

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Case No. 2009-CP-40-8705

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Carolyn Mitchell Powell. .... Appellant,

vs.

Ashlin Blanchard Potterfield; J. Michael Taylor;  
and TAYLOR/POTTERFIELD, ..... Respondents.

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**INITIAL BRIEF OF APPELLANT**

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**SC Court of Appeals**

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## STATEMENT OF ISSUES

- I. Whether the trial court erred in granting Respondents' motions for summary judgment by finding that expert testimony was necessary to establish the certainty of the amount of damages for Appellant's legal professional negligence claim and her breach of contract claim.
- II. Whether the trial court erred in granting summary judgment on Appellant's breach of fiduciary duty claim because a) there was evidence in the record showing legal damages flowing from Respondents' breach of their fiduciary duties owed to Appellant and b) the availability of equitable remedies including disgorgement of legal fees, notwithstanding any ultimate conclusion by the finder of fact of the absence of legal damages.
- III. Whether the trial court erred in granting summary judgment on all of Appellant's claims by ignoring the evidence regarding Appellant's damages that were present in the record.
- IV. Whether the trial court erred in granting Respondents' motions for summary judgment on the grounds that any such ruling was premature because discovery was incomplete.
- V. Whether the trial court's Order granting Respondents' motions for summary judgment was in error by misstating facts, failing to apprehend facts, and viewing the facts in the record or inferences from those facts in a fashion favorable to Respondents, the moving parties.

## STATEMENT OF THE CASE

On December 11, 2009, Appellant filed a Verified Complaint in the Richland County Court of Common Pleas asserting a legal malpractice claim, a breach of fiduciary duty claim, and a breach of contract claim against Ashlin Blanchard Potterfield, J. Michael Taylor, Taylor/Potterfield, Golden, Taylor, Potterfield and Barron, Reid Smith, and Price, Bird & Smith, P.A. (Complaint; ROA \_\_). Simultaneously filed with the Verified Complaint was an Affidavit from Dr. Gregory B. Adams, providing an expert opinion on Respondents' professional negligence. (Adams Expert Affidavit; ROA \_\_). Respondents were all served between December 22, 2009 and December 23, 2009. (Affidavits of Service; ROA \_\_). On January 25, 2010, Appellant filed a Stipulation of Dismissal for Golden, Taylor, Potterfield and Barron. (Stipulation of Dismissal; ROA \_\_).

On February 19, 2010, Blanchard Potterfield, J. Michael Taylor, Taylor/Potterfield served their Answer to the Verified Complaint and, on February 22, 2010, Reid Smith filed his Answer. (Answer of Potterfield/Taylor; ROA \_\_); (Answer of Smith; ROA \_\_). In February 2010, the parties begin an extensive period of exchanging written discovery and documents. On April 6, 2010, Appellant disclosed Dr. Gregory B. Adams as an expert witness. (Plaintiff's Responses to Interrogatories; ROA \_\_). On July 1, 2010, Respondents Potterfield and Taylor disclosed that they had not retained an expert witness. (Potterfield/Taylor Response to Interrogatories; ROA \_\_). On August 20, 2010, Respondents served a Notice of Deposition to Dr. Gregory B. Adams; however, Respondents chose not to depose Dr. Adams. (Notice of Deposition; ROA \_\_). On October 4, 2010, the parties

agreed to a Consent Scheduling Order. (Consent Scheduling Order; ROA \_\_\_\_).

