

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON 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,

 vs.

Ashlin Blanchard Potterfield; J. Michael Taylor;  
TAYLOR/POTTERFIELD; GOLDEN, TAYLOR, POTTERFIELD  
AND BARRON; Reid Smith; and  
PRICE, BIRD & SMITH, P.A.. .... Respondents.

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**NOTICE OF APPEAL**

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Carolyn Mitchell Powell appeals the following Orders by the trial court:

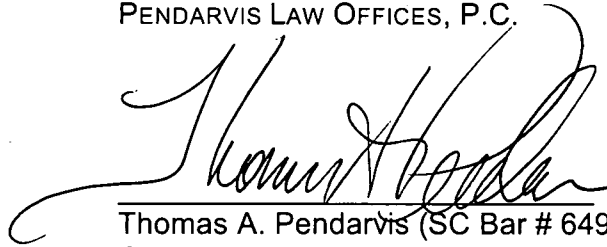
1. Order Granting Defendants' Potterfield, Taylor and Taylor/Potterfield's Motion for Summary Judgment issued by the Honorable R. Knox McMahon dated April 23, 2012 and received on May 20, 2012, a copy of which is attached hereto and incorporated hereby by reference as **Exhibit 1**;

**RECEIVED**  
AUG 08 2012  
**SC Court of Appeals**

2. Order Denying Plaintiff's Motion to Alter or Amend Judgment issued by the Honorable R. Knox McMahon dated July 19, 2012 and received on July 30, 2012, a copy of which is attached hereto and incorporated hereby by reference as **Exhibit 2.**

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)  
Catherine B. Kerney (SC Bar # 81429)  
500 Carteret St., Suite A  
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Attorneys for Appellant, Carolyn Mitchell Powell

August 6, 2012

Beaufort, South Carolina

Other Counsel of Record:

Charles E. Hill, J.D.  
TURNER, PADGET GRAHAM & LANEY, PA  
PO Box 1473  
Columbia, SC 29202  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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Carolyn Mitchell Powell. . . . . Appellant,

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AND BARRON; Reid Smith; and  
PRICE, BIRD & SMITH, P.A.. . . . . Respondents.

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**PROOF OF SERVICE**

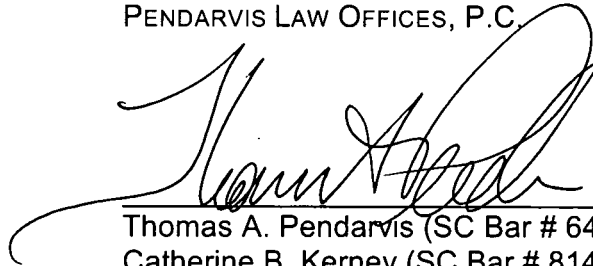
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I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of NOTICE OF APPEAL on counsel for Respondents: Ashlin Blanchard Potterfield; J. Michael Taylor; and TAYLOR/POTTERFIELD by depositing a copy of the same in the United States Mail, postage prepaid, on the 6<sup>th</sup> day of August, 2012 addressed to Charles E. Hill, J.D., TURNER, PADGET GRAHAM & LANEY, PA, PO Box 1473 Columbia, SC 29202.

**RECEIVED**  
AUG 08 2012  
**SC Court of Appeals**

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read "Thomas A. Pendarvis", written over a horizontal line.

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Attorneys for Appellant, Carolyn Mitchell Powell

August 6, 2012

Beaufort, South Carolina



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# First Class Mail



Jenny Abbott Kitchings  
 Clerk of Court  
 Court Of Appeals For The State Of South  
 PO Box 11629  
 Columbia SC 29211-1629



# PENDARVIS LAW OFFICES, PC



August 6, 2012

Jenny Abbott Kitchings, Clerk of Court  
COURT OF APPEALS FOR THE STATE OF SOUTH CAROLINA  
PO Box 11629  
Columbia, SC 29211

**Re: Carolyn Mitchell Powell v. Ashlin Blanchard Potterfield, J. Michael Taylor,  
TAYLOR/POTTERFIELD, GOLDEN TAYLOR POTTERFIELD AND BARRON, Reid Smith  
and PRICE BIRD & SMITH, PA**

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the NOTICE OF APPEAL and a PROOF OF SERVICE in regard to the above-referenced matter. Also enclosed please find our firm check in the amount of \$100.00 representing the filing fee.

Please return the clocked copies in the stamped, self-addressed return envelope enclosed for your convenience.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/lat  
Enclosures

cc: Honorable R. Knox McMahon (w/enclosures)  
Charles E. Hill, J.D. (w/enclosures)  
Susan F. Campbell, J.D. (w/enclosures) (via e-mail only)  
Carolyn Mitchell (w/enclosures) (via e-mail only)

**RECEIVED**  
AUG 08 2012  
SC Court of Appeals

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009CP4008705

Carolyn Mitchell Powell

Ashlin Blanchard Potterfield

PLAINTIFF(S)

J Michael Taylor

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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  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
		\$
		\$
		\$

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

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 \_\_\_\_\_ Judge Code \_\_\_\_\_ 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 26 April 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Susan F Campbell

Thomas A. Pendarvis

J Calhoun Watson  
J Calhoun Watson

Charles E. Hill

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Jeanette W. McBride*



JEANETTE W. MCBRIDE  
2012 APR 26 AM 10:01  
FILED  
RICHLAND COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

CAROLYN MITCHELL POWELL,

Plaintiff,

vs.

