court action, Conrad wrote checks to Powell or to third parties for the children in the amounts of approximately \$60,000 in 2004, \$30,000 in 2005, and \$120,000 in 2006. [R. pp. 1637-1646.] In addition, Conrad gave Powell a lump sum payment of \$400,000 in January 2005. [R. pp. 1628-1631.] This was one of the reasons Potterfield recommended against seeking a hearing on the issue of temporary separate maintenance and support. [R. pp. 905-906.] In

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<sup>3</sup> Potterfield testified she gave this document to Powell on June 23, 2003. [R. p. 814.] The document bears a signature which appears to be Powell’s. Powell testified she was “not sure” this was her signature, but “I can’t deny it.” [R. p. 334.] She recognized her signature on another document, “Fee Agreement and Acknowledgements,” she admittedly received on the same date. [R. p. 333.]

Potterfield's professional opinion, any such award by a Family Court judge would have been less than what Conrad was already paying voluntarily. [R. pp. 907-908.]

On April 1, 2005, Powell wrote a note to Potterfield, expressing dissatisfaction with Conrad's latest settlement proposal, and suggesting the need to "change strategies and move forward toward litigation." [R. pp. 1807-1808.] She thus retained Potterfield's partner, Michael Taylor, and sent a separate retainer. Taylor undertook negotiations with Conrad's counsel.

In September 2005, Powell began an affair with another man. [R. pp. 77, 1204-1205.] Potterfield had given Powell a warning about engaging in such relationships during the divorce proceedings at their first meeting. [R. p. 1811.] However, Powell either did not remember that advice, or chose not to follow it.

Due to Powell's suspicions about Conrad's assets, Taylor associated Reid Smith, a bankruptcy attorney with experience uncovering hidden assets, to help him address the business issues related to the divorce. [R. pp. 277, 1304-1306, 1335.] Smith went with Taylor to Conrad's attorney's office, where they examined Conrad's records, including his tax returns going back to 1999 and the couple's joint returns through 2003 or 2004. [R. pp. 1345, 1352.] Smith also checked the RMC records and tax assessor's offices in Richland, Lexington, Horry and Georgetown Counties, as well as records in North Carolina. He looked at closing statements, mortgages, deeds, financial statements, and check records. Because Powell had expressed a concern that her husband was diluting assets by giving them away to his brother or accountant, Smith checked the formation of Conrad's corporations to determine the identities of the shareholders and their interests. [R. pp. 1359-1362.]

On May 19, 2006, Smith submitted a report detailing his investigation, including a timeline of the acquisition and disposition of various properties and interests, an income analysis,

and an asset summary. [R. pp. 1815-1824.] At Taylor's request, Smith later took Conrad's deposition, which Powell attended. [R. pp. 369, 1366.]

By late 2006, Smith was confident he "had a handle on the business issues and the financial issues related to the businesses. I felt comfortable with the information that I had. I knew that there was a need to get information so that we could make sure we were pursuing settlement discussions appropriately." [R. p. 1364.] As Smith later testified, "My research indicated that there had never been any attempts to dilute the assets. Carolyn had suspected it, but I didn't see any grounds to confirm those suspicions. ... I didn't see any evidence of wasting corporate assets here." [R. p. 1387.] Smith added, "I didn't see anything that indicated that there was an effort to hide assets." [R. p. 1377.]

In January 2007, Smith prepared an updated analysis of Conrad's finances. He explained the report to Powell during a lengthy meeting. [R. pp. 1421, 1825-1829.] Smith calculated the marital estate's value at \$3,119,000. [R. pp. 1825-1829.] This analysis eventually formed the basis for a settlement offer extended to Conrad's attorney on February 14, 2007. [R. pp. 1830-1832.]

On January 17, 2007, Powell terminated Taylor as her attorney. [R. pp. 284-285.] Soon afterwards, she retained Cantzon Foster to serve in his place. The court entered an order substituting counsel on January 29, 2007.

