THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-28-0311

Theresa M. Brown,

Appellant,

v.

Janet Butcher and The Butcher Law Firm, PA,

Respondents.

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION

In this lawsuit, the Appellant, Theresa M. Brown ("Ms. Brown"), is suing the Respondents, Janet Butcher and The Butcher Law Firm, PA (for ease of reference, the Respondents are hereinafter referred to collectively in the singular as "Butcher"), for alleged legal malpractice with respect to Butcher's representation of Ms. Brown in divorce proceedings. According to Ms. Brown, Butcher wrongfully caused her to agree to a divorce settlement that was contrary to her desire for a trial and against her best interests. Ms. Brown bases her malpractice claim upon this allegation notwithstanding the indisputable fact that she previously professed her knowing and voluntary agreement to the underlying divorce settlement, on the record and under oath, when she joined her former husband in asking for the settlement to be approved by the family court.

After sufficient discovery, and upon due notice and opportunity for Ms. Brown to be heard, Butcher successfully moved for summary judgment, with the circuit court basing its decision on a number of independent grounds expressed in its extensive order.

As an initial matter, in evaluating Ms. Brown's appellate challenge to the circuit court's grant of summary judgment in favor of Butcher, it is important to note that, as the Appellant, Ms. Brown has the affirmative obligation to present argument/analysis sufficient to show reversible error as to all of the independent grounds supporting the circuit court's decision. Respectfully, Ms. Brown has not met this burden, failing to address all such independent grounds or addressing them in conclusory fashion, either way, insufficient to upset the decision on appeal.

Moreover, the circuit court's summary judgment should stand on its merits. The circuit court properly exercised its discretion to find Ms. Brown judicially estopped from

prosecuting this action against Butcher. Her case is reliant upon a factual position totally inconsistent with her statements on the record and under oath when she successfully sought the family court's approval of the underlying divorce settlement, expressly and unequivocally professing her knowing and voluntary agreement therewith.

Beyond judicial estoppel, the circuit court also correctly found that there is no evidence to support a reasonable conclusion that Ms. Brown has suffered any damage as a proximate cause of any alleged negligence by Butcher, and, moreover, that Ms. Brown failed to present expert testimony necessary to create a factual issue regarding causation and damages. In a legal malpractice case, a successful plaintiff "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, 174, 561 S.E.2d 654, 657 (Ct. App. 2002). Ms. Brown cannot make this essential showing. Indeed, Ms. Brown's only expert, Susan Rawls Edwards, Esquire ("Edwards"), expressly testified in her deposition that she was not asked to evaluate or provide any opinions regarding damages allegedly suffered by Ms. Brown. (R. p. 138, lines 15-25.)

Respectfully, the circuit court's grant of summary judgment in favor of Butcher should be affirmed. Ms. Brown's appellate challenge is insufficient to undermine it, and the record amply supports it.

STATEMENT OF THE CASE

Ms. Brown commenced this action on March 12, 2010, with the filing of a summons and complaint setting forth a single cause of action against Butcher for legal malpractice. (R. pp. 34-40.) Butcher timely answered, denying the material allegations of Ms. Brown's complaint, and asserting a number of affirmative defenses thereto. (R.

pp. 41-46.)[1]

After a sufficient period of discovery, Butcher moved for summary judgment. (R. p. 47.) The motion was heard in the circuit court on September 6, 2011, with all parties present, and the Honorable G. Thomas Cooper, Jr. presiding. (R. pp. 257-294.) Ms. Brown did not make any objection or otherwise suggest that the motion was premature or that additional discovery was required. (R. pp. 261, line 16 – 262, line 9.) By order entered November 8, 2011, the circuit court granted summary judgment in favor of Butcher. (R. pp. 1-43.) Ms. Brown did not move the circuit court for alteration, amendment, or reconsideration of the summary judgment. This appeal followed.

STATEMENT OF FACTS[2]

Butcher represented Ms. Brown in an action for divorce brought by her former husband, Robert Brown ("Mr. Brown"). (R. p. 35, ¶ 2.) Mr. Brown sought a divorce on the ground of adultery. Ms. Brown counterclaimed, alleging adultery on the part of Mr. Brown, and likewise sought a divorce on that ground. (R. p. 48; R. pp. 69-70; R. pp. 74-75; R. pp. 234, lime 1 – 236, line 9; R. pp. 264, line 14 – 265, line 7; R. p. 116, line 6 – p. 124, line 8.)

The Browns were married in Alabama in 1980. (R. p. 252, lines 8-10; R. p. 150, lines 2-24.) In or about 1990, they moved to Kershaw County, South Carolina, where they continued to live at the time of their divorce. (R. p. 252, lines 8-10.) Three children were born of the Browns' marriage, all of whom had reached the age of majority by the time of the Browns' divorce. (R. p. 252, lines 8-10.) As of the time of the Browns'

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[1] Ms. Brown's statement of the case indicates that Butcher asserted a counterclaim against Ms. Brown. (App. Br. p. 1.) That is not correct. Butcher has not asserted any claim against Ms. Brown in this action.

[2] This statement of facts is presented solely for the purpose of this appeal. Butcher denies and disputes Ms. Brown's material allegations.

divorce, Mr. Brown was on disability retirement, having previously been employed as a deputy in the Kershaw County Sheriff's Department. (R. pp. 70-71; R. p. 79.) Ms. Brown was employed by Blue Cross/Blue Shield of South Carolina, handling telephone inquiries regarding healthcare insurance claims. (R. p. 76; R. pp. 151, line 4 – 153, line 7.)

A final hearing in the divorce action was scheduled for April 16, 2007. (R. pp. 35-36 ¶ 3; R. p. 234, lines 1-8.) On the morning of the scheduled hearing, Ms. Brown personally helped Butcher transport trial materials to the courthouse. (R. p. 160, lines 1-25.) These materials included trial notebooks that Butcher prepared with sections for each witness that Butcher intended to call in support of Ms. Brown's case, Butcher's anticipated examination subjects and questions, any prior statements or affidavits provided by the witness, and the pertinent documents to be introduced through the witness's testimony. Butcher had subpoenaed all of the witnesses needed for the hearing, some 15 in number, all of whom were in attendance. (R. pp. 157, line 14 – 158, line 16; R. p. 160, lines 1-25; R. pp. 166, line 3 – 167, line 7; App. Br. p. 2.)

At the courthouse, the presiding family court judge met with Butcher and Mr. Brown's counsel for a pre-trial review of the case. (R. pp. 35-36 ¶ 3.) According to Ms. Brown, Butcher emerged from the pre-trial conference with a stern expression, whereupon she advised Ms. Brown that the judge did not want to hear her case, would not grant her alimony, and that the case was going to settle. Ms. Brown claims that this caused her to become emotionally distraught, whereupon she tearfully excused herself to the ladies room. (R. pp. 35-36, ¶ 3; R. p. 169, lines 1-23.)

According to Ms. Brown, over the course of the morning, she remained in the

ladies room crying while Butcher negotiated with Mr. Brown's counsel, returning periodically to speak with Ms. Brown, until a settlement agreement was reached. The agreement was then presented to the family court for approval. (R. p. 36, ¶ 4.)

With all parties and their counsel present in the courtroom, Mr. Brown's counsel recited the terms of the settlement agreement to the presiding family court judge, with Butcher adding provisions that were inadvertently omitted. (R. pp. 235, line 7 – 242, line 4.) The court then extensively questioned both Mr. Brown and Ms. Brown about the proposed settlement and their mutual request for its approval. In response to the court's questioning, Ms. Brown expressly acknowledged the following under oath:

1. The terms recited accurately reflected the parties' agreement.

> **[Court]**: Mr. and Mrs. Brown, if you would stand for me now, please?
>
> We're going to do this right where you are, I believe, at this point in the hearing.
>
> Raise your right hands. Thank you very much.
>
> (Plaintiff and Defendant sworn by the Court)
>
> **[Court]**: Mr. Robert Brown?
>
> **[Mr. Brown]**: Yes.
>
> **[Court]**: Mrs. Theresa Brown.
>
> **[Ms. Brown]**: Yes.
>
> **[Court]**: Mr. and Mrs. Brown, listen to me carefully. I have a series of questions to ask you. You need to stand up and I'm going to ask you some questions. This lady here, our Court Reporter, is going to take down your answers.
>
> Now, this action has been pending for quite some time, as you well know. You have had the benefit of representation.
>
> You have had different attorneys, but you have been pretty much represented throughout this matter.
>
> I have been told this morning you have an agreement. You were in the Courtroom just as I am, and we heard the agreement read into the record.
>
> Mr. Brown, is that your agreement?
>
> **[Mr. Brown]**: That's my agreement.
>
> **[Court]**: All right, is that your agreement, maam?

[**Ms. Brown**]: Yes, it was.

(R. pp. 242, line 8 – 243, line 9.)

2. She understood the agreement.

[**Court**]: Do you understand the agreement?
[**Mr. Brown**]: I do.
[**Court**]: Do you understand it maam?
[**Ms. Brown**]: Yes.

(R. p. 243, lines 10-13.)

3. She had not been forced, pressured, coerced or made to enter into the agreement.

[**Court**]: Now, has anyone forced or coerced or threatened you and made you enter this agreement?
[**Mr. Brown**]: No.
[**Court**]: All right. Mrs. Brown?
[**Ms. Brown**]: No.

(R. p. 243, lines 14-18.)

