THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable J.C. Nicholson
Circuit Court Judge

Case No.: 2012-CP-10-8372
Appellate Case No.: 2014-002450

Hattie Mae Greene .... Appellant,

v.

Cindy M. Floyd .... Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

A. STANDARD OF REVIEW

B. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE FAMILY COURT IN THE UNDERLYING ACTION LACKED THE POWER TO AWARD PLAINTIFF ANY PORTION OF HER EX-HUSBAND'S DISABILITY COMPENSATION AND ATTORNEY FLOYD COULD NOT HAVE BEEN NEGLIGENT FOR FAILING TO OBTAIN THIS RELIEF

C. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO ESTABLISH THAT EVEN IF ATTORNEY FLOYD BREACHED A LEGAL DUTY OWED TO THE PLAINTIFF, THAT BREACH WAS A PROXIMATE CAUSE OF PLAINTIFF'S DAMAGES

D. THE LOWER COURT PROPERLY DISCOUNTED THE POST-DEPOSITION AFFIDAVIT OF PLAINTIFF'S EXPERT

E. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF'S EXPERT'S SUPPLEMENTARY AFFIDAVIT LACKED SUBSTANCE

COUNTERSTATEMENT OF THE CASE

I. Factual Background

Cindy M. Floyd ("Attorney Floyd") is an attorney licensed to practice law in the State of South Carolina. (See Dep. C. Floyd p.10, 1 - p.12, l. 13). She began practicing law in 1987 and has devoted most of her practice to Family Law. (See Dep. C. Floyd p.12, ll.6-20). In 2002, Attorney Floyd represented Hattie Mae Greene ("Plaintiff") in a contested proceeding for the division of marital property with Plaintiff's now ex-husband, who is a retired Marine. (See Compl. ¶3; see also Dep. H. M. Greene, p.15, ll.12- p.16, l.21; pp.20, l.6 - p.22, l.25). A trial to divide marital property was held and Attorney Floyd represented Plaintiff at that hearing. (See Compl ¶7). Following the trial, the Family Court issued an Order of Separate Support and Maintenance ("2002 Order of Separate Support and Maintenance" or "2002 Order"), which awarded Plaintiff sixty percent (60%) of her now ex-

husband's military retirement. (See Order of Separate Support and Maintenance dated May 14, 2002; Compl. ¶ 9).

Almost ten years after the Order of Separate Support and Maintenance was entered, Plaintiff's ex-husband applied for and began receiving VA disability compensation. (See Dep. H. M. Greene, pp. 28, ll. 1-2; pp. 36, l.12 - p. 39, l.4). Plaintiff's ex-husband's receipt of VA disability compensation in the amount of $662.00 per month decreased his "disposable retired pay" and, thus, decreased the Plaintiff's sixty percent (60%) payment. (See Compl. ¶ 9). Because federal law prohibits equitable division of military disability compensation, Plaintiff began receiving less money than she had before the onset of the disability. (See Dep. H. M. Greene, p. 42, l.13-19). Plaintiff claims that she should receive $1,020.60 per month, which is sixty percent of her ex-husband's $1,701.00 gross retired pay. (See Compl. ¶ 9; Dep. H. M. Greene, pp.45, ll.15-24). Instead, she now receives $623.40 per month, which is sixty percent of her ex-husband's disposable retired pay, after his disability compensation is subtracted from his gross retired pay. (See Compl. ¶ 9).

II. **Procedural History**

Plaintiff filed a Complaint on December 27, 2012 alleging a cause of action for legal malpractice against Attorney Floyd. Discovery was conducted and ended on April 29, 2014 in accordance with the Amended Consent Scheduling Order. On May 2, 2014, Attorney Floyd filed a Motion for Summary Judgment. Judge J. C. Nicholson granted summary judgment on behalf of Attorney Floyd and entered an Order on October 23, 2014 on the grounds that (1) Plaintiff failed to produce a scintilla of evidence that she would have been more successful in the underlying action had Attorney Floyd not committed the alleged malpractice; (2) the Family Court in the underlying action did not have jurisdiction to grant

Plaintiff the relief that her expert says Attorney Floyd should have demanded; and (3) Plaintiff 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.