After Taylor's dismissal, Smith continued to represent Powell's interests. Powell still questioned Conrad's handling of his assets, but she was never able to furnish any evidence to support her fears. As Foster explained, "I don't recall there being any hard evidence, documentary – any documents supporting that assets were transferred. ... No hard evidence that there were additional assets to the estate." [R. p. 617.] Foster discussed with Powell the

possibility of obtaining a forensic accountant to do further investigations. [R. pp. 715-716.] Foster believed a forensic accountant was advisable not because of any problem with Smith's abilities, but because Smith was counsel of record and could not testify. [R. pp. 647-651.] However, Powell declined to hire an accountant. [R. pp. 715-716.]

The Family Court conducted a *pendente lite* hearing on March 14, 2007. The subsequent order noted Powell had requested an additional lump sum payment of \$250,000, which Conrad agreed to pay as a further advance on equitable distribution. Powell had requested child support of \$3,000 per month, but the court awarded only \$1,249. [R. p. 55.]

On April 27, 2007, the Powells executed a comprehensive "Complete Property, Support, and Custody Agreement" ("the Agreement") [R. p. 1783.] In it, the parties acknowledged:

that each is familiar with the financial ability, income, expenses, assets and liabilities of the other and each recognizes and acknowledges that they are not entering into this Agreement as a result of threats duress or undue influence but as a natural consequence of the breakdown of their marriage and they fully recognize that each party has freely, actively, and fully taken part in the negotiations hereof over a reasonable period of time and each fully accepts the terms and conditions hereof and each party acknowledges and considers the same to be fair, just and equitable under the circumstances.

[R. p. 1785.] Among other things, the Agreement required to Conrad to do the following: (1) pay periodic "child support/property distribution," (2) pay for health insurance for the children, (3) pay for health insurance for Powell for a limited time; (4) pay for the children's educational costs, including private school and college; (5) pay for the children's sports activities, "including horses and equestrian activities, for no more than four horses and four pets," (6) pay off the mortgage on property in Aiken; and (7) transfer clear title to a residence in Columbia to Powell. [R. pp. 1783-1803.] The Agreement also contained a mutual waiver of alimony and provisions

regarding automobiles, personal property, furniture and fixtures. [Id.] The Agreement concluded:

Each party acknowledges that he and she are fully informed as to his or her legal rights and obligations; that each of them has entered into and executed this Agreement after conferring with each of their respective independent attorneys, and having such knowledge and opportunity, each of them executes this Agreement freely and voluntarily, intended to be bound forever by it.

[R. pp. 1800-1801.] Foster said the Agreement was “a good settlement” for Powell. [R. p. 720.]

On May 2, 2007, the parties and their attorneys appeared before Judge Anne Gue Jones, whose “Final Decree of Divorce and Order Approving Agreement” incorporated the Agreement by reference. Judge Jones found the Agreement to be “substantially fair,” providing an equitable division of the parties’ marital property. She further concluded “that the Agreement has been freely, voluntarily and knowingly entered into by the parties...” [R. pp. 61-62.]

In the hearing before Judge Jones, Powell testified she was not under the influence of “alcohol, drugs, medication or stress” that would affect her ability to understand the terms of the Agreement or the court proceedings, she had sufficient knowledge of Conrad’s current financial condition to allow her to knowingly enter into the Agreement, she believed the agreement to be fair to both sides, and she wanted the court to approve it. [R. pp. 283-284.]

## ARGUMENT

### **I. Powell did not timely raise or assert any arguments regarding temporary separate maintenance and support.**

In the trial court, Powell claimed the Respondents’ alleged malpractice caused her to get a lower divorce settlement than she otherwise would have received and also prevented her from obtaining an award of permanent alimony. Powell made those arguments to the trial court in opposition to the Respondents’ summary judgment motion. She then repeated those arguments

in her Rule 59(e) motion after the trial court granted summary judgment. Neither of the trial court's orders ruled on the issue of damages relating to temporary separate maintenance and support, and Powell never sought such a ruling.