4. She had nothing else to ask her attorney.

[**Court**]: Anything else you need to ask your attorney, Ms. Butcher, who has been talking with you and answering your questions?
[**Ms. Brown**]: (No audible response)
[**Court**]: No?
[**Ms. Brown**]: No.

***

[**Court**]: And I have already asked both of you if you had anything else to ask your attorneys. Mr. Brown, you said you didn't have anything? Right?
[**Mr. Brown**]: Yes.
[**Court**]: Mrs. Brown, do you have anything you need to ask?
[**Ms. Brown**]: No, maam.

(R. p. 244, lines 3-8; R. p. 246, lines 6-12.)

5. She was satisfied with the services of her attorney.

[**Court**]: All right, are you satisfied with her services,

maam?
[**Ms. Brown**]: (No audible response)
[**Court**]: You have to - - this lady has to be able to hear it. I'm sorry, but you've got to speak out where we can hear. Okay?
[**Ms. Brown**]: Yes.
[**Court**]: All right. Thank you, maam.
Now, coming here today, no one has forced, pressured or made you enter this agreement, have they, Mrs. Brown?
[**Ms. Brown**]: No.

(R. p. 244, lines 9-20.)

6. **She was not under the influence of medication, drugs or alcohol such that any substance might impair her judgment.**

[**Court**]: Today are you under the influence of any kind of medication, lack of medication, drug, alcohol, or any kind of substance that would impair your judgment or keep you from understanding what you are doing?
Mr. Brown?
***
Ms. Brown, is there anything you are taking today or have not taken that you would be under the influence of?
[**Ms. Brown**]: No, maam.
[**Court**]: All right. You certainly understand the agreement. Is that right?
[**Ms. Brown**]: Yes, maam.

(R. p. 245, lines 14-18; R. pp. 245, line 24 – 246, line 5.)

7. **She had obtained all of the information needed regarding Mr. Brown's financial situation to be able to enter into the agreement and, although she was sure that he had hidden assets and/or income, she agreed to the settlement anyway.**

-and-

8. **There was nothing else that she wanted to review regarding financial statements.**

[**Court**]: Now, listen carefully. In reaching this agreement, you had to consider certain financial information in order to come up with an agreement.
Mr. Brown, is there anything else you need to know

about your wife's financial circumstances?

***

Mrs. Brown, the same question for you. Have you gotten enough information about your husband's financial situation to be able to enter this agreement, maam?

[Ms. Brown]: Yes.

[Court]: Anything you want to know or look at regarding financial circumstances?

[Ms. Brown]: No. I'm sure he's had some hid but I'm agreeing to it.

[Court]: All right. So both of you all say there could be more you could do, but you are basically satisfied with where you are. Is that right?

Mr. Brown?

[Mr. Brown]: Yes.

[Court]: Mrs. Brown?

[Ms. Brown]: Yes.

[Court]: Okay. Thank you so much.

(R. p. 246, line 13 – 247, line 17.)

9. She was willing to give up her right to a trial and asked the court for the agreement to be a final order, understanding that the order would be final and could not be changed.

[Court]: Now, Mr. Brown, do you understand that if you had not entered into this agreement we would have to have a trial, and I don't know if it would take a day or two days or how long it would take, but the fact of the matter is I would have to make the decisions.

What you have done here today is enter into an agreement. You have played an active role in making the decisions.

So, Mr. Brown, are you giving up your right to a trial?

[Mr. Brown]: Absolutely.

[Court]: Mrs. Brown?

[Ms. Brown]: Yes.

[Court]: Mr. Brown, are you then asking that your agreement or the agreement you've reached with Mrs. Brown then be the final Order?

[Mr. Brown]: I do, Your Honor.

[Court]: You, Mrs. Brown?

[Ms. Brown]: Yes.

[Court]: And do you understand, Mr. and Mrs. Brown, that it is an agreement but once this Court makes it

an Order then it is a Court Order. It's enforceable through the Court and this Court can even order contempt sanctions if you don't live up to you?

Do you understand that, Mr. Brown, and do you understand that, Mrs. Brown?

[**Mr. Brown**]: Yes.

[**Ms. Brown**]: Yes.

[**Court**]: And is that what you want me to do then, Mr. Brown? Do you want me to make it a Court Order?

[**Mr. Brown**]: I do.

[**Court**]: Mrs. Brown?

[**Ms. Brown**]: Yes.

[**Court**]: Now, in this agreement, you have agreed to everything on a final basis. You can't come back next week or next year and do this all over again. This is a done deal. You cannot change it. Do you understand, Mr. Brown?

[**Mr. Brown**]: I do.

[**Court**]: Mrs. Brown?

[**Ms. Brown**]: Yes.

(R. pp. 247, line 18 – 248, line 9.)

10. She was not getting any alimony, could never come back to the court and ask for alimony, and that she was willing to give up the right to alimony.

[**Court**]: Now, in that regard, the same issue as to property division or alimony. In other words, you're not getting any alimony, so you can't come back ever and ask for alimony. Mr. Brown?

[**Mr. Brown**]: I understand that.

[**Court**]: You waive that right.

[**Mr. Brown**]: I waive that right.

[**Court**]: Mrs. Brown, you can't come back and ask for alimony. Do you understand that?

[**Ms. Brown**]: Yes.

[**Court**]: Are you giving up that right?

[**Ms. Brown**]: Yes.

(R. p. 248, lines 10-21.)

The family court thereafter approved the settlement agreement, incorporating it into its Decree of Divorce entered on June 21, 2007. (R. pp. 48-54.) In accordance with

the parties' agreement, the decree provided that Ms. Brown received 50% of Mr. Brown's state retirement pay and 25% of Mr. Brown's military retirement. Marital property was divided 50/50, with each party receiving various automobiles and other personal property, and 50% of the equity in the marital home and furniture. The marital home (and the 32.5 acres upon which it is situated) was ordered to be sold, with the first bona fide offer having to be accepted (unless Mr. Brown wished to maintain his ownership of the home, in which case he was to match the net amount to Ms. Brown as indicated on the HUD statement). Both parties waived their right to seek alimony, and divorce was granted on the ground of one-year separation. (Id.)

With regard to the marital home, the decree allowed Mr. Brown to continue residing therein until it sold. He was required to list it for sale at its fair market value. The furniture in the house was to be sold at auction within 30 days of the date of closing on the sale of the house, with the proceeds divided equally between the parties. (Id.) As of the filing of the present suit, the home was still listed for sale and the price had been reduced subsequent to its initial listing. (R. p. 199, lines 3-24.)

STANDARD OF REVIEW

"Summary judgment is a useful tool for ending costly and time-consuming litigation and should be granted where appropriate . . . ." State ex rel. McLeod v. Brown, 278 S.C. 281, 287, 294 S.E.2d 781, 784 (1982) (Ness, J., concurring and dissenting). "When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pye v. Estate of Fox, 369 S.C. 555, 563,

633 S.E.2d 505, 509 (2006).

In ruling on a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Rife v. Hitachi Constr. Mach. Co. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge this initial responsibility by pointing out to the Court the absence of evidence to support the nonmoving party's case. Id. The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. Id.

After the moving party has met this initial burden, the opposing party must, under Rule 56(e), SCRCP, "'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with 'specific facts showing that there is a *genuine issue for trial.*'"" Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original)). In response to a properly supported motion for summary judgment, "the non-moving party may not rest on the mere allegations or denial of the pleadings, but must set forth or point to specific facts

showing there is a genuine issue of material fact. Thus the existence of a mere scintilla of evidence in support of the non-moving party's position is not sufficient to overcome a motion for summary judgment." Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994) (citing Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)).

ARGUMENT[3]

I. The circuit court did not err in granting Butcher's motion for summary judgment.

The circuit court's summary judgment was founded upon a number of independent grounds. As an initial matter, affirmance of the circuit court's decision is warranted, if for no other reason, because Ms. Brown's appellate brief does not sufficiently challenge all of the independent grounds in support of the circuit court's decision; either failing entirely to address them or doing so in conclusory fashion. Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283 n. 3 (2003) ("Since County failed to argue this issue in the body of its brief, the issue is deemed abandoned); First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); Fields v. Fields, 342 S.C. 182, 191, 536 S.E.2d 684, 689 n. 8 (Ct.App.2000) (same); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct.App.2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584

[3] Though separately set forth, the analysis/argument presented herein may contain some overlap amongst the issues before the Court. To the extent that the argument/analysis contained in any particular portion of this brief is relevant to any other portion, the same is hereby incorporated therein by reference.

S.E.2d 390, 396 (Ct. App. 2003) ("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Moreover, the circuit court's decision should stand on its merits.

A. The circuit court did not err in ruling that Ms. Brown is judicially estopped from asserting this cause of action.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). It applies to inconsistent statements of fact. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). There are five necessary elements for judicial estoppel to apply: "(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent." Cothran, 357 S.C. at 215-26, 592 S.E.2d at 632.

In considering the judicial estoppel issue, with respect to the standard of review, it is important to note that it is an equitable concept, entrusted to the discretion of the court, which would never be presented to a jury. *See* Hawkins v. Bruno Yacht Sales, Inc., 342

S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000), *aff'd as modified by* 353 S.C. 31577 S.E.2d 202 (2003) ("Because judicial estoppel is an equitable concept, depending upon the facts and circumstances of each individual case, application of the doctrine is discretionary."); King v. Herbert J. Thomas Mem. Hosp., 159 F.3d 192, 196, 198 (4th Cir.1998) ("As an equitable doctrine, judicial estoppel is invoked in the discretion of the district court.... [W]e conclude that the district court was well within its discretion in applying judicial estoppel....").