On November 10, 2010, the parties agreed to a Consent Order Substituting and Relieving Counsel for Plaintiff. (Order Substituting Counsel ; ROA \_\_\_\_). On January 27, 2011, Respondent Carolyn Powell's deposition was taken. (Deposition Transcript for C. Powell; ROA \_\_\_\_). On February 9, 2011, Reid Smith and Price, Bird and Smith filed a Motion for Summary Judgment and, on March 1, 2011, Potterfield also filed a Motion for Summary Judgment, both of which were based primarily on *res judicata* and collateral estoppel grounds. (Smith Motion for Summary Judgment; ROA \_\_\_\_); (Potterfield Motion for Summary Judgment; ROA \_\_\_\_). Both Motions for Summary Judgment were denied on May 25, 2011. (Order Denying Motions for Summary Judgment; ROA \_\_\_\_). Respondents again noticed the deposition for Dr. Gregory B. Adams on June 29, 2011, but chose not to depose Dr. Adams. (Amended Notice of Deposition; ROA \_\_\_\_).

On September 8, 2011, the parties agreed to a Consent Order Dismissing Reid Smith. (Consent Order; ROA \_\_\_\_). On September 16, 2011, Appellant served supplemental responses to interrogatory requests identifying H. Grady Brown, J.D. as an additional expert witness. (Plaintiff's Supplemental Interrogatory Responses; ROA \_\_\_\_). Respondents for the third time noticed the deposition for Dr. Gregory B. Adams on September 23, 2011, but chose not to depose Dr. Adams. (Notice of Deposition; ROA \_\_\_\_). On November 16, 2011, H. Grady Brown, J.D. was deposed by Respondents. (Brown Deposition Transcript; ROA \_\_\_\_). On November 21, 2011, Appellant served a second set of supplemental responses to interrogatory requests again identifying H. Grady Brown, J.D. as an additional expert witness. (Plaintiff's

Second Supplemental Interrogatory Responses; ROA \_\_\_\_).

On November 22, 2011, the parties agreed to an Amended Scheduling Order. (Amended Scheduling Order; ROA \_\_\_\_). On December 22, 2011, Potterfield and Taylor filed a Motion for Summary Judgment, which they later amended on February 16, 2012. (Amended Motion for Summary Judgment; ROA \_\_\_\_). On March 2, 2012, Respondents filed an Affidavit from Ken Lester in support of their Amended Motion for Summary Judgment. (Affidavit of Ken Lester; ROA \_\_\_\_). On March 12, 2012, Appellant filed an Affidavit of H. Grady Brown, J.D. (Affidavit of Grady Brown; ROA \_\_\_\_). On March 14, 2012, Appellant filed a Memorandum in Opposition to Defendants' Second Motion for Summary Judgment. (Memorandum in Opposition to Motion for Summary Judgment; ROA \_\_\_\_). A Hearing on the Motions for Summary Judgment was held on March 16, 2012 before The Honorable R. Knox McMahon. (Hearing Transcript; ROA \_\_\_\_). On March 20, 2012, Respondents supplemented their interrogatory responses to disclose for the first time an expert witness, Ken Lester, to testify on their behalf. (Defendants' Supplemental Interrogatory Responses; ROA \_\_\_\_). On March 21, 2012, the parties conducted a mediation, which failed to reach a resolution. (Proof of ADR; ROA \_\_\_\_).

On April 23, 2012, the lower court judge issued an Order Granting Defendants' Motions for Summary Judgment. (Order Granting Motion for Summary Judgment; ROA \_\_\_\_). On May 11, 2012, Appellant filed a Motion to Alter or Amend the Judgment pursuant to Rule 59, SCRCP. (Motion to Alter or Amend; ROA \_\_\_\_). On May 18, 2012, Respondents filed a Reply to Appellant's Motion to Alter or Amend the Judgment. (Reply to Motion to Alter or Amend; ROA \_\_\_\_). On July 19,

2012, the lower court judge issued an Order Denying Plaintiff's Motion to Alter or Amend the Judgment. (Order Denying Motion to Alter or Amend; ROA \_\_\_\_). The instant appeal was timely filed on August 6, 2012.

