THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2009-CP-40-8705

Carolyn Mitchell Powell.....Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioners Ashlin Blanchard Potterfield, J. Michael Taylor, and Taylor/Potterfield petition this Court for a writ of certiorari to the South Carolina Court of Appeals to review one section of that court's decision in this matter. In making this petition, Petitioners respectfully assert that the Court of Appeals erred in part in its Opinion No. 2014-UP-114 (filed April 30, 2014) and that this Court should review the following issue:

> Did the Court of Appeals err in reversing summary judgment as to damages relating to an award of "temporary separate maintenance and support," where: (1) that argument was not preserved for review, (2) the record does not support any conclusion that Powell most probably would have received an award of separate maintenance and support, and (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?

STATEMENT OF THE CASE

This appeal arises from a legal malpractice action brought by 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.][1] Discovery efforts began shortly thereafter.

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

In early April 2010, Powell identified Gregory B. Adams as an expert witness. [R. p. 1658.][2] 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, 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.]

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[2] Powell withdrew Adams as an expert in November 2011, before re-identifying him on January 9, 2012.

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 (Cantzon Foster, the attorney who took over representing Powell after she terminated Potterfield and Taylor). [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, Petitioners filed an amended summary judgment motion. [R. p. 1546.] On March 5, 2012, Petitioners filed an affidavit from Ken Lester in support of their motion. Powell responded by filing an affidavit from Brown, her primary expert.

Petitioners' 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 Petitioners' 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.

The Court of Appeals 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, the Court of Appeals 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 as to the element of claimed damages based on loss of temporary separate maintenance and support during the initial stages of the divorce litigation. [Opinion, p. 7.]

Petitioners filed and served a timely Petition for Rehearing on April 3, 2014. Powell did not file a rehearing petition, which meant that the circuit court's rulings that the Court of Appeals affirmed became the law of the case. Powell also did not submit any response in opposition to Petitioner's rehearing request, and the Court of Appeals did not ask her to do so.

On April 30, 2014, the Court of Appeals filed an Order denying the Petition for Rehearing. In that Order, the Court also withdrew its previous opinion and substituted an "amended" version. However, the amended opinion did not change any of the court's rulings, and it is essentially identical to the original opinion.[3]

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, Carolyn Powell sued her former attorneys, claiming that but for their alleged malpractice she would have gotten a better

[3] Petitioners have not been able to discern any appreciable differences between the two opinions.

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.] Powell formally retained Potterfield in September 2003, although 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 some checks made out to her by Conrad, and endorsed Conrad's name to other 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 as an advance on the eventual equitable division. [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 Potterfield's professional opinion, any such court award 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, which he explained 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. [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. Nevertheless, 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.] 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. The Court of Appeals erred in reversing summary judgment for claims relating to temporary separate maintenance and support because Powell did not preserve that issue for appellate review.

In the circuit court, Powell claimed the 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 in opposition to the Petitioners' summary judgment motion. She then repeated those arguments in her Rule 59(e) motion after the court granted summary judgment. Neither of the 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 briefs to the Court of Appeals 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.[4] [*See* App. Brief at 16,

[4] 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."

Reply Brief at 3.] At most, the briefs could be liberally construed as suggesting that separate maintenance and support was something Powell could have sought at some point in the family court litigation. But the briefs made no attempt to demonstrate that Powell most probably would have received temporary separate maintenance and support if the Petitioners had sought an earlier hearing. Although the briefs arguably attempted to make that type of showing as to permanent alimony and the overall divorce settlement, they did not address the issue of temporary separate and maintenance and support. And the briefs certainly did not include the kind of analysis and citation to authority that would be required to present the issue properly to an appellate 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 circuit court, which 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 maintenance and support, or make any substantive assertions about it, until oral arguments in the Court of Appeals. 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 circuit court and in the Court of Appeals, 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 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.*, S.C. Code Ann. §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 ..."); S.C. Code Ann. §20-3-130(B) ("Alimony and separate maintenance and support awards may be granted pendente lite and permanently ..."); S.C. Code Ann. §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 <u>not</u> the same. Were it otherwise, the General Assembly would not have needed to use both terms in the statute. Indeed, the Court of Appeals at least implicitly recognized this distinction in its opinion, where it addressed "alimony" and "separate maintenance and support" as different issues.[5]

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[5] Here, a point of clarification is necessary. 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

This distinction is significant because Powell only presented arguments on the issue of "alimony" in her circuit court submissions and appellate briefs. Powell never made any substantive arguments about temporary separate maintenance and support until oral arguments.[6] This is true even though 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 absence of any arguments specifically relating to temporary relief under the statute is telling, and the Court of Appeals should not have addressed that issue.