ASHLIN BLANCHARD POTTERFIELD; J.  
MICHAEL TAYLOR; and  
TAYLOR/POTTERFIELD

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 09-CP-40-8705

**ORDER GRANTING DEFENDANTS'  
POTTERFIELD, TAYLOR, AND  
TAYLOR/POTTERFIELD'S MOTION  
FOR SUMMARY JUDGMENT**

FILED  
RICHLAND COUNTY  
2012 APR 23 AM 4:01  
JANETTE W. HEDGECOCK  
CLERK OF COURT  
S.C.P. & G.S.

This matter is before the court on the amended motion for summary judgment filed February 16, 2012, on behalf of defendants Ashlin Blanchard Potterfield, J. Michael Taylor, and Taylor/Potterfield. The amended motion added an additional ground to defendants' motion filed December 27, 2011. The amended motion states the following grounds:

1. *As to all defendants:* The Amended Scheduling Order entered November 22, 2011, established a deadline of February 13, 2012 for plaintiff to identify any expert witnesses in addition to the previously disclosed experts, Gregory Adams and Grady Brown. Plaintiff failed to disclose additional experts by this deadline, and further, the experts previously disclosed have failed to express that plaintiff would have received a more favorable settlement in the underlying action but for the alleged negligence of defendants.
2. *As to Defendant Taylor:* There has been no expert testimony as to whether Defendant Taylor breached the standard of care, and as such Plaintiff has failed to make out a case of legal malpractice.

3. *As to Defendant Potterfield:* Defendant Potterfield raised a statute of limitations argument in the Amended Motion that has since been withdrawn for purposes of this motion by counsel for the Defendants by letter dated March 30, 2012.
4. *As to Defendant Taylor/Potterfield:* There are no allegations against the partnership Taylor/Potterfield exclusive of the allegations against Defendant Taylor and Defendant Potterfield individually. If claims against individual partners fail, there is no surviving claim against the partnership entity.

This motion came on for hearing before the undersigned on March 16, 2012. Plaintiff was represented by Thomas A. Pendarvis. Defendants were represented by Charles E. Hill and Virginia W. Williams of the firm of Turner, Padget, Graham & Laney, P.A.

After considering the submittals by the parties and the arguments of counsel, the court determines that the defendants' motion should be GRANTED

#### SUMMARY OF FACTS

Potterfield and Taylor are Columbia attorneys who practice primarily in the area of family law. They practice together in a partnership known as Taylor/Potterfield. This case arises out of their representation of plaintiff in marital litigation against her husband Conrad Powell. On September 17, 2003 Plaintiff retained Potterfield to represent her in a marital dispute with her husband Conrad Powell. Plaintiff and husband separated December 2003. Carolyn Powell initially retained Potterfield, and Potterfield filed a complaint in Richland County Family Court on August 27, 2004. (Carolyn W. Powell, Plaintiff, vs. W. Conrad Powell, Defendant, Case No. 04-DR-40-3081). On April 1, 2005 Plaintiff terminated Potterfield and separately retained Michael Taylor to represent her. Taylor associated Columbia attorney Reid Smith to address the business issues in the marital litigation. Attorney Taylor represented Plaintiff from



April 1, 2005 until Jan 17, 2007 when Plaintiff terminated Attorney Taylor and thereafter retained Cantzon Foster. On April 27, 2007 Plaintiff and Husband entered into "Complete Property, Support and Custody Agreement" that was approved along with a Final Decree of Divorce by the Honorable Anne Gue Jones on May 2, 2007. This detailed agreement, 21 pages in length with an attached "agreement" and an exhibit to the agreement, placed significant financial obligations on Mr. Powell. He was to pay \$5,000 per month in child support/property distribution, until the oldest child graduated high school. He was to pay for education costs of the couple's two children, including undergraduate college fees and costs. He was to pay expenses associated with the keeping of up to four horses. The agreement acknowledged his prior advancements on equitable distribution of \$400,000 in January 2005 and \$250,000 in March 2007. He paid off a \$435,000 mortgage Ms. Powell had assumed in connection with her purchase of horse stables in Aiken after their separation.

December 11, 2009 Plaintiff filed a Verified Summons and Complaint along with an affidavit of Expert Opinion of Dr. Gregory B. Adams pursuant to S.C. Code 15-36-100 against Ashlin Potterfield, Michael Taylor, and Taylor/Potterfield alleging Legal Malpractice and Breach of Contract and Breach of Fiduciary Duty. Dr. Adams' affidavit is dated December 11, 2009 and has not been updated or amended in any manner.