### FACTS

On or about September 2, 2003, Golden, Taylor, Potterfield and Barron ("GTPB") and Respondent Ashlin Potterfield accepted the representation of Carolyn Mitchell Powell ("Powell" or "Appellant") to serve as her counsel for a family law matter concerning Powell and her then husband, Conrad Powell ("husband" or "Mr. Powell"). (Verified Complaint at 2; ROA\_\_); Hearing Transcript at 4:5-7; ROA\_\_). Powell paid Respondents a \$3,000 retainer fee. (Verified Complaint at 2; ROA\_\_); Hearing Transcript at 4:7; ROA\_\_). At the time Powell retained GTPB and Respondent Potterfield, Powell had been married to her husband for fifteen years and was the primary caretaker for two children born of the marriage. (Verified Complaint at 2; ROA\_\_). The legal services which Respondents were expected to provide included: Obtaining a divorce, custody and support of two minor children; separate support and maintenance of Powell; property division; alimony; and advice concerning extra-marital affairs by Powell's husband. (Verified Complaint at 2; ROA\_\_).

Soon after the representation began, Powell's husband sold a valuable commercial property, referred to as the South Carolina Student Loan building. (Verified Complaint at 2; ROA\_\_). On or about September 2, 2003, Powell provided Respondents with a copy of a private investigator report documenting substantial evidence of her husband's opportunity and inclination to commit adultery. (Verified

Complaint at 3; ROA\_\_). Although they were or should have been well aware of the law, Respondents never told Powell that she would be forever barred from receiving alimony should she engage in an adulterous affair before the earliest of these two events: (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. (Verified Complaint at 3; ROA\_\_).

From September 2, 2003, and for three years thereafter, Powell had not engaged in any form of adultery and was entitled to pursue a claim for an award of alimony under the law of South Carolina. (Verified Complaint at 3; ROA\_\_). Respondents never pursued a claim for an award of alimony on Powell's behalf. (Verified Complaint at 3; ROA\_\_). Powell provided Respondents with multiple documents evidencing the existence of valuable marital assets, as well as the net worth of the husband. (Verified Complaint at 3; ROA\_\_). Powell further provided Respondents with multiple documents evidencing her immediate financial needs and evidencing her belief that the husband was hiding assets through family members and business ventures. (Verified Complaint at 3; ROA\_\_).

Despite having knowledge that Powell's interests in the valuable marital assets were in need of protection, by Court Order or otherwise, from September 2, 2003, the date of retention, through August 26, 2004, Respondents made absolutely no filings with the Richland County Family Court on Powell's behalf. (Verified Complaint at 3; ROA\_\_). The marital home was placed on the market sometime in June 2004 and put under contract by Powell's husband while Powell was out of the

country. (Verified Complaint at 3; ROA\_\_).

Upon Powell's return to South Carolina, Respondent Potterfield convinced her to move with her daughters out of the marital home. (Verified Complaint at 4; ROA\_\_). Powell agreed to do so in light of Respondent Potterfield's assurances that she would protect Powell's interest in the proceeds from the sale of the marital home. (Verified Complaint at 4; ROA\_\_). On or about August 26, 2004, Respondents filed a Complaint for separate support and maintenance, styled as *Powell v. Powell*, 2004-DR-40-3081, in the Richland County Family Court. (Verified Complaint at 4; ROA\_\_). On or about December 16, 2004, Respondents filed a Reply in response to husband's Answer with the Court. (Verified Complaint at 4; ROA\_\_). On or about January 20, 2005, and on several occasions thereafter, Powell informed Respondent Potterfield that she had no access to the marital estate funds and that her husband had signed a contract for sale of marital property in the form of a beach home for approximately \$2,075,000. (Verified Complaint at 4; ROA\_\_). Respondents did not protect Powell's interest in the proceeds from the sale of the beach home. (Verified Complaint at 4; ROA\_\_).