Plaintiff has filed this instant appeal from the entry of summary judgment.

III. Summary of Arguments

It is well understood among Family Court practitioners that some military benefits are subject to equitable distribution and others are not. At issue in this case is whether Attorney Floyd, an experienced Family Court practitioner, could or should have persuaded a judge to include a provision in his Order in a contested case requiring Plaintiff's ex-husband to pay her a portion of future military disability compensation that he might receive. The parties could have negotiated for such a provision in a consent decree, but a court does not have the power to award an ex-spouse any part of a retired serviceperson's military disability compensation. This was a contested case. Plaintiff's ex-husband had no known disability at the time of their divorce, but he was a serial adulterer, which led to a hotly contested trial over property distribution. Attorney Floyd obtained an excellent result in the trial, persuading the judge to award Plaintiff sixty percent of her ex-husband's military retirement pay. The Court did not -- and could not -- order that she receive any part of disability compensation that he might in the future become eligible and elect to receive in lieu of retirement pay.

Attorney Floyd is entitled to summary judgment because she could not have been negligent for failing to ask for a benefit for her client that the Court could not award. Further, even if a question of fact existed as to whether Attorney Floyd should have asked the Court to award this benefit, Plaintiff cannot offer a scintilla of competent evidence that such a request would have resulted in a more favorable award.

ARGUMENTS

A. STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." Roe v. Bibby, 410 S.C. 287, 763 S.E.2d 645 (S.C. App. 2014) (citing Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (internal quotation marks omitted). Rule 56, SCRCP, provides the trial court shall grant summary judgment if "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), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Roe v. Bibby, supra (citing Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010)).

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRCP. See also Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n 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."); David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626

S.E.2d 1, 3 (2006) ("In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.").

B. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE FAMILY COURT IN THE UNDERLYING ACTION LACKED THE POWER TO AWARD PLAINTIFF ANY PORTION OF HER EX-HUSBAND'S DISABILITY COMPENSATION AND ATTORNEY FLOYD COULD NOT HAVE BEEN NEGLIGENT FOR FAILING TO OBTAIN THIS RELIEF

Attorney Floyd obtained an extraordinarily favorable result for the Plaintiff in a hotly contested case, convincing the Court to award her sixty percent of her husband's retirement pay. Federal law is clear that the Court could not have awarded the Plaintiff what she now wants, equitable division of her husband's future disability compensation. Attorney Floyd cannot have been negligent for failing to convince the Court to do what it could not do.

In this appeal, Plaintiff argues that the lower court erred in entering summary judgment on behalf of Attorney Floyd based upon the clear legal precedent establishing that the Family Court in the underlying action did not have the power to grant Plaintiff the relief that her expert says Attorney Floyd should have demanded on her behalf. For the reasons that follow, the trial court properly concluded that Plaintiff failed to offer a scintilla of evidence that Defendant breached a duty of care owed to the Plaintiff.

It is well settled in South Carolina that "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. See Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010)(citing Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). 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); see also Doe v. Howe, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005).

The question of the likelihood of success in the underlying claim, if the attorney had done as the plaintiff alleges she should have done, is a question of law. See 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 law is clear that the Family Court in the underlying action lacked the power to grant Plaintiff the relief that her expert claims Attorney Floyd should have demanded on her behalf. The United States Supreme Court, in Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (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 Supreme Court concluded 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, 325 S.C. 379, 480 S.E.2d 92 (1996) 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." Price v. Price, 325 S.C. at 380, 480 S.E.2d at 92 n.2 (1996) (emphasis in original).

In her Brief, Plaintiff cites the affidavit of her expert – who is not licensed to practice law in South Carolina -- and a South Carolina Bar publication entitled *Hot Tips and Cool Tips from the Best Domestic Practitioners*, as the bases for her argument that Attorney Floyd should have requested the inclusion of an "indemnification clause" in the 2002 Order by the Family Court. An indemnification clause would require the military retiree to indemnify his former spouse in the event that his disposable retired pay should ever be reduced such that the spouse's share of his total retired pay falls below an agreed-upon amount. Plaintiff's

argument overlooks the critical difference between a settlement and a contested proceeding. In a property settlement the parties are free to agree to whatever property division they want, and once approved by the Court the agreement is binding.