Powell's appellate briefs were also silent on this issue. Her Appellant's Brief and Reply Brief used the phrase "separate maintenance and support" only one time each, and both of those references were quotations from an expert affidavit.<sup>4</sup> [See App. Brief at 16, Reply Brief at 3.] At most, the briefs could be liberally construed as suggesting that separate maintenance and support was something she could have sought at some point in the Family Court litigation. But the briefs never even make an attempt to demonstrate that Powell most probably would have received temporary separate maintenance and support if the Respondents had sought an earlier hearing. Although the briefs arguably attempted to make that type of showing as to permanent alimony and the divorce settlement, they did not address the issue of temporary separate and maintenance and support. And the briefs certainly did not include the kinds of analysis and citations to authority that would be required to present the issue properly to this Court. *See Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (an issue is deemed abandoned and not presented for review if it is argued only in a short, conclusory statement with no supporting authority).

In short, Powell failed to raise the issue of temporary separate maintenance and support in the trial court, and the trial court never ruled on it. Those omissions alone were sufficient to prevent any appellate review of the issue, but Powell also did not refer to temporary separate

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<sup>4</sup> The briefs quoted the Affidavit of Gregory Adams, which claimed the alleged malpractice "caused Ms. Powell considerable damages including loss of any right to separate maintenance and support and loss of substantial value of the marital estate and her share of it due to the dissipation, transfer, and secreting of much of it by her husband during the pendency of the divorce litigation."

maintenance and support, or make any substantive assertions about it, until oral arguments in this Court. At that point it was too late; Powell had waived any arguments based on those claimed damages. *See Toal, et al. Appellate Practice in South Carolina* (2d ed.) at 76 (“An appellant may not use oral arguments as a vehicle to argue issues not argued in the appellant’s brief; such issues are not preserved for appellate review.”) (citing *South Carolina Dept. of Social Services v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001)).

All of Powell’s previous arguments, both in the trial court and in this Court, had focused on claims of a diminished marital estate and the loss of a right to permanent alimony. Consequently, the Court should have limited its review to those issues. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (an issue must be raised and ruled upon in the lower court in order to be preserved for appellate review).

Powell might now claim the references in her briefs to “alimony” also applied to temporary separate maintenance and support, but any such argument ignores the language of the governing statute. Section 20-3-130 of the South Carolina Code controls awards of “alimony and other allowances.” The statute repeatedly refers to “alimony” and “separate maintenance and support” as different, alternative remedies. *See, e.g.*, §20-3-130(A) (“In proceedings for divorce from the bonds of matrimony, and in actions for separate maintenance and support, the court may grant alimony or separate maintenance and support in such amounts and for such term as the court considers appropriate ...”); §20-3-130(B) (“Alimony and separate maintenance and support awards may be granted pendente lite and permanently ...”); §20-3-130(C) (“In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors ...”). As these passages demonstrate, South Carolina law uses the terms “alimony” and “separate maintenance

and support” to describe relief in different kinds of actions. The former term applies to a remedy in divorce actions, whereas the latter applies to a remedy in actions for separate maintenance and support. While the two remedies are similar, they are not the same. Were it otherwise, the General Assembly would not have needed to use both terms in the statute. Indeed, the Court has already recognized this distinction in its opinion, where it addresses “alimony” and “separate maintenance and support” as different issues.<sup>5</sup>

This distinction is significant because Powell only presented arguments on the issue of “alimony” in her lower court submissions and appellate briefs. Powell never made any substantive arguments about temporary separate maintenance and support until oral arguments.<sup>6</sup> This is true despite the fact that Powell retained and relied upon an expert in domestic relations law, who would be expected to know the difference between the two forms of relief. Thus, the Court should reject any attempt by Powell to argue that she meant the term “alimony” to include “temporary separate maintenance and support” as well.<sup>7</sup> Any other result would fail to honor the longstanding rules regarding issue preservation.