If Respondent Potterfield had reduced to a formal writing the terms of the property settlement on or about January 21, 2005, Powell's ability to pursue a claim for alimony would have been protected. (Verified Complaint at 5; ROA\_\_). On or about March 17, 2005, Respondent Potterfield consented to the withdrawal of Powell's husband's motion for pendent lite relief, giving up the ability to move forward with a scheduled temporary hearing to approve the partial property agreement. (Verified Complaint at 5; ROA\_\_). With the exception of ministerial

affidavits of service and continuances, this was Respondent Potterfield's third and final filing with the Richland County Family Court on behalf of Powell during the multi-year representation. (Verified Complaint at 5; ROA\_\_). If Respondent Potterfield had allowed the hearing to go forward, an Order could have been entered with respect to the partial property agreement, thereby protecting Powell's ability to pursue a claim for alimony. (Verified Complaint at 5; ROA\_\_).

Respondents did not tell Powell that despite the fact that she had been separated from her husband for three (3) years, any claim to alimony would be forever barred should she begin a romantic relationship. (Verified Complaint at 6; ROA\_\_). During the entire time that Respondent Potterfield served as Powell's lead attorney, Powell recalls only one (1) face to face meeting in the law office. (Verified Complaint at 6; ROA\_\_). On or about April 1, 2005, Respondents agreed that Powell's domestic case would be taken over by Respondent Taylor as a replacement for Respondent Potterfield, and he too was thereafter paid a retainer fee, in the amount of \$5,000. (Verified Complaint at 6; ROA\_\_). On or about June 23, 2005, Respondent Taylor served Powell's husband with interrogatories and requests for production, for the first time in the multi-year litigation. (Verified Complaint at 6; ROA\_\_). On or about July 12, 2005, Respondent Taylor admitted that husband's financial declaration had never been requested by Respondent Potterfield. (Verified Complaint at 6; ROA\_\_).

As set forth above, from September 2, 2003 through July 12, 2005, Respondents had purported to represent Powell in the domestic dispute, yet they failed to determine the full extent of the parties' marital assets. (Verified Complaint

at 7; ROA\_\_). Even though Respondent Taylor knew that as of July 12, 2005, the proceeds from the sale of the beach home were placed into Powell's husband's personal accounts, and not in an escrow account, he took no action on Powell's behalf to ensure Powell's interest in the marital assets would be protected by Court Order, or otherwise, while in husband's personal account. (Verified Complaint at 7; ROA\_\_); (Powell Transcript at 145:10-25; ROA\_\_).

On or about August 18, 2005, Respondent Taylor, for the first time, received personal financial statements from Powell's husband in response to a request for production. (Verified Complaint at 7; ROA\_\_). The personal financial statements revealed the value of the marital estate to be as follows: 2002 - \$7,000,000; 2003 - \$2,800,000; 2004 - \$3,200,000. (Verified Complaint at 7; ROA\_\_). Although this dissipation of marital assets was set out in the husband's personal financial statements received by Respondent Taylor on August 18, 2005, Powell had, in 2003, warned Respondents that her husband would hide or transfer assets and provided Respondents with documentation of such conduct. (Verified Complaint at 7; ROA\_\_). On or about February 22, 2006, Respondent Taylor associated Reid Smith to assist with certain financial and accounting aspects of the Powell's case. (Verified Complaint at 7; ROA\_\_).

With the exception of continuances, affidavits of service, and one deposition notice, Respondent Taylor made no substantive filings with the Family Court during his representation of Powell from April 1, 2005 to January 19, 2007. (Verified Complaint at 8; ROA\_\_). From approximately February 28, 2006 to October 12, 2006, Respondent Taylor did not communicate in writing with Powell regarding any

aspect of her case. (Verified Complaint at 8; ROA\_\_). On or about January 19, 2007, Respondent Taylor was relieved as Powell's counsel and replaced by attorney Cantzon Foster. (Verified Complaint at 9; ROA\_\_); (Hearing Transcript at 5:5-8; ROA\_\_). Reid Smith filed a notice of representation of Powell on March 16, 2007, although he was representing Powell as one of her attorneys for more than one (1) year prior to this date. (Verified Complaint at 9; ROA\_\_). On or about January 23, 2007, Powell was told, for the first time, that she could not pursue a claim for alimony because she had begun a romantic relationship with another man in September, 2005, two years after she first hired GTPB and Respondent Potterfield. (Verified Complaint at 9; ROA\_\_).