The Court of Appeals expressly so held in Price, supra.

In a contested case, however, the Court is bound by the law. In a settlement the Plaintiff's ex-husband could have agreed to give her part of his disability compensation, but the Court could not require him to do so in a contested proceeding. The *Hot Tips and Cool Tips* publication advocated negotiating for an indemnity provision in a consent settlement decree, not a contested court order. In fact, in her deposition, Attorney Floyd acknowledged her awareness of indemnification provisions in settlement agreements. Attorney Floyd testified:

> Q: So you read Tirado and Price not to present you with an - - as a practitioner, not to present you with an opportunity to use language that will impact a later determination, as far as the court is concerned, about what benefits you're entitled to - - your client's entitled to?
>
> A: The Price and Tirado cases were both concerning agreements. The Family Court has jurisdiction over agreements; it does not have any jurisdiction over the division of military disability pay.

(See Dep. C. Floyd, p.28, l.21 – p.29, l.5).

Inclusion of such a provision in a proposed Order to the Family Court in a contested matter would have been a transparent effort to circumvent the law. Neither Plaintiff nor her expert have cited any legal authority allowing a Family Court to require – directly or indirectly -- a military retiree to pay his ex-spouse any part of his disability compensation. Plaintiff's implicit claim, that Attorney Floyd should have tried to sneak such a provision into her proposed Order to the Family Court even though the judge did not order it, runs

counter to an attorney's ethical duty of candor to the court. Attorney Floyd could not ethically "make a false statement of fact or law to a tribunal" or "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." South Carolina Rule of Professional Conduct 3.3(a).

Attorney Floyd's expert, Todd Manley, testified that such a request would have been contrary to the law. He testified:

> Q: Could you request any specific language in a divorce decree - - not an agreement, but in a divorce decree - - that would provide protection from the eventually of a subsequent disability?
>
> A: Could you? Sure. Can you, consistent with the law? No. You cannot. I would challenge whether or not that is without some ethical concerns, Rule 11 concerns, seeking relief from the court that you're not entitled to as a matter of law.

(See Dep. T. Manley, p.7, l.19 – p. 8, l.2)

Based on the clear legal mandate of the Uniform Services Former Spouses' Protection Act, as applied in Mansell and recognized in Price, the Plaintiff failed to establish that the Family Court had the power to award the relief requested such that she would have been successful in the underlying action. Therefore, this Court should affirm the lower court's entry of summary judgment on behalf of Attorney Floyd.

C. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO ESTABLISH THAT EVEN IF ATTORNEY FLOYD BREACHED A LEGAL DUTY OWED TO THE PLAINTIFF, THAT BREACH WAS A PROXIMATE CAUSE OF PLAINTIFF'S DAMAGES

In a legal malpractice action, a plaintiff must establish, usually by expert testimony, the standard of care, a breach, and that such breach was a proximate cause of the Plaintiff's damages. See Harris Teeter v. Moore & Van Allen, 390 S.C. at 282, 701 S.E. 2d at 745

(citing Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 437-38, 472 S.E.2d 612, 614 (1996)). Proximate cause requires proof of causation in fact and legal cause. See Harris Teeter v. Moore & Van Allen, 390 S.C. at 290, 701 S.E.2d at 749 (citing Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)). Causation in fact is proved by showing that plaintiff's injury or damages would not have occurred "but for" defendant's negligence. Id

In order to succeed in this malpractice action, the Plaintiff would not only have to prove that Attorney Floyd breached her duty owed to the Plaintiff by failing to argue to and persuade the Family Court to include in its 2002 Order an indemnification clause or a division of "gross retired pay," but also 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. In Harris Teeter v. Moore & Van Allen, supra, 390 S.C. at 290, 701 S.E.2d at 749-50, the Court affirmed summary judgment to the defendant attorney when one of the 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, and neither expert testified that the underlying action most probably would have had a better result if not for the defendant attorney's alleged malpractice. In Doe v. Howe, 367 S.C. 432, 445-46, 626 S.E.2d 25, 31-32(Ct. App. 2005), the Court of Appeals affirmed summary judgment to the defendant attorney when the 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 the expert failed to testify that plaintiff most probably would have

obtained a better result in the underlying action had defendant attorney not been negligent as alleged. In other words, the Plaintiff must show that but for Attorney Floyd's failure to argue to and persuade the Family Court to include an indemnification clause in the 2002 Order or advise her client to appeal, the Family Court would have included the clause in the Order or an appeal would have been successful.