There has been extensive discovery in this case including interrogatories, exchange of documents and depositions. The following depositions have been taken on the dates indicated: Plaintiff Carolyn Mitchell Powell (Jan 27, 2011), Ashlin B. Potterfield (March 10, 2011), Michael Taylor (April 19, 2011), Reid Smith (Sept 30, 2011), Grady Brown (Nov 16, 2011) and Cantzon Foster (Jan 26, 2012).

Grady Brown, Esq. was named as an expert witness for the Plaintiff on September 16, 2011 and a report was submitted from Mr. Brown to the Defendants' attorney through Plaintiff's attorney dated September 12, 2011. Mr. Brown indicated that he had been provided two depositions : the Plaintiff's and Potterfield's. He further indicated " Moreover, my 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." (Page 1 Letter of H. Grady Brown September 12, 2011) During his deposition of November 16, 2011 Mr. Brown reiterated and affirmed that he was offering no testimony on the issue of damages. (Dep. P. 48) Mr. Brown opined as to the standard of care for attorneys in a matter of this type and concludes that "All of the opinions I have set forth herein are based upon a reasonable degree of professional certainty." (Page 7 Letter of H. Grady Brown September 7, 2011). Mr. Brown concluded that defendants breached the standard of care by, among other things, failing to seek a verified financial declaration; failing to hire a forensic accountant; failing to request a temporary hearing; failing to obtain a Lis Pendens; failing to obtain restraining orders regarding disposition of assets; failing to issue subpoenas or other discovery; and failing to bring in third party business associates as parties to this action. Plaintiff's later submitted the affidavit of Grady Brown on March 12, 2012 to supplement Brown's letter of September 12, 2011.



On September 23, 2011, defendants served notice of taking Brown's deposition, and the deposition was taken as scheduled and agreed upon on November 16, 2011. In the deposition he reiterated and affirmed that he was offering no testimony on the issue of damages. (Dep. p. 48).

On March 12, 2012, two days before the present motion was scheduled for hearing, plaintiff submitted an affidavit from Brown. In this document, Brown stated his belief that the defendants "caused Ms. Powell to be unprotected and vulnerable to dissipation of marital assets by her husband..." He stated that defendants could have taken actions which "would have been beneficial to Ms. Powell by protecting and preserving assets and by identifying assets or supplementing and verifying information obtained directly from the opposing party. Had these tools and procedures been used, and used promptly, assets could have been preserved or their status controlled, settlement negotiations could have proceeded based on verified information and delay avoided."

These defendants answered on February 22, 2010, admitting that there had been an attorney-client relationship between them and Carolyn Powell, but otherwise denying the material allegations of plaintiff's complaint.

On Nov. 22, 2011, counsel for the parties met with Chief Administrative Judge James R. Barber III for a status conference. The parties jointly submitted a proposed Amended Scheduling Order, as to which they had conferred and agreed. The order provided in pertinent part, "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." It required that dispositive motions be filed by March 30, 2012. Judge Barber signed the order, which was filed on Nov. 23, 2012.

Plaintiff did not disclose any additional expert witness by February 13. On February 16, defendants filed their amended motion for summary judgment, asserting that plaintiff had not disclosed any expert who, "by affidavit, report, or deposition, has expressed any opinion that plaintiff would have received a more favorable settlement in the underlying action but for the alleged negligence of defendants." In the absence of such testimony, defendants contend they are entitled to judgment as a matter of law.

### STANDARDS

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the adverse party may not rest upon the mere allegations of his pleadings. Instead his response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct.App.1988) (citing Rule 56(e), SCRPC).

In cases applying the 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. Even a scintilla of evidence presented in response to the motion must first be probative. See Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); Bass v. Gopal, Inc., 384 S.C. 238, 247, 680 S.E.2d 917, 921 (Ct.App.2009). Excerpts of testimony may meet the scintilla requirement but fail the probative test if the testimony as a whole "rests entirely on surmise, conjecture and speculation, and therefore has no



probative value.” McDowell v. Stille Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947) (internal citations omitted).

“In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (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, 701 S.E.2d 742 (2010). A plaintiff in a legal malpractice action must establish the standard of care by expert testimony. Smith v. Haynsworth, Marion, McKay and Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996).

Moreover, the plaintiff in a legal malpractice case must show 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, 561 S.E.2d 654 (Ct. App. 2002). The question of the success of the underlying claim is a question of law. Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005); Manning v. Quinn , 365 S. E. 2d 24 (1988)

### ANALYSIS

Defendants argue that the failure of the Plaintiff to abide by the scheduling order in appointing an expert would cause the action to fail for want of proving the standard of care and the breach of that standard. However, summary judgment is a drastic remedy and should not be entered into lightly. Therefore, on the basis of failure to meet the deadline of the scheduling order, the motion for summary judgment is denied.