Respondent Taylor led Powell to believe that because this September 2005 relationship began long after the parties' separation, it would not bar an alimony claim. (Verified Complaint at 9; ROA\_\_). Respondent Taylor never pursued Powell's alimony claim. (Verified Complaint at 9; ROA\_\_). After Powell relieved Respondent Potterfield and Respondent Taylor as her counsel, she learned that if the Respondents had procured a formal signing of the January 21, 2005 partial property settlement agreement, then her claim for permanent alimony would not have been barred as a result of Powell's September 2005 relationship. (Verified Complaint at 9; ROA\_\_).

After five years of frustration, anxiety, depression, and emotional distress concerning the handling of her domestic case, and after repeated assurances that the Respondents' pursuit of her case would become more aggressive, Powell was on the verge of an emotional breakdown. (Verified Complaint at 9; ROA\_\_). In light

of the untenable circumstances and Powell's inability to cope with those circumstances after the multi-year battle with her husband, Powell agreed to a settlement of her domestic case, and on May 2, 2007, a Final Decree of Divorce was granted by Judge Anne Jones of the Family Court for the Fifth Judicial Circuit. (Verified Complaint at 10; ROA\_\_); (Hearing Transcript at 5:13-16; ROA\_\_).

### ARGUMENTS

**I. EXPERT TESTIMONY IS NOT NECESSARY TO PROVE THE DAMAGE ELEMENT OF A LEGAL PROFESSIONAL NEGLIGENCE CLAIM OR A BREACH OF CONTRACT CLAIM.**

**A. Legal Professional Negligence.**

As recognized on page seven of the trial court's Order, South Carolina law does not require a plaintiff to engage an expert to present testimony regarding damages in a legal professional negligence claim. An expert opinion is necessary to establish only the standard of care. See *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Henkel v. Winn*, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 494 (Ct. App. 1998); *Mali v. Odom*, 295 S.C. 78, 80, 367 S.E.2d 166, 168 (Ct. App. 1988). "[T]he purpose of establishing the appropriate standard of care is simply to arm the finder of fact with the appropriate criteria by which to judge the defendant's conduct." *Sims v. Hall*, 357 S.C. 288, 297, 592 S.E.2d 315, 319 (Ct. App. 2003) (citing *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 791 (D.S.C. 1992)). "With the aid of expert testimony, 'the jury is able to analyze the attorney's conduct and measure it against the action that a competent

attorney would be expected to take under the same circumstances.” *Southeastern Housing Found. v. Smith*, 380 S.C. 621, 648, 670 S.E.2d 680, 694-95 (Ct. App. 2008) (citing *Cianbro Corp.*, 804 F. Supp. at 793)).

For filing purposes, SOUTH CAROLINA CODE ANN. § 15-36-100 requires an affidavit of an “expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” S.C. CODE ANN. § 15-36-100(B) (2006). There is no requirement in this statute or in any South Carolina cases that an expert opinion is required to establish to the fact of damages or the specific amount of damages to support a legal professional negligence claim. Notwithstanding that expert testimony is not required to establish damages, specific expert testimony regarding Appellant’s damages was in the record before the trial court.

The trial court held that the affidavits of Dr. Adams and Mr. Brown did not present “an opinion sufficient to meet the requirements of *Hall and Doe*,” did not offer “an opinion as to the value of the underlying settlement,” did not state the “amount for which Powell could have settled, in excess of the value of the underlying settlement, but for the alleged negligence of the defendants,” and failed to refute “the conclusions arrived at by Smith, following his extensive investigation.” (Order granting Motion for Summary Judgment, p. 14; ROA \_\_\_\_). The trial court’s Order then goes on to find that Appellant “has provided nothing more than bald assertions and conjecture, with no real factual support for any damages” concluding that Appellant failed “to present even a scintilla of evidence as to the issue of damages.”