1. The circuit court did not err in finding that Ms. Brown has taken two inconsistent positions.

The essential factual predicate of Ms. Brown's case against Butcher for legal malpractice is that her will was overborne by Butcher who allegedly forced her to settle her divorce case involuntarily, without an adequate understanding of the terms of the settlement. There can be no genuine dispute, however, that this factual predicate is totally inconsistent with Ms. Brown's representations, on the record and under oath, to the family court when she joined Mr. Brown in asking that court to approve the settlement.

2. The circuit court did not err in finding that the underlying divorce action and the present legal malpractice action are related proceedings involving the same party, i.e. Ms. Brown.

There can be no genuine dispute that the same party, i.e., Ms. Brown, that is involved in the present legal malpractice action was also involved in the underlying divorce case. It is also beyond genuine dispute that the underlying divorce case is directly related to the present legal malpractice action, which, of course, challenges Butcher's representation of Ms. Brown in that case.

3. The circuit court did not err in finding that Ms. Brown was

successful in maintaining her position in the underlying divorce action and benefitted therefrom.

Under the terms of the settlement, which were incorporated into the Decree of Divorce, Ms. Brown was awarded a one-half interest in the family residence, the furniture and fixtures, and numerous other items of personalty. She was awarded 50% of Mr. Brown's state retirement and 25% of his Army retirement pay. Ms. Brown retained all of her interest in her 401(k) and IRA retirement funds saved through her employer, Blue Cross/Blue Shield of South Carolina. Mr. Brown received no interest in Ms. Brown's retirement funds. And, of course, the divorce both parties sought was granted. (Div. Decree.) Ms. Brown was obviously successful in maintaining her position in favor of the settlement agreement in the divorce action and benefitted therefrom by the approval of the agreement and her divorce from Mr. Brown. *See* Heinze v. Bauer, 145 Idaho 232, 178 P.3d 597 (2008) (where husband received a final divorce, secured joint custody of his child, and a division of the community estate, by which he was able to retain the marital home to preserve a sense of continuity for his child, he had obtained a benefit that judicially estopped him from later attack).

4. The circuit court did not err in finding Ms. Brown's inconsistency to be part of an intentional effort to mislead the court.

As an initial matter, Ms. Brown's argument on this point is as follows:

> The Appellant has made certain assertions, which may appear to be inconsistent with her statements at the divorce hearing. However the statements and assertions made in this action are not an intentional effort to mislead the court. As stated herein above, the assertions made in this action are deemed to be true for the purpose of considering the motion for summary judgment.

(App. Br. p. 11.) Respectfully, Ms. Brown's argument is conclusory, and insufficient to

upset the circuit court's finding on this point. Moreover, on the merits, the circuit court did not err in so finding.

The present case is substantially similar to Newell v. Hudson, 376 N.J. Super 29, 868 A.2d 1149 (2005). There, Ms. Hudson asserted a claim of legal malpractice against her former divorce attorney, Newell, alleging that Newell's malpractice "resulted in her 'accept[ing] a settlement which was woefully insufficient in terms of both alimony/spousal support and equitable distribution.'"

Like Ms. Brown in the present case, Ms. Hudson's divorce settlement had been presented to and approved by the court, at which time Ms. Hudson had testified, under oath, that she understood and voluntarily consented to the terms of the agreement. Id. at 32, 868 A.2d at 1151. Also like Ms. Brown in the present case, Ms. Hudson's legal malpractice claim was thereafter premised on her contention that "her sworn testimony to [the family court], which she understood was being offered to obtain [its] approval of the settlement, was false." Id. at 34, 868 A.2d at 1153. Newell successfully moved for summary judgment on the basis of judicial estoppel. Id. at 35-36, 868 A.2d at 1154.

On appeal, the Appellate Division of the Superior Court of New Jersey affirmed the grant of summary judgment, explaining as follows:

> We agree with [the lower court's] summary disposition. Hudson's acknowledgements during the voir dire of her divorce settlement bar her inconsistent statements in the malpractice action. Thus Hudson's claim of legal malpractice is barred as a matter of law. If she was honest in the first proceeding and simply changed her mind after the settlement was placed on the record, there was no professional malpractice by Newell. If she intentionally misrepresented in the matrimonial action with secret intent to obtain judicial approval of the agreement and a divorce, as she now claims she did, she is subject to judicial estoppel of her legal malpractice claim. Hudson's self-

> serving behavior is precisely the type of inconsistent judicial position-taking that the doctrine of judicial estoppel is designed to prevent.

Id. at 46-47, 868 A.2d at 1161.

This Court of Appeals has recognized that a negative inference may be drawn from a litigant's later contradiction of prior on-the-record assertions. In Kilcawley v. Kilcawley, 312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994), the Court affirmed an award of sanctions against Mrs. Kilcawley under the South Carolina Frivolous Civil Proceedings Sanctions Act. The sanctions arose out of Mrs. Kilcawley's frivolous motion to vacate a divorce decree that had previously been entered pursuant to an on-the-record settlement. In moving to vacate the decree, Mrs. Kilcawley argued, among other things, that she had been under the influence of prescription drugs when she consented to the settlement. In affirming the lower court's award of sanctions against Mrs. Kilcawley, the Court based its decision, in part, on the fact that the transcript of the divorce proceedings clearly showed that Mrs. Kilcawley was asked if she was under the influence of prescription drugs and that Mrs. Kilcawley had responded that she was not. Id. at 428, 440 S.E.2d at 894.

In the present case, Ms. Brown joined Mr. Brown in persuading the family court that the settlement should be adopted, and, on the basis of Ms. Brown's representations, which included her express representation that the settlement was knowing and voluntary and that she was not coerced into it, the family court issued a final Decree of Divorce containing the provisions of the settlement agreement. Now, in this legal malpractice proceeding, Ms. Brown seeks to take and consciously rely upon an undeniably opposite position; that is, that she was under duress and was too emotionally distraught to make

any decision. The record amply supports the circuit court's finding that Ms. Brown is intentionally advancing an inconsistent position through which she would secure an unfair advantage, with the intention of misleading the Court.

Beyond the total inconsistency of Ms. Brown's positions with regard to the knowing and voluntary nature of her agreement to the divorce settlement, the circuit court properly observed that Ms. Brown's claim of duress is undermined because she had a clear alternative to settlement of her divorce case at the time the settlement was entered in the record and approved by the family court. In McCann v. Doe, 377 S.C. 373, 660 S.E.2d 500 (2008), our Supreme Court reiterated the longstanding definition and explanation of the term "duress." As the Court explained, duress is defined as "'a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition.'" Id. at 385, 660 S.E.2d at 506 (citing Phillips v. Baker, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985)). Further, "[d]uress is viewed with a subjective test, looking at the individual characteristics of the person allegedly influenced, and duress does not occur if the person has a reasonable alternative to succumbing and fails to avail themselves of the alternative." Id. (citing Blejski v. Blejski, 325 S.C. 491, 498, 480 S.E.2d 462, 466 (Ct. App. 1997)) (emphasis added).

The facts in Blejski, which the McCann Court cited favorably, are substantially similar to the facts of the present case. In Blejski, the wife sought a divorce from her husband after learning of his adultery, and sought separate support, maintenance, alimony, custody of the children, child support, possession of the marital home, and equitable division of the husband's military retirement. Prior to the final hearing, the

parties negotiated for approximately three hours and informed the court that they had agreed to a settlement that they wished the court to approve. The court held a settlement hearing and approved the settlement, a part of which included the wife's waiver of any interest in the husband's military retirement.

The wife later became dissatisfied, and hired a new attorney who made a motion for reconsideration, seeking a modification of the settlement agreement or, alternatively, a new trial. In support of the motion, the wife claimed that she had been depressed and distraught at the time of the original hearing; that she had been misled by her attorney as to her potential entitlement to alimony and an interest in her husband's retirement benefits; that she could have explored the retirement issue on appeal but for erroneous advice from her attorney; that she could not afford her expenses or support herself; and that her attorney misled her into thinking the settlement hearing would result in a decree of divorce.

Mirroring the allegations of the present case, the wife in Blejski testified that her attorney had pulled her out of the courtroom at the time of the original hearing to advise her that the trial judge was already mad at her, and that she stood a chance of losing custody of her children if she proceeded to trial instead of taking the settlement. Notably, unlike Ms. Brown here, the wife in Blejski had a history of mental illness, although her therapist thought she was mentally sound, assertive, and independent at the time of the final hearing.

The wife sought reversal on two grounds. She first argued that the trial judge had made comments which affected the proceedings and induced her into entering the settlement under duress. This Court reviewed the trial judge's comments and concluded

they did not apply improper external pressure or influence that induced the wife to enter into the settlement.

