FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-8372

Hattie Mae Greene
PLAINTIFF(S)

Cindy M. Floyd
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117
Judge Code

10/21/14
Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A No.: 2012-CP-10-8372
Hattie Mae Greene,	)	
	)	**ORDER GRANTING DEFENDANT'S**
Plaintiff,	)	**MOTION FOR SUMMARY**
	)	**JUDGMENT**
vs.	)	
	)	
Cindy M. Floyd,	)	
	)	
Defendant.	)	
	)	

FILED
2014 OCT 23 AM 10: 27
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter came before this Court on the Motion of Defendant Cindy M. Floyd (hereinafter referred to as "Attorney Floyd") for Summary Judgment pursuant to South Carolina Rule of Civil Procedure 56. A hearing was held on September 15, 2014. For the reasons that follow, this Court hereby grants Attorney Floyd's Motion for Summary Judgment.

BACKGROUND

This is an action for legal malpractice, arising from Attorney Floyd's representation of the Plaintiff, Hattie Mae Greene, in a proceeding for division of marital property with Plaintiff's now ex-husband, who is a retired Marine. The representation resulted in an Order of Separate Support and Maintenance, which awarded Plaintiff 60% of her now ex-husband's "military retirement." Almost ten years after the Order was entered, Plaintiff's ex-husband applied for and began receiving VA disability compensation. Plaintiff contends that Attorney Floyd was negligent in failing to have the court include a provision in its Order protecting her in the event that her ex-husband later received VA disability compensation, which unlike military retirement pay is not subject

to equitable distribution. Specifically, Plaintiff contends that Attorney Floyd should have persuaded the Family Court to include a provision dividing her husband's gross retired pay rather than his disposable retired pay; a provision requiring her husband to indemnify her if his disposable retired pay was ever reduced; or both. This Court concludes that the Defendant is entitled to summary judgment because the Family Court did not have jurisdiction to provide the relief suggested, and even if it did have such jurisdiction this would have been a novel proposition of law such that Attorney Floyd's failure to obtain this relief was, as a matter of law, not negligence.

FACTS

Plaintiff retained Attorney Floyd to represent her in connection with a divorce and division of marital assets. In the course of the divorce action, Attorney Floyd represented Plaintiff at a contested hearing to divide marital property. The resulting 2002 Order of Separate Support and Maintenance awarded Plaintiff 60% of her husband's military retirement. Subsequently, Plaintiff's ex-husband began receiving $662.00 per month in disability benefits, which decreased his disposable retired pay[1] and, thus, decreased the Plaintiff's payments. Plaintiff claims that she should receive $1,020.60 per month, which is 60% of her ex-husband's $1,701.00 gross retired pay. Instead, Plaintiff now receives only $623.40 per month, which is 60% of her ex-husband's $1,039.00 disposable retired pay, after his $662.00 disability compensation is subtracted from his $1,701.00 gross retired pay.

Plaintiff claims that Attorney Floyd was negligent in failing to request that the family court include in its 2002 Order of Separate Support and Maintenance a division of

[1] Disposable Retired Pay is the amount that is paid by the Defense Finance Accounting Service to a veteran and/or their spouse after any deductions, including disability pay, are deducted from the veteran's "gross" or "total" retired pay.

gross retired pay, a requirement that Plaintiff's ex-husband indemnify her in the event that her share of his military retirement income was ever decreased.

In support of her claims, Plaintiff identified Mark E. Sullivan, an attorney licensed to practice in North Carolina, as her expert witness. Mr. Sullivan was deposed on December 19, 2013 and testified:

- He is not nor has he ever been licensed to practice law in South Carolina.
- In accordance with federal law, the South Carolina family courts do not have jurisdiction to divide disability pay as marital property.
- There is no South Carolina case law addressing the propriety of the inclusion of an indemnification clause in an order dividing marital property.
- He could not opine to a reasonable degree of certainty most probably that had Attorney Floyd made an argument for the inclusion of an indemnification clause, the family court would have incorporated it into the final order.
- He could not opine to a reasonable degree of certainty that had Attorney Floyd requested the division of the gross military retired pay rather than the disposable retired pay, the family court most probably would have done so.
- He could not opine that an appellate court in South Carolina would have held that the South Carolina family court has jurisdiction to equitably divide VA disability compensation.

In a Supplementary Affidavit, executed after Attorney Floyd filed her motion for summary judgment, Mr. Sullivan avers that he has reviewed educational materials published in or around 2002, and he now believes that the judge would have been aware

of the problem involving post-divorce disability elections and could have been persuaded to include a curative provision in his Order.

STANDARD OF REVIEW

Summary judgment is appropriate because there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Moseley*, 327 S.C. 144, 146, 488 S.E.2d 862, 863 (1997). In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Id.*

"Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (*citing George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). For the reasons that follow, this Court grants Defendants' Motion for Summary Judgment as to Plaintiff's claims in this matter.

LEGAL DISCUSSION

To recover for legal malpractice, a plaintiff must prove the following: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate cause of the client's damages by the breach. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). The plaintiff must prove that she "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Summer v. Carpenter,* 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997); *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005).

The question of the success of the underlying claim, if suit had been brought, is a question of law. *Manning v. Quinn,* 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (holding in a legal malpractice case that the likelihood of success of action that the plaintiff alleged the defendant should have taken was a question of law "and decision of that question on summary judgment motion is appropriate"); *Doe v. Howe*, 367 S.C. at 442, 626 S.E.2d at 30. Here, Plaintiff has not produced a scintilla of evidence that she would have been more successful in the underlying action had Attorney Floyd not committed the alleged malpractice.