The issue of whether the record contained evidence showing Powell most probably would have recovered temporary separate maintenance and support was simply not part of this case

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<sup>5</sup> Here, a point of clarification is in order. The statute permits awards of “separate maintenance and support” and “alimony” on temporary or permanent bases. Thus, there is such a thing as “temporary alimony” (or alimony *pendente lite*), just as there is such a thing as “permanent separate maintenance and support.” However, the language and context of the Court’s opinion makes it clear that the Court used the term “separate maintenance and support” to refer to a temporary form of relief (*i.e.* during the marital litigation) and the term “alimony” to refer to a permanent form of relief (*i.e.* extending beyond that litigation).

<sup>6</sup> Even then, the colloquy between Powell’s attorney and the Court addressed “alimony” and “separate maintenance and support” as different forms of relief (*i.e.* the former as a permanent remedy and the latter as a temporary one).

<sup>7</sup> Had that been Powell’s intent, she could (and should) have plainly stated as much in one of her previous submissions. The absence of any statement to that effect is telling.

until the oral arguments in this Court. The parties never briefed or argued that issue, and there was no ruling by the trial court on that issue for this Court to review. Therefore, the Court should issue an amended opinion in which it declines to address the issue of temporary separate maintenance and support.

**II. The evidence does not show Powell most probably would have obtained an award of temporary separate maintenance and support.**

In its opinion, the Court made the following statement regarding the purported claim for damages relating to temporary separate maintenance and support:

When we view the evidence in the light most favorable to [Powell], it shows that she most probably would have received court-ordered separate maintenance and support, along with the stability that comes with a court award enforceable by contempt, had Potterfield obtained a temporary hearing to pursue this relief.

[Opinion, p. 7 (emphasis added).] The Court did not specify what evidence it felt satisfied Powell's burden of proof or explain why it believed a Family Court judge would most probably have awarded separate maintenance and support to Powell on a temporary basis.<sup>8</sup> The Respondents respectfully submit that the Court erred in reaching this conclusion, and a rehearing should be granted on this issue.

Based on the paragraph in the opinion that addresses this issue, it appears the Court premised its conclusion on two considerations: (1) an award of temporary separate maintenance and support could have been sought before Powell received advances on the property distribution, and (2) a formal award of separate maintenance and support on a temporary basis would have provided "stability" to Powell because it would have been enforceable in court. As

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<sup>8</sup> The Court had previously concluded the same record evidence did not show that Powell would most probably have received an award of alimony under S.C. Code §20-3-130, which mandates the same standards for both forms of relief.

discussed below, however, these factors do not support a conclusion that Powell satisfied her burden of proof on this claimed element of damages.

- (A) The evidence weighs against a successful claim for temporary separate maintenance and support.

The record evidence makes it debatable, at best, whether Powell would have obtained an award of temporary separate maintenance and support. As a threshold matter, even Powell's primary expert could not say with any certainty that she would have received that remedy. Grady Brown made the following statement in the affidavit Powell submitted in opposition to the summary judgment motion:

[I]t is **possible** that Ms. Powell **could have** shown the amounts her husband was providing to [sic] or on her behalf prior to a temporary hearing and the court **could have** required him to continue to do so pursuant to an enforceable court order.

[R. p. 1624 (emphasis added).] This statement amounts to nothing more than speculation as to what Powell might have been able to accomplish at a temporary hearing. As such, it falls far short of satisfying the burden of proving an award of temporary maintenance and support was the "most probable" result.<sup>9</sup>

The other evidence in the record also fails to demonstrate that Powell most probably would have received an award of temporary separate maintenance and support. This is true in no small part because of what the evidence does not show. As discussed above, S.C. Code §20-3-

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<sup>9</sup> Powell's other expert (Gregory Adams) also failed to present an opinion that Powell most probably would have received such an award. His pre-suit affidavit merely stated that the alleged malpractice resulted in damages "including loss of any right to separate maintenance and support ...." [R. pp. 100-101 (emphasis added).] This statement references a right to seek a recovery; it is not an opinion that such a recovery is most probable. But even if it were more definite, this would still be nothing more than the kind of conclusory statement the courts have previously discredited in similar cases. *See Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (conclusory statements in expert affidavit about possible legal actions that could have been taken were insufficient to withstand a summary judgment motion when they did not address the likelihood for success of those actions).