Most pertinent to this case, the wife also argued that the actions of her attorney supported her claim that she was under duress at the time she agreed to the settlement. Id. at 499-500, 480 S.E.2d at 467. This Court found against the wife, stating:

> The wife also points to actions by her attorney to support the claim that she was under duress at the time she agreed to the settlement. Even if the attorney told the wife that the judge was mad at her and she should accept the settlement or she possibly could lose custody of her children, these statements would not amount to duress as to make the wife's assent involuntary and require a new trial. Essentially, these statements, if made, amounted to the wife's attorney giving his best advice that if the wife did not accept the settlement, the case would have to be tried and the wife potentially could have lost custody of her children. The wife had the reasonable alternative of taking her chances with a trial. Moreover, the ultimate decision was the product of a rational judgment call in a bargaining process where the wife achieved what she wanted most, custody of her children. The attorney testified that all indications were that the husband would be discharged from the service, thus losing his retirement benefits. This judgment was reasonable at the time even though the husband ultimately was not discharged. Similarly, the settlement is not invalid because the attorney did not, and could not, predict how this court would subsequently resolve the issue of divisibility of retirement benefits in Ball. Therefore, we reject the wife's claim she was subject to duress from her attorney.

Id.

As in Blejski, Ms. Brown chose to accept the settlement, and she had the reasonable alternative of taking her chances with a trial. The family court specifically advised Ms. Brown that she had a right to a trial and Ms. Brown expressly confirmed her understanding that she would be waiving that right by agreeing to the settlement. And, as

for Butcher's trial readiness, the evidence is susceptible of only one reasonable inference: Butcher was ready to try Ms. Brown's case. The witnesses were subpoenaed and present, the trial notebooks were prepared and ready, and Butcher had prepared Ms. Brown for trial. Ms. Brown simply chose not to avail herself of the reasonable alternative of trial that was certainly available to her. Moreover, with regard to the allegations that Butcher was negligent for not requesting a continuance, there is no evidence in the record to indicate that the family court would have granted any continuance. The granting of a continuance is, of course, a matter entrusted to the discretion of the trial judge. Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). Here, the final hearing in Ms. Brown's divorce case had already been continued from a date in November of 2006, and, during the April 16, 2007 settlement hearing the family court expressly noted concern over the age of the case, stating "[w]e are here today to dispose of this case. Otherwise it is in jeopardy of having to be dismissed." (R. p. 235, lines 5-6; R. pp. 242, lines 23-24.) Upon the record here, it is pure speculation to suggest that the family court would have been inclined to grant a continuance.

That Ms. Brown is intentionally taking a totally inconsistent position in pursuit of her legal malpractice claim from that which she previously maintained in the family court is highlighted by the fact that Ms. Brown acknowledged to the family court in the settlement hearing that she believed her husband was hiding assets and income, but she agreed to settle anyway. The court asked the parties multiple times if they needed further information about the other party's financial condition before entering into the settlement. Finally, the court asked Ms. Brown one last time:

> **[Court]**: Anything you want to know or look at regarding financial circumstances?

> [**Ms. Brown**]: No. I'm sure he's had some hid but I'm agreeing to it.
> [**Court**]: All right. So both of you all say there could be more you could do, but you are basically satisfied with where you are. Is that right?
> Mr. Brown?
> [**Mr. Brown**]: Yes.
> [**Court**]: Mrs. Brown?
> [**Ms. Brown**]: Yes

(R. p. 247, lines 6-16.)

This exchange further shows that Ms. Brown entered into the settlement knowingly and voluntarily. She is chargeable with knowledge of the facts that she now claims could have been discovered. *See* McKay vs. Owens, 130 Idaho 148, 155, 937 P.2d 1222, 1229 (Idaho 1997) ("[judicial estoppel] takes into account not only what a party states under oath in open Court, but also what the party knew, or should have known, at the time the original position was adopted. Thus, the knowledge that the party possesses, or should have possessed at the time the statement was made is determinative as to whether the party is 'playing fast and loose' with the Court.").

Under similar circumstances, the Court of Special Appeals of Maryland concluded in Vogel v. Touhey, 151 Md. App. 682, 828 A.2d 268 (2003) that the plaintiff's position was intentionally asserted to deceive the court, and the inconsistent position later advanced in the legal malpractice case was judicially estopped. In that case, Mrs. Vogel's divorce attorney recommended a settlement that Mrs. Vogel orally agreed to accept. She then discovered before the settlement hearing that her attorney had received a box of financial documents from her spouse, but had not reviewed them when he made his settlement recommendation to her. Despite this knowledge, she appeared at the settlement hearing with a new lawyer and agreed to the settlement, representing to the

court that it was fair and equitable. In her later legal malpractice action against her first attorney, she insisted she lacked full knowledge of material facts at the time of her settlement and claimed that, because of her attorney's negligence, the settlement agreement was grossly unfair and inequitable. Though her two positions as to the settlement were inconsistent, she argued her prior representations in domestic court were not made with the requisite intent to mislead.

The Maryland appellate court rejected Mrs. Vogel's contention, ruling "[c]learly, then, Vogel knew by the time of the divorce hearing that she was not in a position to make an informed decision as to the settlement, because the information she hired [her first attorney] to obtain had not yet been analyzed." Id. at 716, 828 A.2d at 288. The court noted that the master had conducted a thorough voir dire of Mrs. Vogel in the settlement hearing to determine that she wanted to waive her right to a trial, and thus, the court concluded that any suggestion by Mrs. Vogel that she had no choice but to proceed with the settlement was belied by the record. Id. Consequently, the court held "[i]n our view, [Mrs. Vogel] is bound by her representations in the divorce proceedings." Id. at 718, 828 A.2d at 289.

Like Mrs. Vogel, Ms. Brown stated on the record in the settlement hearing that she believed Mr. Brown was hiding assets and that, although there was "more [she] could do . . . ," she wanted to go forward with the settlement anyway. Under those circumstances, she is chargeable with all that she could have discovered and now would claim as undermining the fairness of the agreement. Ms. Brown worked at Blue Cross/Blue Shield, where she had been employed for many years, and handled telephone inquiries regarding health insurance claims. Before that, she had been in the military

police in the United States Army and also a private security guard and substitute teacher. (R. pp. 148, line 24 – 149, line 12; R. p. 153, lines 12-25.) Ms. Brown was not an unsophisticated individual or a vulnerable litigant. Furthermore, she hired new counsel in post-divorce proceedings against Mr. Brown and has not identified any income or assets that were not disclosed by her husband at the time of the divorce. (R. pp. 192, line 17 – 197, line 21.)

Further still, Ms. Brown cannot be heard to argue that any malfeasance on the part of Butcher "forced" her to lie in the family court in order to obtain her settlement. Ms. Brown was specifically asked whether or not she was satisfied with Butcher's services and whether she needed to ask Butcher anything else. She, of course, answered that she was satisfied with Butcher's services and that she did not need to ask Butcher anything else.

To properly carry out its duties in approving a settlement, a court must be fully informed of the nature and status of the agreements. To mislead the court by stating that one agrees to a settlement when one does not, adversely affects the court's ability to discharge its duties and impedes the administration of justice. *See* Cothran, 357 S.C. at 215, 592 S.E.2d at 631 ("The purpose of the doctrine [of judicial estoppel] is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary."); McKay, 130 Idaho at 154-155, 937 P.2d at 1228-1229. The fact that a litigant is using the court as a forum for inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances. *See* Quinn vs. Quinn, 343 S.C. 422, 416 540 S.E.2d 474, 480 (Ct. App. 2000) (Anderson, J., concurring) (citing Randell G. Broyers, Precluding Inconsistent Statements: The Doctrine

of Judicial Estoppel, 80 Nw. U. L. Rev. 1244 (1986)).

5. The circuit court did not err in finding that the two positions taken by Ms. Brown are totally inconsistent.

Clearly, Ms. Brown's position in the family court is totally inconsistent with her position in this case. Again, the essential factual predicate of Ms. Brown's case for legal malpractice against Butcher is that her will was overborne by Butcher who allegedly forced her to settle her divorce case involuntarily, without an adequate understanding of the terms of the settlement. It cannot genuinely be disputed that her position at the settlement hearing and her position in this case are diametrically opposed to one another. Indeed, in her brief to this Court, Ms. Brown "admits that she represented to the Family Court in the settlement hearing that she understood the agreement and that she was not forced, pressured, coerced or made to enter into it." (App. Br. 8.) Her legal malpractice claim is, of course, reliant upon a totally opposite factual position.

B. The circuit court did not err in ruling that the record does not allow for a reasonable conclusion that Ms. Brown suffered any damage as a proximate cause of any alleged negligence by Butcher.

In order to prevail in a cause of action for legal malpractice, a 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. Rydde vs. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Ms. Brown has no factual support for her assertion that she suffered damages proximately caused by Butcher's negligence.

1. The circuit court did not err in ruling that, because Ms. Brown has identified no basis for establishing that any opinion or advice given by Butcher was unreasonable as a matter of law, Ms. Brown has not shown any negligence that proximately caused a loss of alimony to Ms. Brown.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Ms. Brown claims that she did not receive alimony as a result of entering into the divorce settlement based upon Butcher's negligent advice and/or the fact that Butcher was negligent in telling her that the family court had indicated Ms. Brown would not be awarded alimony. Even assuming that Butcher did so advise Ms. Brown, Butcher's professional opinion in this regard cannot provide the basis for a legal malpractice claim unless it was unreasonable as a matter of law. *See* Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 292, 701 S.E.2d 742, 751 (2010) (where attorney's judgment call against the presentation of evidence in support of a viable defense was not unreasonable as a matter of law, plaintiff had no viable claim of malpractice); Id. (noting that "the practice of law is not an exact science" and recognizing an attorney's professional responsibility to "exercise independent professional judgment and render candid advice") (quoting Rule 2.1, RPC, Rule 407, SCACR). In this case, there are multiple reasons why Ms. Brown's claim for alimony was reasonably debatable.