The United States Supreme Court, in *Mansell v. Mansell*, 490 U.S. 581 (1989), addressed the relationship between a retired serviceman's retirement pay and disability benefits, as follows:

> Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay. . . . Veterans who became disabled as a result of military service are eligible for disability benefits. . . . In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retired pay. . . . Because disability benefits are

> exempt from federal, state, and local taxation, . . . military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

490 U.S. 581, 583-84 (1989) (internal citations omitted).

The Uniform Services Former Spouses' Protection Act (hereinafter "the Act") authorizes state courts to treat "disposable retired pay" as marital property that can be divided upon a couples' divorce or separation. 10 U.S.C. § 1408(c)(1); *Mansell*, 490 U.S. at 584. The Act defines "disposable retired pay" as total monthly retired pay minus certain deductions, which deductions include any amount waived in order to receive disability benefits. 10 U.S.C. § 1408(a)(4)(B); *Mansell*, 490 U.S. at 585. Accordingly, the *Mansell* Court reached the conclusion that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. The *Mansell* Court recognized the harsh result the Act could have on former spouses, yet declined to rule in opposition of Congress' intent. Id.

The South Carolina Court of Appeals, in *Price v. Price*, recognized *Mansell's* directive that "disability benefits may not be equitably divided in a divorce proceeding" and that "[w]hile the Act allows state courts to treat *disposable* retired pay as divisible property, courts do not have the authority to treat *total* retired pay as divisible property. 325 S.C. 379, 380, 480 S.E.2d 92, 92 n.2 (1996) (emphasis in original). Based upon these clear authorities, the Family Court in the underlying action did not have jurisdiction to grant Ms. Greene the relief that her expert says Attorney Floyd should have demanded on her behalf.

Plaintiff has failed to offer a scintilla of evidence that Attorney Floyd breached her duty owed to the Plaintiff by failing to argue to the Family Court to include in its 2002 Order an indemnification clause or a division of "gross retired pay," or that, had Attorney Floyd done so, such language would have most probably been included in the Order and the Plaintiff would have obtained a better result. *See Harris Teeter, Inc.*, 390 S.C. at 290, 701 S.E.2d at 749-50 (granting summary judgment to defendant attorney where one of plaintiff's expert witnesses testified that, had defendant attorney not breached the standard of care, plaintiff's "percentage of success [in the underlying action] would have been greater," and plaintiff's other expert testified that it would be "speculation" as to whether the plaintiff would have been successful in the underlying action, but neither expert testified that the underlying action most probably would have had a better result if not for the defendant attorney's alleged malpractice); *Doe v. Howe*, 367 S.C. at 445-46, 626 S.E.2d at 31-32 (granting summary judgment to defendant attorney where plaintiff's expert testified that plaintiff most probably would have been successful in certain aspects of the underlying action had defendant attorney not been negligent as alleged, but where plaintiff's expert failed to establish that plaintiff most probably would have obtained a better result in the underlying action had defendant attorney not been negligent as alleged).

Plaintiff's only expert, Mark Sullivan's, opinions fall short of the standard required to survive summary judgment. In his initial affidavit and in his deposition, Mr. Sullivan could not opine that, had Attorney Floyd requested the inclusion of an indemnification clause or the division of "gross retired pay" in the Order, the Plaintiff most probably would have enjoyed a better result in the underlying action. He could not

state whether such an award would have been upheld on appeal. In his Supplementary Affidavit, executed after his deposition and after Defendant moved for summary judgment, he revised his opinion to state that, based on his review of continuing legal education materials available in and around 2002, he now believes that the Family Court judge would have been aware of the problem of post-divorce disability election by military retirees and would have granted a request to include a curative provision in the final Order. The problem with Mr. Sullivan's opinion is that the educational materials that he relied on advocate negotiating for an indemnity provision in a consent settlement decree. Neither Mr. Sullivan nor the Plaintiff can cite any authority that allows the Family Court to include such a provision in a contested Order. Mr. Sullivan's belated Supplementary Affidavit is like those that the Court discounted in *Harris Teeter v. Moore & Van Allen, supra:* "Harris Teeter apparently recognized the clear insufficiency of the Scarmanich and Levick testimony, for it submitted post-deposition affidavits in an attempt to rescue its malpractice claims." The trial court properly characterized these post-deposition affidavits as 'sham' affidavits . *See Cothran v. Brown,* 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (setting forth six considerations a court may use to determine if a post-deposition affidavit is a 'sham affidavit')." 390 S.C. at 289, 701 S.E.2d at 749. Even if Mr. Sullivan's post-deposition Supplementary Affidavit is entitled to consideration, his opinion lacks substance because it is a legal opinion that is contrary to controlling precedent.

Plaintiff has failed to produce a scintilla of evidence to support negligence or causation in this case, and Defendant Cindy Floyd is therefore entitled to summary judgment as a matter of law. All of the authorities cited by Mr. Sullivan and the Plaintiff

advocate being aware of the post-divorce disability election dilemma and negotiating to include an indemnification provision in settlement decrees. However, this was not a settlement, but a hotly contested case. Attorney Floyd obtained a good result for her client, sixty percent of the marital estate. No authority exists in South Carolina for the Family Court to circumvent the mandates of the Act, *Mansell,* and *Price* by apportioning gross retirement income or requiring a retiree to indemnify his former spouse if he should ever qualify for and elect disability benefits. This Court concludes as a matter of law that Attorney Floyd did not deviate from the generally accepted standard of care by failing to persuade the Family Court judge to do so.

CONCLUSION

For the foregoing reasons, the Court grants Cindy M. Floyd's Motion for Summary Judgment pursuant to Rule 56.

AND IT IS SO ORDERED.

J.C. Nicholson, Presiding Judge

October 21, 2014