Whether the record contained evidence showing Powell most probably would have recovered temporary separate maintenance and support was simply not part of this case until the oral arguments in the Court of Appeals. The parties never briefed or argued that issue, and there was no ruling by the circuit court on that issue for the Court of Appeals to review. Therefore, the Court of Appeals erred in considering and ruling upon this issue, and this Court should grant a writ of certiorari to correct that error.

II. The Court of Appeals erred because the evidence does not show Powell most probably would have obtained an award of temporary separate maintenance and support.

In its opinion, the Court of Appeals 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

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"permanent separate maintenance and support." However, the language and context of the Court of Appeals' opinion makes it clear the court used the term "separate maintenance and support" to refer to temporary relief (*i.e.* during the marital litigation) and the term "alimony" to refer to permanent relief (*i.e.* extending beyond that litigation).

[6] 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).

> 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 neither specified what evidence it felt satisfied Powell's burden of proof, nor explained why it believed a family court judge would most probably have awarded separate maintenance and support to Powell on a temporary basis.[7] The Petitioners respectfully submit the court could not possibly have done so because an analysis of the relevant record materials reveals no such evidence.

Based on the paragraph in the opinion that addressed this issue, it appears the Court of Appeals 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 discussed below, however, those 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:

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[7] The Court of Appeals 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. The court did not explain why it reached a different conclusion as to temporary maintenance and support.

> [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 below the burden of proving an award of temporary maintenance and support was the "most probable" result.[8]

The other evidence in the record also fails to support the Court of Appeals' conclusion. This is true in no small part because of what the evidence does not show. As discussed above, S.C. Code §20-3-130 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 might possibly have been part of the divorce litigation, it does not appear in the Record on Appeal.

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[8] 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 only the right to seek a recovery. It is not an opinion that such a recovery was 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).

This makes it impossible for any court 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 of Appeals' conclusion. As the court noted 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.] Those 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.]

Those payments allowed Powell and her daughters to maintain a comfortable lifestyle during the family court litigation.[9] 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.

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[9] 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.]

The record further 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 Petitioner 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. [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."

The discretionary nature of such an award casts further doubt on the Court of Appeals' conclusion. Under S.C. Code §20-3-130, family court judges have "broad discretion" in

determining whether relief is warranted and, if so, in what amounts. *See Doe v. Doe*, 319 S.C. 151, 459 S.E.2d 892 (Ct. App. 1995). For this reason, it is impossible to say a family court judge "most probably" would have granted a request by Powell for temporary support. A judge might have decided Powell was entitled to receive periodic payments in set amounts based on Conrad's superior financial position. Yet, a judge also could have decided that Conrad's voluntary payments were more than sufficient to provide for Powell's needs and no formal award was necessary. Under the broad discretionary standard, a judge could have reached either decision. Thus, the evidence in this case did not provide a basis for satisfying the "most probably" standard.

Indeed, the Court of Appeals acknowledged this very point when it addressed the issue of permanent alimony. The court concluded Powell could not prove that she most probably would have received an award of permanent alimony, and it based that decision, at least in part, on the discretionary standard for such awards. Given the fact that the same standard also applies to award of separate maintenance and support, an obvious question arises: What difference did the Court of Appeals perceive between the claims for permanent alimony and temporary maintenance and support? The court did not provide an answer to that question, which is another reason this Court should review the decision below.

(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 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 throughout the separation period, Powell cannot possibly meet that burden. The Court of Appeals erred in overlooking this point.

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.