In proving a legal malpractice claim, the first element the Plaintiff must prove is the existence of an attorney-client relationship. The Plaintiff argues, and the Defendants agree, that there was an attorney-client relationship between the Plaintiff and Defendants Taylor and Potterfield and the partnership. Thus, this element is undisputed.



Next, the Plaintiff must prove a breach of duty by the Defendant. In his affidavit, the Plaintiff's expert on the standard of care in legal malpractice opines that it was breached and provides a list of duties which would have been proper for the attorneys to carry out in adequately pursuing Plaintiff's case. The Court finds that the affidavit of Grady Brown is a scintilla of evidence that creates a genuine issue of material fact on this issue of breach of duty by the Defendant and as to this element, Defendants' Motion for Summary Judgment is denied as to breach of duty by the attorney(s).

Plaintiff's complaint alleges that the defendants failed to protect marital assets, and failed to secure marital property against waste and dissipation. Under the foregoing authorities, plaintiff has the burden of proving that the alleged failure to protect and secure marital property resulted in a less favorable disposition of the case than she would have otherwise achieved. Defendants' motion asserts that plaintiff has no evidence to carry this burden on the essential element of damages. Thus it is necessary to review the record before the court for evidence pertinent to this issue. The court begins with the deposition testimony of attorney Smith, who was associated by defendant Taylor.

Smith testified that he was qualified and competent to assist Taylor with regard to such issues as determining business assets, liabilities and cash flow. (Dep. 39, 41). He conducted his own investigation into Mr. Powell's holdings. (Dep. 41). Shortly after he was retained, he and Taylor went to Mr. Powell's attorney's office, where they spent several hours examining the husband's records. (Dep. p. 48). He reviewed Mr. Powell's tax returns going back to 1999, and the couple's joint returns through 2003 or 2004. (Dep. p. 55).

Continuing his investigation, Smith checked the RMC records and tax assessor's offices in Richland, Lexington, Horry, and Georgetown Counties in South Carolina and records in a

North Carolina county as well. He looked at closing statements, mortgages, deeds, financial statements, and check records. Because Ms. Powell had expressed a concern that her husband was diluting assets by giving them away to his brother or accountant (dep. 9), he checked the formation of Mr. Powell's corporations to determine who were the shareholders and what were their interests. (Dep. 62-65).

By late 2006, Smith was confident that "I 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" (Dep. p. 67). Because of Smith's familiarity with the business issues, he personally conducted the deposition of Conrad Powell on December 13, 2006. His impression was that Mr. Powell was forthcoming in his testimony regarding his business interests. Smith testified, "I didn't see anything that indicated that there was an effort to hide assets," and his opinion in that regard never changed. (Dep. p. 80).

Smith concluded, "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." (Dep. p. 90).

Attorney Foster assumed the representation of Ms. Powell after she terminated Taylor, and Smith remained associated in the case. Foster likewise noted Ms. Powell's suspicion that her husband was hiding money and hiding assets. "There was a concern that some of the assets may have been transferred over to Mr. Powell's brother." (Dep. p. 30). But he acknowledged that Ms. Powell was never able to furnish him with any evidence of her husband hiding assets. "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.” (Dep. p. 31).

During Foster’s representation, the deposition of Tim Tyler, Mr. Powell’s accountant, was taken. Foster testified, “We didn’t get anything that conclusively proves that there were other assets that we needed to go after...” (Dep. p. 105).

Foster was asked, “Did you ever become aware at any time, during the time that you were representing her or subsequently, of any assets that were hidden or transferred or anything improperly done by Mr. Powell in that regard?” He answered, “No, sir.” (Dep. p. 135).

Ms. Powell herself was not able to provide any specifics. In her deposition, she testified, “I think there’s property that (her husband) invested in and tied up that I don’t know about.” But she could not say what that property was. “Q. Any proof, though? Any facts, papers, witnesses? A. Not at this time.” (Dep. 198-200).

The “Complete Property, Support, and Custody Agreement,” entered into between Mr. and Mrs. Powell on April 27, 2007, is attached as Exhibit 20 to the deposition of Ms. Powell. This detailed agreement, 21 pages in length with an attached “agreement” and an exhibit to the agreement, placed significant financial obligations on Mr. Powell. He was to pay \$5,000 per month in child support/property distribution, until the oldest child graduated high school. He was to pay for education costs of the couple’s two children, including undergraduate college fees and costs. He was to pay expenses associated with the keeping of up to four horses. The agreement acknowledged his prior advancements on equitable distribution of \$400,000 in January 2005 and \$250,000 in March 2007. He paid off a \$435,000 mortgage Ms. Powell had assumed in connection with her purchase of horse stables in Aiken after their separation.