(Order granting Motion for Summary Judgment, p. 15; ROA \_\_\_\_). These conclusions were in error and should be reversed.

First, the trial court failed to recognize Appellant's claim for damages in the loss of available alimony due to the negligence of Respondents. The record contains numerous references to Appellant's claims that she had a viable claim for alimony; that Respondents failed to advise her regarding actions that could cause her to lose her claims to alimony; and that Respondents failed to take various legal actions that would have preserved her claims to alimony. (Verified Complaint at 3, ROA\_\_); (Affidavit of Grady Brown at 3; ROA \_\_\_\_); (C. Foster deposition at 148:10-24, ROA\_\_); (Powell deposition at 245:15-246:15, ROA\_\_). Prior to the eventual settlement in her divorce matter, Appellant was damaged as a result of Respondents' acts and omissions because, for example, she was unable to recover any alimony and additional taxes were incurred because Respondents failed to properly monitor marital property sold during the representation resulting in taxes that could have been avoided under a Section 1031 tax-free exchange. See (Affidavit of Grady Brown, p. 4; ROA \_\_\_\_). These specific damages alone were identified, in the record before the trial court, and were more than sufficient to defeat Respondents' motion for summary judgment.

Second, the trial court erred in its focus on the necessity of expert testimony as to the specificity of damages in proving that Appellant would have more probably reached a better settlement but for the negligence of Respondents. In doing so, the trial court essentially modified the standard to establish the damage element of a legal professional negligence claim. Under South Carolina law, "[i]n order to prevail

in a legal malpractice action, the plaintiff must prove four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach." *Ellis v. Davidson*, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct. App. 2004) (finding that the trial court inappropriately granted summary judgment in a legal malpractice claim). In South Carolina, establishing the damage element does not require expert testimony to prove a specific amount of damages suffered by the plaintiff in a legal professional negligence claim; however, the trial court effectively imposed this additional factor for Appellant to prove her *prima facie* case against Respondents.

This possibility was considered by this Court in *Doe* and rejected because the Court found that the *Doe* trial court was not imposing an additional standard to establish damages a legal professional negligence claim but instead "was considering an alternative course for which Doe could avoid summary judgment." *Doe v. Howe*, 367 S.C. 432, 445, 626 S.E.2d 25, 33 (Ct. App. 2005). Essentially, the Court in *Doe* held that the plaintiff had not presented expert testimony to show that he most probably would have received a greater settlement had his lawyers not committed malpractice. *Id.* In the case at hand, Appellant did presented expert testimony that she most probably would have received alimony, would not have incurred additional taxes if the marital property had been sold in a fashion to utilize a § 1031 exchange, and Appellant intended to present additional evidence showing she would have received a greater settlement or a greater distribution of marital property had Respondents met the standard of care. However, the trial court's ruling improperly raised the standard of certainty for proof of damages at the

summary judgment stage by requiring a plaintiff provide expert testimony regarding the specific amount of her damages, far beyond the scintilla of evidence standard.

In making its determination that expert testimony presented was insufficient or that Appellant was required to present additional testimony to establish the specific amount of Appellant's damages, the trial court relied on three South Carolina cases: *Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); and *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005).

In *Manning*, the South Carolina Supreme Court held that the expert affidavits relied on by the plaintiff were

mere conclusory statements suggesting legal actions which, in hindsight, might have been instituted on the half of appellant's. Nowhere in the affidavits do the attorneys address the likelihood of success of these actions.

*Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988).