130 governs awards of both alimony and separate maintenance and support. Subsection (C) of that statute lists thirteen factors a Family Court judge must consider when setting such awards. Although the Record on Appeal in this case arguably allows for a review of some of those factors, it is silent on others. For example, the record does not contain sufficient information for any finding as to “the current and reasonably anticipated earnings of both spouses,” “the current and reasonably anticipated expenses and needs of both spouses,” or “the tax consequences to each party as a result of the particular form of support awarded.” S.C. Code Ann. §20-3-130(C)(6), (7) and (11) (emphasis added). While that type of information could possibly have been part of the divorce litigation, it does not appear in the current Record on Appeal. This makes it impossible for any judge to reach a conclusion one way or the other about whether a Family Court judge would have awarded separate maintenance and support.

In addition, the evidence the record does contain weighs against the Court’s conclusion. As the Court notes in the opinion, Powell’s ex-husband (Conrad) paid most, if not all, of her expenses during the Family Court litigation. Powell and Conrad did not actually separate until the end of December 2003 or early January 2004. [R. pp. 898-899.] Thus, Powell could not have asserted any claim for temporary separate maintenance and support before January 2004. *See Theisen v. Theisen*, 394 S.C. 434, 442, 716 S.E.2d 271, 275 (2011) (“living separate and apart is a requirement for separate maintenance”). After the separation, Conrad continued to pay for Powell and their daughters’ expenses, including “most of the household bills, mortgage payments, electric and gas, telephone, cable, [and] groceries.” [R. p. 255, lines 8-10.] All told, Conrad made payments of approximately \$60,000 to Powell in 2004, not including \$16,000 he gave Powell after the sale of some marital property. Conrad then paid approximately \$30,000 to Powell in 2005 and more than \$100,000 to her in 2006. [R. pp. 1637-1646.] These amounts do

not include the \$400,000 lump sum payment Conrad made to Powell in January 2005 as an advance on the property distribution. [R. pp. 1628-1631.]

These payments allowed Powell and her daughters to maintain a comfortable lifestyle during the Family Court litigation.<sup>10</sup> Powell switched her daughters from public to private schools, the daughters were still able to keep multiple horses, and Powell eventually purchased a barn for the horses. [R. p. 262.] The daughters were even able to attend several out-of-state horse shows each year. [R. p. 262.] Clearly, then, Powell did not suffer any serious decline in her standard of living during the separation, due to the support Conrad voluntarily provided to her and their daughters.

The record also shows Powell engaged in questionable conduct regarding some of the checks Conrad sent her. Powell increased the written amounts on some of those checks, and she also endorsed Conrad's name (without his knowledge or consent) on a check from a third party stemming from a sale of marital property. [R. pp. 250-254.] After those actions came to light, the Respondent Potterfield warned Powell that they would hamper any attempts to seek court-ordered payments because a Family Court judge would not approve of that conduct. [R. pp. 907-908, 942-946.] Indeed, this was part of the reason Powell agreed with Potterfield's professional recommendation that she not pursue a claim for temporary separate maintenance and support. [R. pp. 905-906.]

The lack of any established income stream for Conrad also complicated the issue of temporary separate maintenance and support. As he and Powell had done during their marriage, Conrad relied primarily on investments for his income after the separation. The returns on those investments fluctuated, which made it very difficult to prove a steady flow of income for Conrad.

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<sup>10</sup> Powell also continued to receive some income from a business she owned with Conrad, just as she had done before the separation. [R. pp. 220-221.]

[R. p. 824.] This fact placed another obstacle in the path of any claim for temporary support payments during the Family Court litigation.