Here, Conrad made consistent and substantial payments to Powell during the relatively brief period of time when she could have sought temporary separate maintenance and support. The record 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 pay temporary separate maintenance and support, Conrad would have ceased making his voluntary payments. Thus, unless a judge had 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 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. 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 judge ordering greater payments. And even Powell admitted at the time that, due to the amounts Conrad was paying voluntarily, he "would be better off paying me child support at the highest going rate." [R. p. 255, lines 12-14.] This admission belies any claim that Powell 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 of Appeals did, that Powell most probably would have been

successful if a hearing on temporary relief had taken place.[10] The next step requires a determination of whether success on that claim would have resulted in Powell getting more money than she was already receiving. Powell bore the burden of proving a better result was the most probable outcome, and she failed to meet it. The record contains no basis for determining how much support a judge would have ordered, which means no court could possibly conclude that amount would have exceeded the voluntary payments. Therefore, the record does not support any claim for damages based on temporary separate maintenance and support.

The same logic applies to the Court of Appeals' 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 erroneously considered the question of "ordered payments versus voluntary payments" in a vacuum instead of taking the actual circumstances of this case into account.

Conrad consistently made payments to Powell (or on her behalf) throughout the family court litigation. This was one of the primary reasons why the Petitioners never recommended pursuing temporary separate maintenance and support. Powell did not need to do so because she was already receiving regular support through voluntary payments. Thus, Powell did not need the court's coercive power because Conrad was already complying on his own. The court's contempt power was a weapon Powell never had any reason to seek or use.[11]

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[10] As discussed above, the Petitioners dispute that finding, but it can be assumed for purposes of the current argument without affecting the argument's conclusion.

[11] Indeed, the voluntary nature of the payments might have been one reason they were for such generous amounts. Had Powell sought and obtained the "coercive power" of a court order, Conrad might very well have become angry and stopped making any voluntary payments. This

Furthermore, any reliance on the perceived "stability" provided by a court order is misplaced. If the Court of Appeals used that term 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. 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 even to suggest, let alone to prove, what types of payments would have been 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 of Appeals used the term "stability" to refer to more subjective concerns, such as Powell's emotional state or "peace of mind," such claims are outside the scope of this issue. If 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 from family court litigation, which is often unavoidably stressful for the parties. Judges dealing with those types of cases should not have to delve into the question of what "stress" or "worry" resulted from the malpractice rather than from the litigation itself. Creating that type of requirement would unduly broaden legal malpractice claims.

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would have limited Powell to the amounts stated in the court order, which, as explained above, easily could have been less than Conrad's previous voluntary payments.

In addition, there is no evidence the absence of a court order actually caused Powell any stress or worry. 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, but the record does not show that court-ordered temporary payments would have made that process any easier. Indeed, Conrad agreed to a 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.[12]

(C) Conclusion as to Temporary Separate Maintenance and Support

In deciding this issue, the Court of Appeals 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. 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 of Appeals 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 result. Temporary separate maintenance and support might have benefited Powell, but it 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

[12] 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.

evidence provides a basis for concluding one outcome was more likely than the other, let alone "most probable."

Stated another way, the Court of Appeals 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 still failed as a matter of law. The Court of Appeals erred in ruling otherwise.

CONCLUSION

Powell did not specifically raise or assert any arguments regarding temporary separate maintenance and support until the oral arguments in the Court of Appeals. In addition, the circuit court never ruled on that issue. This means the issue was not preserved for review, and the Court of Appeals 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 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 such an award most probably would have created a more favorable overall result. If anything, the record supports the opposite conclusion.

For these reasons, this Court should grant a writ of certiorari to review the Court of Appeals' decision.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for the Petitioners certifies that the Petitioners filed a timely Petition for Rehearing in the South Carolina Court of Appeals, which was finally denied in an Order filed on April 30, 2014.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2009-CP-40-8705

Carolyn Mitchell Powell.....Respondent,

v.

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

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioners, certifies that I have this **30th day of May, 2014**, served a copy of the **Petition for Writ of Certiorari** upon counsel for the Respondent 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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May 30, 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 two copies each of a Petition for Writ of Certiorari (filed today in the Supreme Court) and the Proof of Service. Please file one copy of each document pursuant to Rule 242(c), SCACR, 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

RHB:
Enclosures

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