Plaintiff identified Mark A. Sullivan as her expert to establish the standard of care and causation. Mr. Sullivan is an attorney licensed to practice law in North Carolina. (See Dep. M. Sullivan p.5, ll.5-19). He is not licensed in South Carolina. (See Dep. M. Sullivan p.5, ll.7-15). Mr. Sullivan posits that Attorney Floyd should have asked the family court to include an indemnification provision in its 2002 Order. (See Dep. M. Sullivan p.39, l.5 - p.40, l.5). He believes that Attorney Floyd deviated from the accepted standard of care by failing to ensure that the 2002 Order divided "gross retired pay." (See Dep. M. Sullivan p.39, l.5 - p.40, l.5). He also holds the opinion that Attorney Floyd deviated from the standard of care by failing to advise her client of the possibility for an appeal. (See Dep. M. Sullivan, pp.58, l.5 – p.62, l.8). However, Mr. Sullivan admitted that he cannot say whether Attorney Floyd could have persuaded the judge to include such a provision, or even whether it would be permissible under South Carolina law. Plaintiff relies upon the following testimony from Mr. Sullivan:

> Q: Okay. Do you have any understanding of whether indemnification clauses are routinely adopted in court orders in South Carolina?
>
> A: I don't have any understanding one way or the other.

(See Dep. M. Sullivan p.45, ll.9-13).

> Q: Okay. Does the Family Court have jurisdiction to divide disability pay?

A: No, it does not.

Q: Is there any authority in South Carolina that supports your opinion for the inclusion of an indemnification clause in a final order of property division?

A: Could you restate the question? I'm not sure I understand what you are asking.

Q: Sure. Is there any case law that you are aware of in South Carolina that addresses the issue of the inclusion of an indemnification clause in a final order of division of property, marital property?

A: I can't tell you the name of any case. I'm not going to tell you that there isn't, but I have not done research on that.

(See Dep. M. Sullivan p.53, l.13 - p.54, l.4).

Q: Okay. Do you have any understanding in Family Court in South Carolina in 2002 how a judge would typically issue an order?

A: No.

(See Dep. M. Sullivan p.55, ll. 3-6).

Q: Can the division of property be changed or altered in South Carolina after it is incorporated into a final order?

A: I don't know the answer to that. It would be a South Carolina law question

(See Dep. M. Sullivan p.56, ll.10-14).

With regard to causation, Plaintiff relies on Mr. Sullivan's testimony:

Q: Okay. Now, is it your opinion to a reasonable degree of certainty most probably that had Cindy Floyd made an argument for the inclusion of an indemnification clause, that the judge would have incorporated that clause into the final order?

A: I can't say that. I don't know what the judge would have done.

Q: Okay. And likewise, is it your opinion to a reasonable degree of certainty most probably that had Cindy Floyd argued for the division of the gross military retired pay rather than the disposable retired

pay, that the judge would have incorporated that specific term into the order?

A: Again, I don't know what the judge would have done.

(See Dep. M. Sullivan p.58, ll.5-19).

Q: Okay. So, I am sorry, could you say your full opinion, just to clarify, your full opinion on that, the issue regarding an appeal?

A: That if the judge refused to allow an indemnification clause and/or the disability -- excuse me, and/or the division of gross retired pay, then she would have a duty to consult with the client about whether to take an appeal of the refusal of the Court to grant that. That in itself would be an issue of South Carolina law, which I am not allowed to give opinions on, to see whether or not the Court of Appeals then could take up the issue of a refused request for division of gross retired pay or indemnification clause.

Q: Okay. And so just to clarify, what percentage of orders in Family Court in South Carolina regarding the division of property actually are successfully appealed?

A: I don't know the answer to that.