Given those facts, which appear in the Record on Appeal, it is impossible to conclude with any degree of probability that Powell would have received an award of temporary separate maintenance and support. While it is possible Powell could have successfully pursued such a claim, it is at least equally possible a Family Court judge would have denied the claim. The record simply does not support a conclusion that a ruling in Powell's favor was more likely than an unfavorable outcome, let alone that it was "most probable." Therefore, the Respondents respectfully submit that the Court erred in reaching its conclusion to the contrary, and a rehearing on this one issue is warranted.

- (B) There is no evidence that any award of temporary separate maintenance and support would have created a more favorable result for Powell.

Even if the record could otherwise show that Powell most probably would have received an award of temporary separate maintenance and support, a crucial piece of the puzzle would still be missing for purposes of proving damages for malpractice. Powell would nevertheless need to prove that such an award would have placed her in a better overall position. In light of the voluntary payments Powell received from Conrad throughout the separation period, Powell cannot possibly meet that burden. The Respondents respectfully submit that the Court overlooked or misapprehended this point in its decision.

In order to prove damages in a legal malpractice claim, a plaintiff "must show that he or she 'most probably' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002). This showing necessarily requires a plaintiff to prove he most probably would have obtained a better overall result than the one he actually received in the underlying case. *See Doe*

*v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) (summary judgment affirmed where plaintiff failed to prove he most probably would have obtained a better settlement but for the alleged malpractice). This is clearly what the phrase “successful in the underlying suit” means for purposes of this test. Any other interpretation would open the door for absurd results in legal malpractice actions.<sup>11</sup>

In the present case, the record shows that Conrad made consistent, substantial payments to Powell during the relatively brief period of time when she could have sought temporary separate maintenance and support. The record further shows at least the approximate amounts of those payments, and their total value is not difficult to discern. On the other hand, the record contains no evidence showing what amounts of payments Powell might have received for temporary separate maintenance and support. Even if one were to accept the premise that Powell would have obtained that relief in the first place, the value of such payments would remain a mystery. Powell’s experts never addressed that question, and any attempt to determine what amount of support a Family Court judge would have ordered would be an exercise in pure speculation. The record does not provide a basis for anything else.

As a result, it is impossible to conclude that obtaining temporary separate maintenance and support would have led to a better overall result for Powell. Had the Family Court ordered him to make periodic payments for temporary separate maintenance and support, Conrad would have ceased making his voluntary payments to Powell. Thus, unless the Family Court had

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<sup>11</sup> For example, suppose a plaintiff sued his former attorney for malpractice, claiming bad advice led him to accept a settlement of a tort claim for \$50,000. Further suppose the plaintiff presented expert testimony to the effect that the plaintiff most probably would have won on the merits at trial, but there was no evidence showing that a verdict most probably would have exceeded \$50,000. Under those circumstances, it would make no sense to find a viable malpractice claim because the plaintiff failed to prove a better overall result was most probable (*i.e.* a verdict greater than the settlement). Thus, the plaintiff would not have proved any damages.

ordered payments that exceeded the amount of the support Conrad was providing on his own, “winning” on the issue of temporary separate maintenance and support would have been a pyrrhic victory for Powell. She easily could have wound up receiving less money if she had successfully pursued court-ordered temporary support. The record does not show that this negative result would have been any less likely than a scenario in which court-ordered support benefited Powell.

If anything, the record demonstrates the negative result was more likely to have occurred. Potterfield could not recommend pursuing a claim for temporary separate maintenance and support because Conrad was already “paying, on a voluntary basis, a great deal of money that could not be substantiated by his flow of income.” [R. p. 824, lines 4-6.] This created a “big risk” that any court-ordered support would have been less than Conrad’s voluntary payments. [R. pp. 905-906.] Indeed, looking at the large amounts of money Powell received from Conrad during the separation, it is difficult to imagine a Family Court judge ordering greater payments. And even Powell admitted at the time that, due to the amounts Conrad was already paying voluntarily, he “would be better off paying me child support at the highest going rate.” [R. p. 255, lines 12-14.] This telling, contemporaneous admission belies any claim Powell might now make that she most probably would have benefited from court-ordered temporary support.