Foster, who was representing Ms. Powell at the time the settlement agreement was entered into, testified in his deposition, "Based on the information I had and based on my knowledge of the facts of the case, I thought it was a good settlement." (Dep. p. 134). Foster testified that he recommended that Ms. Powell not enter into this settlement, because in his opinion further discovery into Mr. Powell's assets should be conducted. But Ms. Powell declined to follow this advice, and proceeded with the voluntary settlement. (Dep. pp. 132-135).

The settlement agreement contained an acknowledgement that each party "has adequate knowledge of the other's financial situation, including: income, expenses, debts and assets as they have exchanged sworn financial declarations," and that the agreement was fair and reasonable.

Brown, an attorney in Beaufort, was identified by plaintiff as an expert witness on September 16, 2011. Plaintiff submitted a report written by Brown, dated September 12 and summarizing his review of the case. In this report, Brown stated, "My review was not in any way intended to determine the nature or the extent of any damages Ms. Powell may have incurred as a result of representation by the Taylor/Potterfield Law Firm."

On September 23, 2011, defendants served notice of taking Brown's deposition, and the deposition was taken as scheduled and agreed upon on November 16, 2011. In the deposition he reiterated and affirmed that he was offering no testimony on the issue of damages. (Dep. p. 48).

But on March 12, 2012, two days before the present motion was scheduled for hearing, plaintiff submitted an affidavit from Brown. In this document, Brown stated his belief that the defendants "caused Ms. Powell to be unprotected and vulnerable to dissipation of marital assets by her husband..." He stated that defendants could have taken actions which "would have been beneficial to Ms. Powell by protecting and preserving assets and by identifying assets or

supplementing and verifying information obtained directly from the opposing party. Had these tools and procedures been used, and used promptly, assets could have been preserved or their status controlled, settlement negotiations could have proceeded based on verified information and delay avoided.”

In addition to the Brown affidavit, plaintiff relies in opposition to this motion on Adams’ affidavit, dated Dec. 11, 2009, and filed with the complaint. In the affidavit, Adams asserted that various alleged deviations from the standard of care by defendants “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.”

The Hall and Doe cases, cited above, are instructive when determining whether plaintiff has sustained the burden of proof on the issue of damages when the alleged malpractice occurred during defendant’s handling of prior litigation. These cases were decided on defense motions for summary judgment, in circumstances very similar to the present case.

In the first of these cases, Hall was arrested by the Lexington County Sheriff’s Department on the basis of information about a potential drug purchase. Fedor represented Hall in the criminal matter; he was able to get the criminal charges dropped, and to secure the return of \$40,000 seized in the arrest. Hall then brought a civil suit against the arresting officer, and Fedor appeared as co-counsel. Hall accepted a settlement offer of \$30,000. He then brought a legal malpractice action against Fedor, contending that his attorney had made misrepresentations to him concerning the settlement. Fedor moved for summary judgment, and the trial court granted the motion.

In affirming, the Court of Appeals noted that Hall could have defeated the summary judgment motion by establishing he “most probably” would have received a larger settlement than \$30,000. But the court found there was no evidence to that effect. Judge Anderson remarked, “In contrariety, the evidentiary record demonstrates with remarkable clarity that the \$30,000 amount was a good settlement, even to the point of reaching a windfall for Hall.” 349 S.C. at 176; 561 S.E.2d at 657. Judge Anderson continued, “Indubitably, considering the absence of any admissible evidence presented by Hall, and in light of the evidence presented by Fedor, Hall failed to show he ‘most probably’ would have received a settlement amount greater than \$30,000.” 349 S.C. at 177; 561 S.E.2d at 658.

The court concluded, “In South Carolina, a plaintiff in a legal malpractice claim is required to prove he ‘most probably’ would have been successful in the underlying litigation if the attorney had not committed the alleged malpractice. In regard to Hall’s legal malpractice case based on the settlement agreement claim, there is no admissible evidence in the record to support Hall’s burden of proof.” 349 S.C. at 179; 561 S.E.2d at 659.

In the second case, John Doe was a pseudonym for a student who attended Porter-Gaud school in Charleston. He was sexually molested by a teacher at the school. Much later, Doe retained Howe to represent him in a claim against the school. This claim was settled for \$88,000. Other victims of the same teacher obtained more favorable settlements on their claims for sexual abuse. Doe sued his former counsel for legal malpractice. Howe moved for summary judgment on the legal malpractice claim, and the trial court granted the motion.

In affirming, the Court of Appeals considered the statements of attorney David Flowers, relied upon by plaintiff in opposition to the motion. Flowers said, “Doe most probably would have defeated Porter-Gaud’s defense if his case had been filed and zealously pursued.” The trial

judge held Flowers' statement was insufficient to defeat Howe's summary judgment motion because Flowers never explicitly stated Doe most probably would have recovered more than the \$88,000 he received in his settlement with Porter-Gaud.