As an initial matter, it should be remembered that Ms. Brown does not claim, nor does she advance any evidence to support a claim that Butcher misrepresented or misinterpreted the family court's in-chambers remarks. Instead, Ms. Brown argues Butcher was negligent in "[i]nforming [Ms. Brown] prior to the hearing on the merits that the Judge had stated she would not award alimony." (App. Br. p. 4; *see also* R. pp. 38-40, ¶ 14; R. p. 58, ¶ 13.) Essentially, Ms. Brown claims that Butcher should have

concealed from her the judge's remarks. The circuit court did not err in finding this insufficient to substantiate a cognizable claim for legal malpractice.

Furthermore, Mr. Brown asserted a claim for divorce on the ground of adultery. Under South Carolina law, a family court may not award alimony to a spouse who commits adultery before the earliest of (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties. S.C. Code Ann. § 20-3-130(A). Because of the "clandestine nature" of adultery, obtaining evidence of the commission of the act by the testimony of eyewitnesses is rarely possible, so direct evidence is not necessary to establish the charge. Fulton v. Fulton, 293 S.C. 146, 147, 359 S.E.2d 88 (Ct. App. 1987). Adultery may be proven by circumstantial evidence that establishes both a disposition to commit the offense and the opportunity to do so. Hartley v. Hartley, 292 S.C. 245, 246-47, 355 S.E.2d 869, 871 (Ct. App. 1987). Generally, "proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed." Loftis v. Loftis, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985).

In support of his claim for temporary relief, Mr. Brown submitted an affidavit attesting to his personal observation of Ms. Brown's suspicious behavior leading him to believe that she was having an affair. He recounted following Ms. Brown when she visited a male friend named Ben Rabon—at night, in Rabon's house, while Mrs. Rabon was not present. He described seeing Ms. Brown and Mr. Rabon sitting on a couch kissing and hugging and then exiting into a darkened bedroom, where they remained together for at least an hour. (R. pp. 69-70.) Mr. Brown also submitted an affidavit from

another individual, Lee Christianson, who accompanied him that evening and corroborated Mr. Brown's observations. (R. pp. 74-75.)

Although Ms. Brown denied that she committed adultery, this nonetheless pits the credibility of her denial against the credibility of the assertions by Messrs. Brown and Christianson. Under similar circumstances, our courts have affirmed a trial judge's adultery ruling precluding alimony on the basis of sexual intimacy, even in the absence of intercourse. Nemeth v. Nemeth, 325 S.C. 480, 486, 481 S.E.2d 181, 184 (Ct. App. 1997); *see also* Marquez v. Caudill, 376 S.C. 229, 656 S.E.2d 737 (2008); Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct.App.1998) (Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved). Thus, under any view of the evidence in the divorce case, there was a material risk that Ms. Brown would be statutorily barred from receiving alimony because of adultery. Indeed, Ms. Brown's expert admitted in her deposition that the facts asserted in Messrs. Brown and Christianson's affidavits provided a basis for a finding of adultery against Ms. Brown if they testified consistently at the trial and were believed by the family court. (R. p. 122, line 23 – p. 124, line 8.)

The strength of Ms. Brown's claim for alimony was also reasonably debatable in light of the parties' respective circumstances. South Carolina Code Ann. § 20-3-130 provides a list of factors that must be considered by the family court in determining whether to award alimony. These factors include: the age of the parties at the time of the divorce; the physical condition of the parties; the employment history and earning potential of each spouse; the current and reasonably anticipated earnings of both spouses;

and the current and reasonably anticipated expenses and needs of both spouses.

At the time of the divorce, Mr. Brown was 60 years of age. (R. pp. 79-83.) He attested that he was disabled, having suffered strokes and a heart attack. (R. pp. 70-71.) He further claimed that he suffered from Meniere's Disease, causing a degeneration of his ear structure, resulting in vertigo, and that he was also diagnosed with a tumor on his pituitary gland. Mr. Brown was on full Social Security disability and took 22 prescription pills per day. (Id.) In contrast, Ms. Brown was only 47 years of age, in good health, and had full-time employment with Blue Cross/Blue Shield earning approximately $32,000 per year. (R. pp. 76-78; R. pp. 188, line 18 – 192, line 16.)

Further, Mr. Brown had a declared income composed of his sheriff's department retirement, his military retirement and social security disability, in the total amount of $3,846.00 per month, with monthly expenses of $3,733 per month. (R. pp. 79-83.) Ms. Brown had a salary of $2,646 per month, which yielded a net income of $1,704 per month. Her total monthly expenses were $1,693, which, unlike Mr. Brown, is less than her monthly net income. (R. pp. 76-78.)

Under like circumstances, this Court affirmed the denial of alimony to the wife in Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997). There, the parties had approximately the same disparity in ages (14 years in Hatfield, compared to 13 years between the Browns), and both parties were at least partially disabled. Unlike the Browns' case, both parties in Hatfield appeared to be in good health at the time of the hearing. In Hatfield, the wife's financial declaration reflected gross income of $1,735.31 per month and monthly expenses of $978.01. As for the husband, his financial declaration listed gross monthly income of $5,419.01 ($4,612.34 after taxes and

insurance), and monthly expenses of $ 4,525.00. The majority of the husband's income came from his government pension, social security, and dividends and interest. After weighing all of the circumstances, the family court denied the wife any alimony, and this Court affirmed.

In view of the Browns' circumstances and existing South Carolina statutory and case law, it cannot be said that there was no material risk that Ms. Brown would be denied alimony. Consequently, it cannot be said that the opinion attributed to Butcher was unreasonable as a matter of law. It was within the bounds of reasonable professional judgment. Because Ms. Brown has identified no basis for establishing that any opinion or advice given by Butcher was unreasonable as a matter of law, and therefore outside the bounds of reasonable professional judgment, Ms. Brown has not shown any negligence that proximately caused her a loss of alimony.

2. The circuit court did not err in ruling that, as a matter of law, the divorce settlement terms do not deny Ms. Brown her one-half equity in the marital residence or personal property.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Observing that the marital residence has not yet sold and that Mr. Brown is continuing to reside therein, Ms. Brown asserts that it will never sell, and that Butcher was negligent because (even though the Decree of Divorce clearly awards Ms. Brown

one-half of all marital property[4]) the divorce settlement denies her the benefit of her one-half interest in the marital residence and personalty. Ms. Brown suspects that Mr. Brown will try to thwart any sale, but she acknowledges—as she must—that she has no evidence of this. (R. pp. 199, line 25 – 201, line 20.) Furthermore, when asked about trying to enforce the sale requirement through the contempt power of the court, she opined that such an effort would be futile. (R. pp. 216, line 24 – 217, line 24.) Accordingly, Ms. Brown's claim is based on her own speculation as well as her own decision to ignore her legal remedies.

It is undisputed that the settlement agreement was incorporated into the final Decree of Divorce, and thereby became an order of the family court. The decree provides:

> B. Real Estate. The parties agree that their marital home and 32.5 acres shall be sold and the net proceeds shall be divided equally between them after payment of all costs of sale, other costs and mortgage indebtedness as of date of filing. The parties shall accept the first bona fide, reasonable offer they receive. The parties shall timely execute all documents necessary to effect the sale of the marital home and land. [Mr. Brown] may match the net to [Ms. Brown] as is indicated on the HUD statement in the event he desires to maintain ownership of the home.

(R. p. 50.) The decree also provided that the furniture and furnishings in the home are to be sold at auction 30 days after the closing of the sale of the residence. (Id. at p. 2.)

With respect to enforcement, the decree provides as follows:

> 13. The terms of the Agreement shall be fully enforceable by and against each party under the contempt powers of the Court. Any party who willfully violates this

[4] In this regard, Butcher notes Ms. Brown's deposition testimony that her "big issue was to get half of everything . . . to make sure I got half of everything was the first thing on my mind. That's what [Butcher] told me I could get was half of everything." (R. pp. 205, line 25 – 206, line 3.)

> Order shall be subject to imprisonment of up to one year, a fine of up to $1500.00, community service of up to three hundred (300) hours, or a combination of any of these.

(Id. at p. 7.)

Clearly, Ms. Brown's property interest awarded by the family court in the settlement incorporated into the Decree of Divorce is protected under the law. The decree specifically alerts the parties that its provisions are enforceable under the contempt powers of the family court. Of course, even without this express provision, the family court has the power to enforce the provisions of the final Decree of Divorce through contempt. Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.") (quoting Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982)); State ex rel. McLeod v. Hite, 272 S.C. 303, 306, 251 S.E.2d 746, 748 (1979) (instructing that a court has the inherent authority to punish offenses calculated to obstruct, degrade, and undermine the administration of justice, and such power cannot be abridged).

Furthermore, Ms. Brown's claim that Butcher committed malpractice by not incorporating a specific time frame for sale of the house into the settlement is without merit. In Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995), this Court considered a settlement provision incorporated into a final order of the family court in which the parties had agreed that the wife received titled ownership and exclusive use of the parties' lake house until it was sold. The agreement gave the husband the primary responsibility to price, market, and sell the lake house for a period of time, after which it

became the wife's choice to market the property to whomever she chose at such price as she determined. Pending sale, husband was responsible for taxes, insurance and maintenance and was obligated to pay wife $4,000 per month until the house sold. No final date by which the property had to be sold was set forth in the agreement.