Again, the key question for purposes of this issue is whether obtaining temporary separate maintenance and support would have given Powell a more favorable result. It is not enough to conclude, as the Court did, that Powell most probably would have been successful if a hearing on temporary relief had taken place.<sup>12</sup> The next step requires a determination of whether success on that claim would have resulted in Powell getting more money than she was already

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<sup>12</sup> As discussed above, the Respondents dispute that finding, but it can be assumed for purposes of the current argument without affecting the argument’s conclusion.

receiving without a court order. Powell bore the burden of proving that better result was the most probable outcome, and she failed to meet it. The record contains no basis for determining how much support a Family Court judge would have ordered, which means no court could possibly conclude that amount would have exceeded Conrad's voluntary payments. Therefore, the record does not support any claim for damages based on the issue of temporary separate maintenance and support.

The same logic applies to the Court's apparent finding that the "stability" of court-ordered support would have constituted a more favorable result for Powell. It is true that court orders are enforceable by contempt. It also seems accurate to say, as a general matter, that a court order would be preferable to a voluntary agreement to pay, which the paying spouse could later rescind. But the Court cannot consider the question of "ordered payments versus voluntary payments" in a vacuum. Rather, the Court must take the actual circumstances of this case into account when examining this issue.

The record shows that Conrad consistently made payments to Powell (or on her behalf) throughout the Family Court litigation. Indeed, this was one of the primary reasons why the Respondents never recommended pursuing a claim for temporary separate maintenance and support. Powell did not need to follow that course of action because she was already receiving regular support through voluntary payments that remained consistent. Under the actual facts of the case, therefore, the enforceability of a court order would not have served any purpose for Powell. She did not need the court's coercive power to ensure compliance; Conrad was already "complying" on his own. Stated another way, the court's contempt power was a weapon that Powell never had any reason to seek or use.

Furthermore, any reliance on the perceived “stability” provided by a court order is misplaced. To the extent the Court used that term in its opinion to suggest Powell would have benefited from payments made on a time schedule set by a court, there is no evidence to support that assertion. The record does not provide any basis for concluding that a court order most probably would have led to Powell receiving money at more frequent or more regular intervals. First, it is not entirely clear exactly how often Powell received money from Conrad. The record reveals the total amounts of those payments, but not their specific timing. This means there is no “baseline” for a comparison. Second, there is no evidence in the record even to suggest, let alone to prove, what types of payments a Family Court would have ordered. Such payments could have been monthly, a one-time lump sum, or anything in between. Without being able to know those things, there is no way to determine whether a court order would have provided any more stability than the payments Powell actually received.

In the perhaps unlikely event the Court used the term “stability” to refer to more subjective concerns, such as Powell’s emotional state or “peace of mind,” the Respondents respectfully submit that such claims are outside the scope of this issue. If things such as stress or worry were elements of damages in this context, it would create a loophole that would effectively eliminate the “most probable better result” requirement. No matter what else the evidence showed, a plaintiff could always claim she would have had a better “result” in the underlying matter without the malpractice because she would not have suffered emotionally. This would be an especially problematic scenario in malpractice cases arising out of Family Court litigation, which is often inherently and unavoidably stressful for the parties. Judges dealing with those types of cases (or any other type litigated case, for that matter) should not have to delve into the question of what “stress” or “worry” resulted from the malpractice as

opposed to the litigation itself. Creating that type of requirement would constitute an unwarranted broadening of legal malpractice claims.