Doe claimed that he only had to show that he "most probably would have been successful" in the underlying action and did not need expert testimony regarding the amount that he would have recovered. The Court of Appeals responded, "We disagree with both arguments." The court continued, "We further agree with the trial judge's reliance on the fact that Flowers never stated that Doe 'most probably' would have received more than the \$88,000 he received in his settlement with Porter-Gaud." Finally, the court commented, "Notably absent from the record in this case, however, is any mention of settlement value from Flowers or any other expert that was brought to the trial judge's attention." 367 S.C. at 445; 626 S.E.2d at 31-32.

Reading the affidavits of Dr. Adams (December 11, 2009) and Grady Brown (March 12, 2012) in the light most favorable to the Plaintiff, neither presents an opinion sufficient to meet the requirements of Hall and Doe. Neither states an opinion as to the value of the underlying settlement. Neither states an amount for which plaintiff could have settled, in excess of the value of the underlying settlement, but for the alleged negligence of the defendants. Neither refutes the conclusions arrived at by Smith, following his extensive investigation.

Brown's affidavit states that certain actions of defendants "would have been beneficial;" that assets "could have been preserved," and that settlement negotiations "could have" proceeded on verified information. These statements are remarkably similar to those of plaintiff's experts in Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988), who opined as to actions the defendant attorney "could have" and "should have" taken, one such action that attorneys should have sought a temporary restraining order among other actions. In affirming summary judgment

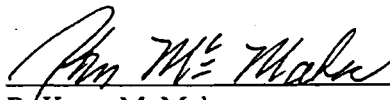
for the attorney, the court observed, "The attorney affidavits in the record contain mere conclusory statements suggesting legal actions which, in hindsight, might have been instituted on behalf of appellants. Nowhere in the affidavits do the attorneys address the likelihood of success of these actions." 294 S.C. at 386; 365 S.E.2d at 25.

Although damages do not have to be proven with mathematical certainty or precision, as the Plaintiff correctly points out, the claim cannot be speculative. Here Plaintiff has provided nothing more than bald assertions and conjecture, with no real factual support for any damages. The evidence in the record is not sufficient to withstand summary judgment as to the issues of damages in this case.

### CONCLUSION

In summary, the Court denies Defendants' motion for summary judgment on the basis that Defendants breached the standard of care to the Plaintiff or that the Plaintiff violated the amended scheduling order thereby entitling the Defendants to summary judgment. The Court grants the Defendants' motion for summary judgment on the basis of Plaintiff's failure to present even a scintilla of evidence as to the issue of damages.

AND IT IS SO ORDERED.

  
R. Knox McMahon  
Presiding Judge  
Fifth Judicial Circuit

Lexington, S.C.

April 23<sup>RD</sup>, 2012

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009CP4008705

Carolyn Mitchell Powell

PLAINTIFF(S)

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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  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 \_\_\_\_\_

JEANETTE W. BRIDE  
C.C.P. & G.S.  
2012 JUL 25 AM 10:33  
FILED  
RICHLAND COUNTY

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
		\$
		\$
		\$

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

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 \_\_\_\_\_ Judge Code \_\_\_\_\_ 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 25 July 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas A. Pendarvis

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Jeanette W. Bride*



STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

Carolyn Mitchell Powell, )

Plaintiff, )

vs. )

Ashlin Blanchard Potterfield; J. Michael Taylor; Taylor/Potterfield; Golden, Taylor Potterfield and Barron; Reid Smith; and Price, Bird & Smith, P.A., )

Defendants. )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP40-08705

**ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

RICHLAND COUNTY  
**FILED**  
2012 JUL 19 PM 2:50  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

Plaintiff moves to Alter or Amend the Court's Order Granting Defendants' Potterfield, Taylor, and Taylor/Potterfield's Motion for Summary Judgment dated April 23, 2012. For the reasons following, Plaintiff's motion is **DENIED**.

**FACTS & PROCEDURAL HISTORY**

Potterfield and Taylor are Columbia attorneys who practice primarily in the area of family law. This case arises out of their representation of Plaintiff in marital litigation against her husband Conrad Powell. Carolyn Powell initially retained Potterfield, and Potterfield filed a complaint in Richland County Family Court on August 27, 2004. In 2005, Potterfield transferred the role of primary attorney to her partner, Michael Taylor. Taylor represented Plaintiff from 2005 until January 17, 2007, when Plaintiff terminated Attorney Taylor and thereafter retained Cantzon Foster. On April 27, 2007, Plaintiff and Husband entered into "Complete Property, Support and Custody Agreement" that was approved along with a Final Decree of Divorce by the Honorable Anne Gue Jones on May 2, 2007. That agreement, running 21 pages in length, put substantial financial obligations on Mr. Powell, including \$5,000 per month in child support, the

**SCANNED**

education costs of the couple's two children, the expenses of maintaining up to four horses, and the payment of a \$435,000 mortgage Ms. Powell had assumed in connection with her purchase of horse stables after their separation. Plaintiff filed suit against Attorneys Potterfield, Taylor, and the Taylor/Potterfield partnership on December 11, 2009, alleging Legal Malpractice, Breach of Contract, and Breach of Fiduciary Duty.