Q: Okay. So had the judge refused to allow for the inclusion of an indemnification clause and Hattie Greene had the opportunity to consult with Cindy Floyd about the potential for an appeal, can you say to a reasonable degree of certainty most probably whether that denial of the inclusion of an indemnification clause would have been successfully appealed?

A: I don't know.

Q: Okay. And so I am sorry, you can't say to a reasonable degree of certainty most probably whether that appeal would have been successful?

A: That's correct.

Q: Likewise, if the judge had refused to incorporate the language regarding the gross retired pay rather than disposable pay into the final order and Hattie had the opportunity to discuss with Cindy Floyd the possibility of an appeal, can you say to a reasonable degree of certainty most probably whether that issue would have been successfully appealed?

A: I cannot.

Q: Okay. Now, I think in your affidavit, you also talked about other opportunities that Cindy Floyd -- or that would have arisen that may have given Cindy Floyd the opportunity to present or try to incorporate the indemnification clause or the gross retired pay language into the final order. Do you recall those opinions?

A: I don't understand the question.

Q: Sure. I think you said in addition to the closing argument, that when the order was being drafted, she could have inserted language for the judge's consideration?

A: Yes. What I meant to say is that if she had been given the opportunity to review the order, whether prepared by the judge or opposing counsel, or if she had been given the opportunity to draft the order, as is common in North Carolina for the prevailing party, she would have had another opportunity to insist upon one of those two approaches in the preparation of the order to be signed by the judge.

Q: Okay. And had she been given the opportunity to review the order and request -- had she requested the inclusion of the language concerning the indemnification clause, can you say to a reasonable degree of certainty, most probably whether the judge would have incorporated the terminology for the inclusion of the indemnification clause into that order?

A: No.

Q: Okay. And likewise, had she tried to propose or insert language concerning the gross retired pay rather than the disposable retired pay into that order, can you say to a reasonable degree of certainty most probably whether the judge would have included that language in the order?

A: No.

(See Dep. M. Sullivan pp.58, l.5 - p.62, l.8).

In addition, both Plaintiff's expert, Mark Sullivan, and Attorney Floyd's expert, Todd Manley, agree that an award of sixty percent of a retiree spouse's military retired pay is an extraordinary result. In his deposition, Mr. Sullivan testified:

Q: Okay. Based on your understanding of the length of Hattie and Joseph Greene's marriage and the statutory law, what portion or what share of Joseph Greene's military retirement benefits was Hattie Greene actually entitled to?

A: While that is a question of South Carolina law, I think that what you are looking for is how long were they married during military service, which I believe was 17 years. He was in for 20 years. So at least in North Carolina, the answer would be 17/20ths is the marital share of the pension, and the spouse is presumptively entitled to a 50 percent portion of that marital share.

Q: Okay. And how much was Hattie Greene awarded by the Family court in 2002?

A: Sixty percent.

Q: So that would be more than what she was statutorily entitled to based on her years of marriage?

A: You are asking me to assume knowledge of South Carolina law, which I can't tell you. I can say generally you are probably correct in terms of the law, but I can't speak to South Carolina's equitable apportionment of retirement benefits or the rules for equitable distribution in South Carolina.

Q: Have you seen in your experience awards of greater than 50 percent of the marital - -

A: Yes.

Q: Is that fairly common?

A: No.

Q: Okay. And what factors in your experience often lead to an award of more than 50 percent of the military pension?

A: Sometimes an issue of unfaithfulness is the reason. Sometimes economic disparity is a reason. Those are two that come to mind in the nationwide cases that I keep track of involving an award of greater than 50 percent.

(See Dep. M. Sullivan, pp.56, l.15 - p.58, l.4).

In his deposition, Mr. Manley testified:

> Q: And if you reduced - - or example, if you reduced the amount of your demand from 60 percent to 50 percent in exchange for an agreement for this to survive any future disability reduction, then that would be an issue that was not on the table?
>
> A: Since I don't know what happened in this case, I would challenge the likelihood of somebody agreeing to give 50 percent plus some portion of the VA disability benefits. The only surprise that I saw at the trial level here is that Mrs. Greene got 60 percent. So, I wouldn't go into this negotiation if I represented Mrs. Greene, thinking I would get 60 percent. That - - that seemed to be a nice proportion.