In addition, there is no evidence that the absence of a court order actually caused Powell any stress or worry. As previously discussed, Conrad made consistent and substantial voluntary payments to Powell throughout the Family Court litigation. Powell testified that at one point she had difficulty finding a new permanent residence for her and the daughters, but the record does not show that court-ordered temporary payments would have made that process any easier. Indeed, Conrad agreed to pay for a new residence for Powell and the daughters within a certain price range, and it was Powell's preference for houses above that range that caused the delays. Thus, there is no basis for any conclusion that the lack of a court order proximately caused any emotional damages.<sup>13</sup>

(C) Conclusion as to Temporary Separate Maintenance and Support

In deciding this issue, the Court focused too narrowly on its belief that Powell most probably would have “won” on the merits at a hearing for temporary separate maintenance and support. As previously discussed, the Respondents contend the record does not support that conclusion in the first instance. But even if such a finding were possible based on the record, the Court erred in not proceeding to the second step of the analysis.

The Court did not explain (and the record does not show) how or why obtaining an award of temporary separate maintenance and support would have given Powell a more favorable overall result. Temporary separate maintenance and support might have benefited Powell, but it

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<sup>13</sup> Again, this is not to claim that Powell experienced no “stress” or “worry” during that period of time. She almost certainly did, as did Conrad and even the daughters. That is the unfortunate reality of divorce litigation. This argument simply points out that there is no evidence the absence of a court order caused greater or different emotional problems than the ones arising from the divorce litigation itself.

also might have resulted in her receiving less money than she actually did through Conrad's voluntary payments. Neither of Powell's experts addressed that question, and no other evidence provides a basis for concluding one outcome was more likely than the other, let alone "most probable." As a result, Powell's claim for damages on this issue fails for lack of evidentiary support.

Again, the Court appears to have considered only the question of whether Powell would have succeeded on the merits at a hearing on temporary relief. In doing that, the Court overlooked the larger and more significant question of whether success at that hearing would have created a more favorable result for Powell. Stated another way, the Court focused only on one battle and did not contemplate the outcome of the war. When viewed in that proper context, Powell's claim for damages based on temporary separate maintenance and support cannot stand. There is no evidence that winning on that one issue would have led to a better overall result, which means the malpractice claim fails as a matter of law.

### **CONCLUSION**

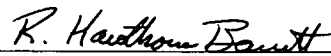
Powell did not specifically raise or assert any arguments regarding temporary separate maintenance and support until the oral arguments in this Court. In addition, the trial court never ruled on that issue. As a result, the issue was not preserved for review, and this Court should not have reached or addressed it.

Even if the issue had properly been preserved, however, Powell's claim for damages based on temporary separate maintenance and support fails as a matter of law. The record evidence does not permit any conclusion that Powell most probably would have received an award of temporary separate maintenance and support. The record also does not show that an

award of that type of relief most probably would have created a more favorable overall result for Powell. In fact, if anything, the record tends to support the opposite conclusion.

Therefore, the Court should grant the Respondents' Petition for Rehearing, withdraw its original opinion and submit a revised opinion affirming summary judgment for the Respondents in full.

Respectfully submitted,



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Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Case No.: 2009-CP-40-8705

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Carolyn Mitchell Powell.....Appellant,

v.

Ashlin Blanchard Potterfield; J. Michael Taylor;  
and Taylor/Potterfield.....Respondents.

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Respondents, certifies that I have this **3<sup>rd</sup> day of April, 2014**, served a copy of the **Respondents' Petition for Rehearing** upon counsel for the Appellant by causing it to be deposited in the United States mail, first class postage prepaid, addressed to: Thomas A. Pendarvis, Esq. and Catherine B. Kerney, Esq.; Pendarvis Law Offices, P.C.; 500 Carteret St., Suite A; Beaufort, SC 29902.

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April 3, 2014

Attorneys for the Respondents

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April 3, 2014

**Hand Delivered**

The Hon. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

Re: Powell, Carolyn v. Potterfield, Ashlin, et al.  
Appeal No.: 2012-212678

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the original and seven copies of the Respondents' Petition for Rehearing, and (2) the original and one copy of the Proof of Service. Also enclosed is a check for the filing fee. Please file the originals and necessary copies and return the extra stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

*R. Hawthorne Barrett*

R. Hawthorne Barrett

RHB:  
Enclosures

cc (w/ encls.): Thomas A. Pendarvis, Esq.  
Catherine B. Kerney, Esq.

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