Defendants first motioned for summary judgment in 2011. That motion was denied by the Honorable G. Thomas Cooper, Jr. on May 31, 2011. Defendants again motioned for summary judgment in 2012. That motion, the subject of Plaintiff's present motion to alter or amend, was granted April 23, 2012. Plaintiff received that Order on May 2, 2012 and submitted the present motion on May 11, 2012.

#### STANDARDS

A party may motion to alter or amend a judgment of the Court no later than 10 days of receipt of the written notice of the entry of the order. Rule 59(e), SCRPC. Rule 59(e) is the proper procedure for correcting factual errors in an order. Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) "[A] party cannot use a Rule 59(e) motion to present to the . . . [C]ourt an issue the party could have raised prior to the judgment but did not." Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (2009).

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "When a motion for summary judgment is made and supported by such facts as would be admissible in evidence at trial, the adverse party may not rest upon the mere allegations of his pleadings. Instead his response to the motion must set forth



specific facts, admissible in evidence, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.” Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988) (citing Rule 56(e), SCRPC). Summary Judgment cannot be granted unless the opposing party has had a full and fair opportunity to complete discovery. Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857, (2001). However, the opposing party cannot be dilatory in seeking discovery and further discovery must be likely to uncover additional relevant evidence. Id.

In cases applying the 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. Even a scintilla of evidence presented in response to the motion must first be probative. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); Bass v. Gopal, Inc., 384 S.C. 238, 247, 680 S.E.2d 917, 921 (Ct. App. 2009). Excerpts of testimony may meet the scintilla requirement but fail the probative test if the testimony as a whole “rests entirely on surmise, conjecture and speculation, and therefore has no probative value.” McDowell v. Stille Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947) (internal citations omitted).

“In order to prevail in a cause of action for legal malpractice, the plaintiff must prove: (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, 701 S.E.2d 742 (2010). Moreover, the plaintiff in a legal malpractice case must show 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, 561 S.E.2d 654 (Ct. App. 2002). The question of the success of the underlying claim is

a question of law. Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005); Manning v. Quinn, 294, S.C. 383, 365 S.E.2d 24 (1988).

### ANALYSIS

Plaintiff advances five arguments in favor of amending the Order of Summary Judgment dated April 23, 2012:

1. The Order misstates or fails to recognize factual allegations creating disputed issues of material fact that would defeat the motion for summary judgment.
2. The Order fails to recognize that discovery was not complete nor was discovery closed under the scheduling order when the trial court granted summary judgment.
3. The Order fails to recognize the evidence creating a disputed issue of material fact presented by two expert witnesses' sworn testimony supporting Plaintiff's allegations that Plaintiff was damaged by Defendants' acts or omissions.
4. The Order fails to recognize or apply the proper standard of review to Dr. Adams' specific statements regarding damages as presenting the evidence necessary to move forward with a trial in this matter.
5. The Order fails to recognize Plaintiff's breach of fiduciary duty claim and the evidence in the record satisfying the standard of proof as to disputed facts regarding the amount of damages flowing from the attorneys' errors in breach of their fiduciary duties owed to Plaintiff.

In addressing these arguments, it is vital to recognize the narrow grounds on which this Court granted Defendants' Motion for Summary Judgment. This Court found that Plaintiff, as of the summary judgment hearing, did not provide a scintilla of evidence as to damages element of a legal malpractice claim. Plaintiff offered no facts to argue that she "most probably" would have



received more than what was provided in the divorce agreement. With that narrow ground in mind, the overwhelming majority of Plaintiff's present motion is irrelevant.

**I. PLAINTIFF FAILS TO PROVIDE ANY EVIDENCE THAT SHE  
"MOST PROBABLY" WOULD HAVE RECEIVED A SUM GREATER  
THAN THAT PROVIDED IN THE DIVORCE SETTLEMENT**

Plaintiff insists that the scintilla of evidence as to the other elements of a legal malpractice claim, in combination with the expert affidavit of Gregory B. Adams, is sufficient to show that she would have "most probably" received a larger settlement. First, the evidence as to establishing a relationship, breach, and cause, are all irrelevant to the singular matter of damages. That Defendants breached their standard of care says nothing as to whether or not Plaintiff "most probably" would have received at trial a sum greater than the settlement. As for the testimony of Professor Adams, the Court finds it to be remarkably similar to the testimony he provided for the opposing party in Doe v. Howe. In Howe, Prof. Adams testified that "Doe would have shared in the lucrative settlement and recovered much more than what he agreed to accept on Howe's advice." Howe, 367 S.C. at 444, 626 S.E.2d at 31. The Court of Appeals concluded that Prof. Adams "did not assert anything that would create an issue of material fact warranting denial of summary judgment in this case." Id. The Court further endorsed the reliance on the fact that Doe provided no expert testimony explicitly stating that he would have received more than what was provided in the settlement of that case. Here, once again, Plaintiff provides no such expert testimony. The facts of the present case are so incredibly similar to those of Howe that the Court would be misguided to reach any contrary conclusion on this matter. Therefore, Plaintiff's motion as to the legal malpractice claim is **DENIED**.