When the property did not sell as quickly as the parties had contemplated, husband brought an action to stop his obligation to continue supporting the wife, arguing there was no incentive for her to sell and no specified time by which it must be sold. Construing the provisions of the settlement, the Court noted that "[a] court approved divorce settlement must be viewed in accordance with principles of equity and there is implied in every such agreement a requirement of reasonableness. Where there is no time set for performance of the terms of a contract, a reasonable time is implied." Id. at 340, 465 S.E.2d 126 (citing 17A Am. Jur. 2d Contracts § 479 (1991)). Based upon this ruling, the Court remanded for a determination of a reasonable time, after which the family court was instructed to sell the residence at a judicial sale. Similarly, in this case, the Browns' settlement included an implied timeframe based on reasonableness that Ms. Brown could choose to enforce.

Ms. Brown's unfounded fear that Mr. Brown may thwart a court-imposed mandate to sell the home is not a damage that can be claimed in a malpractice action. To begin with, it is mere speculation. But even if that fear is realized by Mr. Brown's actions, Ms. Brown has the remedy of enforcing the decree through the contempt powers of the family court. Clearly, this does not provide a basis for a malpractice claim. Otherwise, every attorney is subject to a claim of malpractice whenever the adverse party in a case fails to live up to their legally-binding agreement.

3. The circuit court did not err in ruling that Ms. Brown failed to put forth actual and ascertainable damages.

As an initial matter, with respect to damages, Ms. Brown's brief includes the following:

> [A]s to damages of the Appellant, which were caused by the Respondent, the courts have long held lawyers liable in tort for malpractice. Also, the law in South Carolina has been recognized [sic] tort actions when the damages are purely economic. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995).
>
> ***
>
> The actual amount of Appellant's damages from lack of alimony can only be determined by a trial on the merits.
>
> ***
>
> The actual amount of Appellant's damages for her interest in real and personal properties can only be determined by a trial in this matter.

(App. Br. pp. 15, 17, and 23.) Respectfully, Ms. Brown's argument is conclusory, and insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Ms. Brown's claim must fail because she cannot put forth the necessary evidence of "actual and ascertainable" damages. The United States District Court for the Southern District of New York addressed a similar scenario in a legal malpractice action based upon an alleged insufficient settlement of a previous lawsuit. In Schweizer v. Mulvehill, 93 F. Supp. 2d 376 (S.D.N.Y. 2000), the client brought a lawsuit against his former attorney alleging malpractice in settling the underlying wrongful death and personal injury action the attorney had filed on his client's behalf arising out of an auto accident. The underlying suit was settled for $1 million, the policy limits of the at-fault driver, even though the alleged damages were much higher. In the malpractice suit, the

defendant-attorneys filed a motion for summary judgment, arguing, among other things, that the plaintiff-client could not prove causation or damages. In granting summary judgment in favor of the defendant-attorneys, the district court held as follows:

> if causation is lacking, it can frequently be said that there are no damages. The rule for proof of damages in legal malpractice is stringent. The lawyer's conduct must have caused damages that are actual and ascertainable. Mere speculation of a loss resulting from an attorney's alleged omissions is insufficient to sustain a prima facie case in malpractice. The loss attributable to malpractice must be real and not hypothetical, and the damages must be readily measurable in economic terms. The client-plaintiff will not prevail on a malpractice claim where the damages are "too speculative and incapable of being proven with any reasonable certainty."

Id. at 395-396 (emphasis added) (internal citations omitted.) Regarding the inherently speculative nature of recovering damages at trial, the court continued:

> Plaintiff's allegation that he would have recovered more if the underlying action had gone to trial or if his lawyers had not confined themselves to settlement within the limits of the relevant insurance coverage does not demonstrate the "actual and ascertainable" damages necessary for a malpractice claim. The speculative nature of what a plaintiff might have recovered at trial is precisely the risk that pre-trial settlement avoids. . .
>
> If malpractice claims could be based on such speculation as to what might have been recovered from an underlying defendant, settlements would frequently subject the participating attorneys to malpractice suits by clients who later become dissatisfied with the risk assessment that they and their counsel engaged in when deciding to settle.

Id. at 396.

Ms. Brown asks this Court to set a dangerous precedent. She has failed to present any specific evidence to as to her damages. Yet, she asks this Court to revive her lawsuit against her former attorney and allow it to go forward based upon the speculation that she

may have done better had her divorce action gone to trial. Under Ms. Brown's theory, any settlement signed off on by a client could result in a malpractice action against his former attorney so long as the action included mere allegations of negligence on the part of the attorney. Without proof of actual and ascertainable damages, Ms. Brown's position is simply untenable, and the circuit court was correct in so ruling. Hall, 349 S.C. 169, 561 S.E.2d 654 (plaintiff must show he or she "most probably" would have been successful in the underlying suit if the attorney had not committed the alleged malpractice).

C. The circuit court did not err in ruling that Ms. Brown has not provided expert testimony necessary to create a factual issue.

On a defendant's motion for summary judgment in a professional negligence claim, there usually will be no genuine issue of material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant. Jernigan v. King, 312 S.C. 331, 334, 440 S.E.2d 379, 381 (Ct. App. 1993). Ms. Brown's expert, Edwards, provided testimony by affidavit and deposition. Edwards' testimony did not establish the proper standard of care, any breach or deviation from the proper standard of care, or that Butcher's actions were the proximate cause of Ms. Brown's alleged damages. Additionally, Edwards based her expert opinion on impermissible sources, such as the opinions of others and the credibility of witnesses. Under the circumstances, the circuit court correctly ruled that Ms. Brown did not present sufficient expert testimony to create a factual issue requiring a trial.

1. The circuit court did not err in ruling that Ms. Brown's expert witness did not establish the correct standard of care in her affidavit or deposition.

As an initial matter, Butcher is unable to find where Ms. Brown directly

challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Ms. Brown failed to establish the standard of care required of Butcher. In order to create a genuine issue for trial in a claim for legal malpractice, a plaintiff must provide expert testimony to establish the required standard of care. Harris Teeter, 390 S.C. at 290, 701 S.E.2d at 749-50. The standard of care set forth must be specific as to the situation complained of and do more than set forth mere generalities which could be applied to any professional negligence claim. Id. "[G]eneralities fall woefully short of our admissibility standards for experts in professional negligence cases." Id. at 290, 701 S.E.2d at 750. Our Supreme Court further rejects "as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care." Id. 390 S.C. at 291, 701 S.E.2d at 750.

As an initial matter, Ms. Brown's complaint is not premised upon a proper, situation-oriented standard of care. The complaint refers generically to "violation[s] of the standard of care owed by the Defendant to the Plaintiff" and to "the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing." (R. pp. 37 and 39, ¶¶ 8, 11, and 14(f).)

Edwards' affidavit also fails to set forth the proper standard of care. (R. pp. 55-58.) In her affidavit, Edwards simply concludes that Butcher breached the standard of care, listing actions which she believes constitute breach, without actually establishing the requisite standard of care. Specifying a negligent act or omission presupposes a definition of "negligence," and, indeed, only begs the question as to what that definition

is. Prior to setting forth what conduct allegedly "breached" the standard, the expert must set forth the standard in reference to which the conduct at issue is to be judged. Because Edwards did not state on what standard of care she was basing her assertions, her statements that Butcher breached the standard of care are not entitled to any weight. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (court not required to admit opinion evidence connected to event only by the expert's *ipse dixit*).

Edwards also failed to establish the proper standard of care in her deposition. Edwards' deposition did not contain any language similar to the required standard of "the degree of skill, care, knowledge and judgment usually possessed and exercised by members of the profession." Her testimony only provided generalities: "I just think that in the area of domestic law, the reasonably prudent thing to do is to make sure your client understands what he or she is agreeing to and is not emotional in making that agreement." (R. p. 110, lines 20-23.) In response to the question "What standard do you apply when you say a breach of the duty of care?" Edwards replied, in a patently circuitous and conclusory fashion, "I think her duty of reasonable care, exactly what's alleged in the complaint." (R. p. 111, lines 21-24.)

Edwards further testified, "I think a reasonable lawyer in a similar situation, with the same knowledge, information, experience, would not recommend to a client (a) to waive alimony . . . (b) this issue of the house is a horrible thing." (R. p. 125, line 21 – p. 126, line 2.) She also testified: "The objective standard I think that [Butcher] breached was her duty to give reasonable care to her client and informing in this waiver of alimony." (R. p. 126, lines 21-23.) Neither statement sets forth the generally recognized and accepted practices in the profession, or the degree of care, skill, and judgment

typically exercised by a member of the profession in that scenario. Edwards opines as to the supposed breach without properly setting forth the requisite standard of care.

Ms. Brown failed to establish the proper standard of care by expert testimony. Because expert testimony as to the standard of care is required in a legal malpractice claim, there is no genuine issue of material fact, and summary judgment was appropriately granted.

2. The circuit court did not err in ruling that Ms. Brown's expert witness did not provide evidence to establish that Butcher breached the standard of care.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

An expert witness must establish that the defendant breached the standard of care. Harris Teeter, 390 S.C. at 289, 701 S.E.2d at 749. An expert witness who does not testify as to the correct standard of care, and yet concludes that the defendant breached the standard of care does not create a genuine issue of material fact. Id. Conclusory statements that the defendant breached the standard of care do not create a genuine issue of material fact. Id.

The Harris Teeter Court held that testimony which establishes a vague, general standard of care does not create a genuine issue of fact as to a breach of the standard of care. Id. at 290, 701 S.E.2d at 749. The expert's testimony must do more than center on the adverse judgment obtained, and instead focus on how defendant's actions breached the properly set forth standard of care. Id., 701 S.E.2d at 750.