(See Dep. T. Manley, pp.31, l.21 – p.32, l.8).

In her brief, Plaintiff asserts that Mr. Sullivan's testimony and affidavits provide more than a mere scintilla of evidence that Attorney Floyd deviated from the standard of care. We disagree, as set forth in the previous Section. But even though Mr. Sullivan opined that Attorney Floyd breached a duty to the Plaintiff, he failed to establish that a breach of a duty by Attorney Floyd was a proximate cause of Plaintiff's damages. Stated differently, Mr. Sullivan's testimony does not establish that "but for" a deviation from the standard of care by Attorney Floyd, Plaintiff most probably would have been more successful in the underlying suit. His testimony is plainly insufficient to meet Plaintiff's burden under South Carolina law.

D. THE LOWER COURT PROPERLY DISCOUNTED THE POST-DEPOSITION AFFIDAVIT OF THE PLAINTIFF'S EXPERT

The Court may discount a post-testimony affidavit as a "sham"; that is, as not creating an issue of fact for purposes of summary judgment, when the subsequent affidavit is submitted to contradict that party's own prior sworn statement. See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004); Harris Teeter v. Moore Van Allen, 390 S.C. 275, 701 S.E.2d 742 (2010). The Court generally considers five factors in distinguishing between a sham affidavit and a correcting or clarifying affidavit:

(1) whether an explanation is offered for the statements that contradict prior sworn statements;

(2) the importance to the litigation of the fact about which there is a contradiction;

(3) whether the nonmovant had access to this fact prior to the previous sworn testimony;

(4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;

(5) whether the previous sworn testimony indicates the witness was confused at the time;

(6) when, in relation to summary judgment, the second affidavit is submitted.

See Cothran v. Brown, 357 S.C. at 218, 592 S.E.2d at 633 (citing Pittman v. Atlantic Realty Co., 359 Md. 513, 754 A.2d 1030, 1042 (2000)).

Plaintiff's expert submitted his Supplementary Affidavit dated July 2, 2014, after his deposition on December 19, 2013 and after Attorney Floyd moved for summary judgment. (See Supp. Aff. of M. Sullivan dated July 21, 2014). In his Supplementary Affidavit, Mr. Sullivan revised his opinion (quoted at length in the previous Section) 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 educational materials relied upon by Mr. Sullivan advocate negotiating for an indemnity provision in a consent settlement decree, not a contested court order. (See *Cool Tips from the Hottest Domestic Law Practitioners II* dated May 19, 2002; *Hot Tips from the Best Domestic Law Practitioners* dated Sept. 15, 2000). As previously

stated, neither Mr. Sullivan nor the Plaintiff can cite to any case law or statutory authority that allows the Family Court to include such a provision in a contested Order.

In her brief, Plaintiff asserts that Mr. Sullivan's Supplementary Affidavit is essentially a mirror image of the affidavit submitted contemporaneous with the Complaint, and, therefore, is not a sham. A review of both affidavits clearly demonstrates that the Supplementary Affidavit is far from a mirror image of the original. Rather, Mr. Sullivan's post-deposition affidavit cites to the educational materials in an attempt to resuscitate his deposition testimony on causation. It is exactly the kind of affidavit that the court excluded in Harris Teeter as an attempt to rehabilitate the expert's opinion on causation in order to defeat summary judgment. See Harris Teeter v. Moore & Van Allen, supra.

Based on the foregoing, the lower court properly discounted the Supplementary Affidavit of Plaintiff's expert, Mark Sullivan.

E. THE LOWER COURT PROPERLY FOUND THAT PLAINTIFF'S EXPERT'S SUPPLEMENTARY AFFIDAVIT LACKED SUBSTANCE

The Supplementary Affidavit submitted by Plaintiff's expert is unworthy of consideration for the additional reason that the opinion expressed therein is rank speculation that a Family Court judge would ignore clearly established law by requiring Plaintiff's ex-husband to pay Plaintiff a portion of his future military disability compensation. Mr. Sullivan previously testified that he is not admitted to practice in South Carolina, that he knows of no legal authority supporting his position, and that he could not predict either the Family Court's ruling or the outcome of an appeal if his position had been presented to the Court.