**II. PLAINTIFF'S ARGUMENT THAT DISCOVERY WAS NOT COMPLETE WAS NOT RAISED IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT AS IS THEREFORE UNAVAILABLE IN A MOTION TO ALTER OR AMEND.**

Plaintiff further argues that she was not yet finished with discovery and that Plaintiff's expert H. Grady Brown was working on a comprehensive damages report. However, this argument that summary judgment was foreclosed due to ongoing discovery does not appear anywhere in Plaintiff's "Memorandum in Opposition to Taylor/Potterfield Defendants' (Second) Motion and Amended (Second) Motion for Summary Judgment." Under Garfield, Plaintiff cannot raise an issue previously unstated on a Motion to Amend any more than she could on appeal. The Court therefore rejects this argument.

Furthermore, even had Plaintiff raised this argument below, the Court would find that she has had ample opportunity to seek discovery. This case has hung on the judicial system for two-and-a-half years. There has been extensive discovery in this case, including interrogatories, exchange of documents, and depositions. The Court went so far as to allow the submission of a new affidavit by Mr. Grady Brown on March 12, 2012, a mere two days before the motion for summary judgment. Depositions were closed. Additional expert witnesses were by the date of the hearing prohibited. The deadline for dispositive motions, such as Defendants' motion for summary judgment, was looming at the end of March, as was required mediation. Plaintiff had full and fair opportunity to complete discovery and cannot defeat summary judgment through claims that an already identified expert witness is still working up until the day of trial, especially given that dispositive motions were due two months before the day certain.

Therefore, Plaintiff's motion that the order of summary judgment be withdrawn on the grounds that discovery was ongoing is **DENIED**.

### III. PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM WAS NOT SETTLED BY THE COURT'S ORDER OF APRIL 23, 2012

Finally, Plaintiff argues that this Court's Order of Summary Judgment did not recognize her breach of fiduciary duty claim. Defendants did not address the breach of fiduciary duty claim in their motion for summary judgment, nor did Plaintiff argue the subject in its opposition. The motion and hearing thereon were focused overwhelmingly on the legal malpractice claim.

As to the issue of the fiduciary duty claim, the Court is guided by Gartside and Howe. First and foremost, Plaintiff puts an unnecessary burden on the Court by raising an issue on a Rule 59(e) motion that was not otherwise argued in opposition to the motion for summary judgment. The decision to do so potentially offers Plaintiff a second bite at the apple beyond the typical scope of a Rule 59(e) motion. Allowing that second bite on grounds that Plaintiff did not bring the Court's attention to the fiduciary duty issue would only give incentive to incomplete and inefficient arguments in Court and disrupt the steady beat of the judicial system. It is that concern of judicial efficiency and fairness that underpins the rule stated in Gartside, that a party cannot use a Rule 59(e) motion to bring up issues not raised before judgment. For that reason, the Court concludes that Plaintiff failed to adequately preserve the issue of a fiduciary duty in opposition to the motion for summary judgment.

Furthermore, even if it were adequately preserved, the Court would still deny Plaintiff's motion. Plaintiff's failure to show she "most probably" would have recovered a larger settlement than she did recover is a flaw that persists through her breach of fiduciary duty claim. Howe, 367 S.C. 432, 448 n.27, 626 S.E.2d 25, 33 n.27; see also Cf. General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F.Supp.2d 951, 961-62 (E.D.Va. 2005) (breach of fiduciary duty claim was "mere disguise[] for the plaintiffs' legal malpractice claims"). To allow a fiduciary duty claim to continue under a standard of damages lesser than that of the malpractice

claim central to the whole case would, in effect, defeat the "most probably" standard as it presently exists as a hurdle for proving legal malpractice. The Court therefore finds that Plaintiff's claim for breach of fiduciary duty is as deficient as her claim for legal malpractice.


Because Plaintiff failed to argue her claim for breach of fiduciary duty in opposition to the motion for summary judgment and because Plaintiff failed to prove she would "most probably" have recovered a larger settlement, Plaintiff's motion as to the breach of fiduciary duty claim is **DENIED**.

#### SUMMARY

1. Plaintiff's motion to alter or amend the Order of Summary Judgment dated April 23, 2012 as it relates to the legal malpractice claim is **DENIED**.
2. Plaintiff's motion to withdraw the Order of Summary Judgment dated April 23, 2012 on the grounds that discovery was ongoing is **DENIED**.
3. Plaintiff's motion to alter or amend the Order of Summary Judgment dated April 23, 2012 as it relates to the breach of fiduciary duty claim is **DENIED**.

IT IS SO ORDERED

Lexington, SC  
July 19, 2012

  
\_\_\_\_\_  
The Honorable R. Knox McMahon