Even if the Court finds that Ms. Brown's expert's vague statements properly set forth the standard of care, speaking in generalities about the "bad result" does not create a genuine issue of fact as to breach. In her affidavit, Edwards listed five ways in which she believed Butcher breached her duty owed to Ms. Brown. (R. pp. 55-58.) However, nowhere did Edwards state why these actions were a breach of or deviation from the standard of care. She fails to testify as to generally accepted practices of attorneys in such situations.

Regarding the alleged breach of the standard of care by Butcher, Edwards further testified: "So your question now is, if Ms. Butcher recommended to Ms. Brown that she waive alimony, would I think that was a breach of her duty of care? If that's the question, my answer would be yes." (R. p. 111, lines 17-20.) She did not follow through to explain why such a recommendation deviated from the "reasonable" standard of care Butcher owed Ms. Brown.

Ms. Brown's expert testimony failed to properly establish that Butcher breached the standard of care and failed to establish that Butcher's actions were unreasonable as a matter of law; Edwards merely provides conclusory statements that Butcher breached the standard of care. No genuine issue of material fact has been created by Edwards' testimony, and as a result, the circuit court properly found that Butcher is entitled to summary judgment.

3. The circuit court did not err in ruling that Ms. Brown's expert witness did not provide evidence to establish that Butcher's actions were the proximate cause of Ms. Brown's alleged damages.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is

insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Ms. Brown has the burden of proving that the alleged breach of the standard of care by Butcher was both the cause in fact and proximate cause of any injuries she alleges. "In the vast majority of legal malpractice actions in which expert testimony is required, the plaintiff must establish through expert testimony not only the applicable standard of care and the breach of that standard, but also that the alleged breach of the standard of care was the proximate cause of his injury." Meyer v. Mulligan, 889 P.2d 509, 516-517 (Wyo. 1995) (citing Dennis J. Horan and George Spellmire Jr., Attorney Malpractice: Prevention and Defense at 13.6 (1987); 2 R.E. Mallen & J.M. Smith Legal Malpractice §§ 27.14, 27.15, 27.22; and Jarman v. Hale, 112 Idaho 270, 731 P.2d 813, 816 (Idaho App. 1986)); *see also* Samuel v. Hepworth, Nungester & Lezamiz, 134 Idaho 84, 89, 996 P.2d 303, 308 (Idaho 2000) ("A plaintiff must normally produce expert evidence of negligence and causation of damages to establish a prima facie case of legal malpractice.").

An expert witness must testify that the defendant's action satisfied the causation-in-fact requirement of proximate cause. Harris Teeter, 390 S.C. at 289, 701 S.E.2d at 749. The expert witness must state that the conduct most probably caused the outcome in order to establish that defendant's actions were the "but for" cause of plaintiff's loss. Id. at 290, 701 S.E.2d at 749.

Although it is not necessary that the words "most probably" be used, the expert's testimony must impress that the opinion represents the expert's professional judgment that the attorney's conduct was the most likely cause of the plaintiff's injuries. Hatfield

v. Van Epps, 358 S.C. 185, 191, 594 S.E.2d 526, 529 (Ct. App. 2004). In order to satisfy the proximate cause requirement, Edwards would have had to testify that but for Butcher's actions, Ms. Brown would have received alimony and would have received one-half of the equity in the marital home.

Nowhere in her affidavit or deposition testimony does Edwards use "most probably" or any other words conveying the proper magnitude of certainty to describe the likelihood that Ms. Brown would have been awarded alimony or received one-half of the equity in the marital home. Edwards merely opines: ". . . in my expert opinion, Ms. Brown would have been entitled to a substantial sum of alimony each month." (R. p. 57.) Edwards then fails to provide or calculate in any form what alimony she believes Ms. Brown to be entitled to. When asked, "What's your opinion as to what alimony Ms. Brown would have been entitled to?," she replied, "I have not done that analysis." (R. p. 131, line 22 – p. 132, line 2.) Indeed, Edwards expressly confirmed that she was not asked to evaluate or provide any opinions regarding damages allegedly suffered by Ms. Brown. (R. p. 138, lines 15-25.)

Edwards testified in her deposition that Ms. Brown would not have waived alimony had the case gone to trial. (R. p. 107, line 7 – p. 109, line 17.) This statement fails to provide any insight into how Butcher's actions allegedly injured Ms. Brown. Rather, the statement merely describes what Edwards believes would have been Ms. Brown's likely course of action. Edwards's opinion about Ms. Brown's entitlement to alimony is further undermined by her admission that the family court in the divorce proceeding could have ruled that Ms. Brown committed adultery, which clearly would have affected Ms. Brown's ability to receive alimony. Edwards testified: "If it was raised

in the pleadings, if Mr. Christianson testified, if [Mr. Brown] met the burden of proving adultery with Mr. Christianson's testimony and his, and if it were credible, yes." (R. p. 122, line 23 – 124, line 8.) In other words, Edwards admits that, had witnesses merely followed through and testified in accordance with affidavits previously submitted to the court under oath, the family court could have found Ms. Brown barred from any alimony. Ms. Brown's claim regarding her award of alimony in the absence of the divorce settlement is purely speculative.

The same lack of certainty about the success of Ms. Brown's underlying action is found in Edwards's statements about the marital home. In her affidavit, Edwards states "Ms. Brown would have been entitled to receive as an equitable division one half of the marital estate." (R. p. 57.) Not acknowledged by Edwards is the fact that Ms. Brown was, in fact, awarded one-half of the marital estate under the Decree of Divorce. (R. p. 50) Further, Edwards gave no indication of the likelihood that a court would have granted such a division; failed to set forth an opinion that Ms. Butcher would have received one-half of the marital estate in the underlying action but for any alleged negligence of Butcher; and failed to take into account the exhaustive negotiation process Butcher undertook on behalf of Ms. Brown in coming to final settlement terms. As such, this testimony does not meet the standards required for causation.

The factors involved in determining the proper standard of care for an attorney in Butcher's position and the potential breach of that standard are not within the knowledge or experience of lay people, and, as a result, a jury cannot determine these issues without the assistance of sufficient expert testimony. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) ("[E]xpert evidence is required where a factual issue

must be resolved with scientific, technical, or any other specialized knowledge."); *see* Jernigan, 312 S.C. at 334, 440 S.E.2d at 381; Samuel, 134 Idaho at 89, 996 P.2d at 308. Expert opinion is required to show both the standard of care required and that any alleged breach of that standard proximately caused injury to the Ms. Brown. Ms. Brown has failed to provide proper expert testimony to meet her burden, and as a result, summary judgment was appropriately granted.

4. The circuit court did not err in ruling that Ms. Brown has not provided any evidence that a divorce settlement on any other terms could have been reached.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

The crux of the testimony from Ms. Brown and her expert, Edwards, is that Butcher failed to negotiate a settlement of Ms. Brown's divorce case on terms that they felt were "fair." Clearly, if the divorce proceeding were handled in a similar fashion by Butcher, yet Ms. Brown obtained "significant alimony" and "half the marital estate," Butcher would not be a party to this litigation. However, there is no testimony in the record indicating that Mr. Brown would have agreed to those terms. In fact, Ms. Brown admits that "I knew we would not be able to negotiate a fair settlement, even if we were given the opportunity before trial." (R. p. 59.) Regardless, Mr. and Ms. Brown entered into a settlement and put that settlement on the record in court. Ms. Brown cannot now argue that Butcher was negligent in negotiating this settlement, because she has failed to provide any evidence or testimony that would indicate that Mr. Brown ever would have

agreed to settle the divorce action on terms more advantageous to Ms. Brown.

In Hazel & Thomas, P.C. v. Yavari, 251 Va. 162, 166, 465 S.E.2d 812, 815 (Va. 1996), the Supreme Court of Virginia analyzed a similar scenario. The client sought assistance from an attorney in negotiations to purchase a tract of commercial land, indicating he wanted to move in immediately upon entering into the purchase contract. The attorney negotiated the terms and the client paid a $1 million deposit. The client moved in to the property and wanted to lease portions of the land to third parties prior to closing on the property, and sought a non-disturbance agreement from the seller (an agreement that leaseholders' rights would not be disturbed if buyer defaulted on the contract). The seller refused to provide the requested non-disturbance agreements, as that was not a term of the sales contract. The client then refused to close on the property; the client was evicted, and the seller kept the deposit and recovered additional damages for breach of contract.

The client brought a malpractice suit against his attorney, alleging through expert testimony that the attorney violated the standard of care required of attorneys by, *inter alia*, failing to negotiate into the contract the requirement of non-disturbance agreements on the part of the seller. The client won at the trial and attorney successfully appealed with the Supreme Court of Virginia noting that: "[o]rdinarily, the fact finder decides whether a plaintiff has shown that the defendant's negligence was a proximate cause of the plaintiff's loss. When, however, the evidence is such that reasonable minds could not differ as to the outcome, the issue of proximate cause should be decided by the court, not the jury." Id. at 166, 465 S.E.2d at 815.