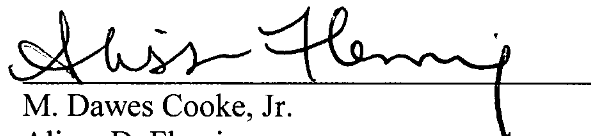
In her brief, Plaintiff cites Price v. Price, 325 S.C. 379, 480 S.E.2d 92, 128 (1996) and Tirado v. Tirado, 325 S.C. 379, 530 S.E.22d 128 (2000) for the proposition that neither Price

nor Tirado preclude the inclusion of an indemnification clause in a final order. However, both Price and Tirado involved settlement agreements that were incorporated into the decree of divorce. Similarly, in both cases, the retiree spouse was receiving a portion of his military retirement as disability when the agreements were entered. 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). Neither Price, Tirado, nor Mansell holds that a court in this State may incorporate an indemnity provision into a contested final Order. In addition, the educational materials that Mr. Sullivan relies upon in support of his opinion do not pertain to a contested Order. As previously stated, there is no legal authority in South Carolina permitting the Family Court to include such a provision in a contested Order

South Carolina Rule of Civil Procedure 56(e) provides, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mr. Sullivan's Supplementary Affidavit meets none of these requirements. Therefore, the lower court properly found that the affidavit was insufficient to create a genuine issue of material fact.

CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's entry of summary judgment on behalf of Defendant Cindy M. Floyd.



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
MAR 16 2015
SC Court of Appeals

The Honorable J.C. Nicholson
Circuit Court Judge

Case No.: 2012-CP-10-8372
Appellate Case No.: 2014-002450

Hattie Mae Greene .... Appellant,

v.

Cindy M. Floyd .... Respondent.

PROOF OF SERVICE

I, Alissa D. Fleming, attorney for the Respondent, do hereby certify that I have served on this 13th day of March, 2015, a copy of the Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service thereof upon counsel for Appellant by delivering via U.S. Mail, first class postage pre-pad, to said counsel at the following address:

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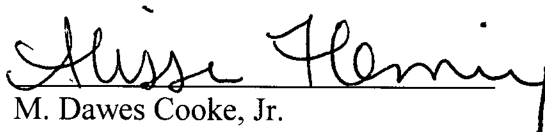

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Charleston, South Carolina

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RECEIVED
MAR 16 2015
SC Court of Appeals

March 13, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
John C. Calhoun Building
1015 Sumter Street
Columbia, SC 29201

RE: Hattie Mae Greene vs. Cindy M Floyd
Appellate Case No.: 2014-002450

Dear Ms. Kitchings:

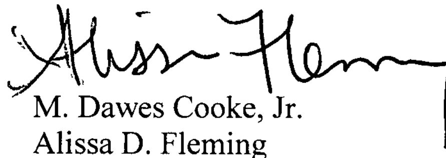
Enclosed please find the original and one (1) copy of each of the following:

(1) Initial Brief of Respondent Cindy M. Floyd;
(2) Designation of Matter to be Included in the Record on Appeal; and,
(3) Proof of Service.

We would appreciate if you would file the original documents and return the filed, stamped copies to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving copies of the enclosures upon counsel for the Appellant.

Sincerely,



M. Dawes Cooke, Jr.
Alissa D. Fleming

MDCjr/ADF/jgc
Enclosures

cc: D. Cravens Ravenel, Esquire

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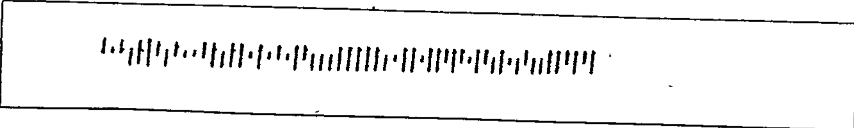

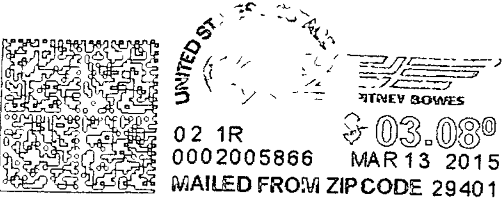

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