The Court went on to hold that the client bore the burden of producing evidence

that the attorney's negligence proximately caused the client's loss, and as such, was required to show i) that the seller would have agreed to the contract with inclusion of the non-disturbance agreement or ii) that the client would not have agreed to enter into the contract had seller refused to include the additional terms. The client could provide no concrete evidence that the seller would have agreed to the contract had it included the additional terms. Furthermore, the client failed to offer testimony that he would have refused to enter into the contract had his attorneys insisted on inclusion of additional terms. Because plaintiff-client could not show that any contract would have been entered into on the terms preferred by the seller, he failed to introduce any evidence that his former attorney's purported negligence was a proximate cause of his injuries. Essentially, if there is no evidence indicating any other agreement could have been entered into, a plaintiff-client cannot argue that his previous attorney's alleged negligence was the proximate cause of his injuries. The lawsuit was dismissed against the attorney because of the plaintiff's failure to show proximate cause.

The same rationale should be applied here. Mr. and Ms. Brown entered into a settlement agreement; there is no evidence in the record indicating a settlement on any other terms was possible. Ms. Brown cannot now argue that had she been advised to enter into the agreement on different terms, she would have been adamant about demanding different terms. A separate settlement agreement on different terms never would have been entered into by the parties. As such, the issue of proximate cause should be decided by the court because reasonable minds cannot differ as to the outcome—there is simply no evidence that any other agreement could have been entered into. Ms. Brown failed to produce evidence that any of her alleged injuries were

proximately caused, and the circuit court properly granted summary judgment in favor of Butcher for this reason.

5. The circuit court did not err in ruling that Ms. Brown's expert witness's opinions were based on impermissible sources.

As an initial matter, Butcher is unable to find where Ms. Brown directly challenges this ruling in her brief and, respectfully, submits that Ms. Brown's brief is insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Edwards' opinions do not meet the standards of Rule 703, SCRE. Rule 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible." The plain language of this rule does not permit experts to base their opinions on the opinions of others, but only facts or data from others.

Edwards testified in her deposition that she took the opinions of her former boss, attorney Vickie Eslinger, into account when she represented Ms. Brown: "I'm not going to – you don't sit in a meeting with someone who has her level of expertise and discount what she – if you're asking me if I'm going to say, 'Vickie [sic] believes this; therefore, I believe all of this,' and 'Vickie said," and "Vickie said" I'm not suggesting that. But I'm telling you that certainly that we had [sic] where we dug through the documents was something that I took into account in my representation of Ms. Brown and in my preparation of this affidavit." (R. p. 106, line 22 – p. 107, line 6.)

Edwards's testimony also suggests that her opinions are based on emotion and

feelings instead of facts and data. She testified that "of all of the people that I have represented since 2007, [Ms. Brown] would probably be the person that I have felt the most empathy for, for what happened to her." (R. p. 105, lines 14-16.)

Edwards's testimony further fails to satisfy the requirements of Rule 702, SCRE. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." Judging credibility is not specialized knowledge; the credibility of witnesses is peculiarly within the province of a jury. Warren v. Watkins Motor Lines, 242 S.C. 331, 343, 130 S.E.2d 896, 902 (1963); United States v. Scop, 846 F.2d 135, 142 (2nd Cir. 1988) ("We believe that expert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony. The credibility of witnesses is exclusively for the determination by the jury . . . . [E]ven expert witnesses possessed of medical knowledge and skills that relate directly to credibility may not state an opinion as to whether another witness is credible . . . . [W]e believe that such testimony not only should be excluded as overly prejudicial but also renders inadmissible any secondary opinion based upon it.").

Edwards based her opinion about Ms. Brown's underlying alimony issue on her opinion of Mr. Brown's credibility as a witness. In response to whether financial considerations would weigh against alimony being awarded to Ms. Brown, she replied, "I don't think I can agree to that . . . because I've seen Mr. Brown. And if we want to talk about this [the factors a judge considers in awarding alimony], there's a particular element of credibility with Mr. Brown that is significant to this case." (R. p. 113, line 18

– p. 114, line 4.) She continued, "But with Mr. Brown, I think that one of the main issues with Mr. Brown that would need to be proven at a trial would be his credibility or lack thereof." (R. p. 114, lines 15-17.) Finally, she answered "Yes, I do" in response to the question "So, essentially, your view of your expert opinion here would be that it's based upon your view of the strength of Ms. Brown's case and the credibility or lack of credibility of the opposing case." (R. p. 115, line 19 – p. 116, line 5.) Edwards' testimony about Mr. Brown's credibility is not based on specialized knowledge and thus she cannot testify as to her opinions under Rule 702.

6. The circuit court did not err in ruling that Ms. Brown failed to provide expert testimony to support a factual basis for determining what a reasonable family court judge, who was aware of all of the facts and circumstances, would have awarded in the divorce action.

As an initial matter, Ms. Brown's argument on this point is as follows:

> There is not a requirement of a plaintiff in a malpractice action to have an affidavit from a judge, nor to file a declaratory judgment action prior to the initiation of the malpractice action.

(App. Br. p. 6.) Respectfully, Ms. Brown's argument is conclusory, and insufficient to upset the circuit court's ruling on this point. Moreover, on the merits, the circuit court did not err in so ruling.

Ms. Brown states in her affidavit that she "begged for the [Butcher] to fight for me." (R. p. 60.) Presumably, this means that she wanted either a) to obtain a more favorable settlement or b) to go to court and attempt to prove her case. Ms. Brown's divorce action, had it been tried, would have been tried to a judge, sitting as fact-finder and arbiter of the law. Ms. Brown has the burden of proof on her "case within a case" and ultimately a jury in this case would have decided whether the judge in the divorce

case would have ruled favorably for Ms. Brown. This is, to say the least, an unusual situation for a jury. However, this is a situation previously addressed in the case law.

Typically, in scenarios such as the one presented here, the issues of "causation and damages" will hinge upon the merits of the previous action. Courts require the plaintiff to put forth evidence that the settlement recommended by the attorney in the previous action was "less than what a reasonable judge who was aware of all the facts would have awarded" had the case gone to trial. *See* Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 118, 362 N.W.2d 118, 131 (Wis. 1985); *cf.* Hall, 349 S.C. at 174, 561 S.E.2d at 657 (in a legal malpractice case, a successful plaintiff "must show he or she 'most probably' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice"). Without setting forth this evidence, a plaintiff fails to satisfy her burden of proving causation and damages.

In the instant matter, Ms. Brown has failed to provide any evidence of what a "reasonable judge" would have awarded had the divorce action gone to trial. In fact, Ms. Brown's expert indicates she was not asked to provide any testimony or calculations as to damages. (R. p. 138, lines 15-25.) There is no evidence in the record of what damages a "reasonable judge" would have granted had the divorce action gone to trial. Without additional expert testimony regarding the potential damages award of a "reasonable judge" in the underlying action, Ms. Brown has simply failed to satisfy her burden of providing evidence from which a jury could decide the issue of damages.

7. The circuit court did not err in ruling that there is no claim based upon a conflict of interest and no testimony to support any such claim.

Confusingly, and for the first time in opposition to Butcher's motion for summary

judgment, Ms. Brown raised an issue involving a supposed conflict of interest held by Butcher. No allegations of the kind were set forth in her complaint. As such, her claim for legal malpractice is not based on any such allegations, nor would it be proper for the court to render its decision based on such allegations. *See* Patterson v. Goldsmith, 292 S.C. 619, 627, 358 S.E.2d 163, 167-68 (Ct. App. 1987) ("A court's judgment must conform to both the pleadings and proof, and be in accordance with the theory of action on which the pleadings are framed and the case was tried."). Furthermore, Edwards states explicitly that she has not been asked to provide an opinion as to whether any conflict of interest existed. (R. p. 144, lines 13-25.) Consequently, the circuit court did not err in finding that no basis for recovery was framed in Ms. Brown's pleadings on account of an alleged conflict of interest and that Ms. Brown presented no competent testimony as to any potential breach of the standard or care regarding an alleged conflict of interest.

D. Ms. Brown's argument regarding Butcher's credibility is neither preserved for review nor meritorious.

Ms. Brown's brief includes an argument aimed at attacking Butcher's credibility by claiming that Janet Butcher made false statements "at the time of and during her deposition . . . ." (App. Br. pp. 23-24.) As an initial matter, this argument is not preserved for review because it was not ruled upon by the circuit court. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 18-25, 602 S.E.2d 772, 777-81 (2004) (explaining that issues and argument are only preserved for appellate review when they are raised to and ruled upon by the lower court, and that, even where an issue or argument is raised to the lower court but not ruled upon, it is necessary for the appellant to timely seek a ruling upon the issue or argument via Rule 59(e), SCRCP motion or else the issue is not

preserved for appellate review). Moreover, it is without merit, because it is wholly irrelevant to the circuit court's grant of summary judgment, which was not at all based upon Butcher's credibility, but, except for those discretionary aspects of its ruling pertaining to judicial estoppel, viewed the evidence and inferences capable of being reasonable drawn therefrom in the light most favorable to Ms. Brown.

CONCLUSION

For the foregoing reasons, and for any other reason appearing in the record, Butcher asks that this Honorable Court affirm the circuit court's summary judgment.

Respectfully submitted,

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Dated: 11/19/12

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-28-0311

Theresa M. Brown,

Appellant,

v.

Janet Butcher and The Butcher Law Firm, PA,

Respondents.

RESPONDENTS' CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of August 13, 2007.

Respectfully submitted,

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I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **Final Brief of Respondents** in the above-captioned matter was served on all other parties to this appeal by depositing a copy of the same in the United States Mail, postage prepaid, on November 19, 2012, addressed as follows to their attorneys of record:

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