In this case, Appellant's expert witnesses satisfied the requirements under *Manning* by specifically addressing Appellant's likelihood of success in her divorce matter and the specific improvements of Appellant's settlement of the divorce if the Respondents had not performed negligently. For instance, Mr. Brown's affidavit specifically addresses the additional taxes incurred because of Appellants' acts and omissions. (Affidavit of Grady Brown at 4; ROA \_\_). Dr. Adams' affidavit testimony concluded that Appellant sustained "considerable damages including loss of any right to separate maintenance and support and loss of substantial value of the marital estate and her share of it due to the dissipation, transfer, and secreting of

much of it by her husband during the pendency of the divorce litigation". (Affidavit of Gregory B. Adams at 3-4, ¶ 1(E); ROA \_\_\_).

Next, the trial court relied heavily on the holding in *Hall* as support for its finding that Appellant failed to present sufficient evidence on her damages from the settlement of her divorce matter. However, this Court in *Hall* did not hold that expert testimony was necessary in a legal malpractice claim to prove damages, instead it simply held that a plaintiff must prove he "most probably" would have been successful in the underlying litigation if the attorney had not committed malpractice. *Hall v. Fedor*, 349 S.C. at 179, 561 S.E.2d at 659. Further, the Court in *Hall* determined that the plaintiff had not presented any admissible evidence to show that he most probably would have received a larger settlement if his attorney met the standard of care. *Id.* at 349 S.C. at 177, 561 S.E.2d at 658 ("considering the absence of any admissible evidence presented by Hall, and in light of the evidence presented by Fedor, Hall failed to show he "most probably" would have received a [greater] settlement amount") (emphasis added). In this matter, Appellant satisfied the standard in *Hall* by presenting admissible evidence establishing that she "most probably" would have received a greater settlement.

Finally, the trial court relied on the holding in *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) to require Appellant to present expert testimony to establish effectively a specific amount of damages from Respondents' malpractice. However, *Doe* did not require expert testimony to establish the specific amount of damages, instead this Court in *Doe* held that the plaintiff's expert "never stated 'that [the plaintiff] 'most probably' would have received more than the \$88,000 he

received in his settlement with [the underlying defendant].” *Id.* at 367 S.C. at 445, 626 S.E.2d at 31-32. As this Court recognized in *Doe* and as the evidence presented by Appellant showed in this case, all a plaintiff needs to establish is that they “lost a probability of success as a result of the attorney’s negligence.” *Id.*

The trial court erroneously granted summary judgment by finding that plaintiff did not present expert testimony “as to the value of the underlying settlement” or “the amount for which [Powell] could have settled, in excess of the underlying settlement, but for the alleged negligence of the [Respondents].” (Order granting summary judgment at 14; ROA \_\_). These requirements to establish specific values and amounts do not exist under South Carolina law and it was in error for the trial court to grant summary judgment in reliance on those standards. The trial court misapprehended the holdings in the *Manning, Hall and Doe* cases, which led to an inaccurate interpretation of the law and its application to the facts of the case at hand and by creating an additional standard to establish damages a legal professional negligence claim well beyond the current law in South Carolina. These Orders should be reversed and the matter remanded for trial.

**B. Breach of Contract claim.**

There was evidence in the record that Appellant contracted with Respondents and that Respondents breached the contract to provide legal services to protect her interests with regard to her claims for divorce, alimony, and equitable division of marital assets. (Affidavit of Gregory B. Adams at 2, ¶ 1(C) & (F); ROA \_\_). Dr. Adams also opined that Respondents’ breach of that contract caused Appellant’s damages as stated earlier. This Court recently held that a breach of contract claim

is available to a client when the client's lawyer breaches the contract for legal services. See *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 653 (Ct. App. 2010). While the *Manios* opinion acknowledged that expert testimony was used by the plaintiff at trial to establish damages proximately resulting from the breach, there was no heightened standard of proof articulated to establish those damages either by the trial court or this Court in affirming the trial court's denial of the lawyers' motion for directed verdict.

Appellant respectfully requests this Court reverse the trial court's order granting summary judgment based on the trial court's erroneous requirement of expert testimony regarding damages resulting from the Respondents' negligence and resulting from Respondents' breach of contract.

**II. EVIDENCE WAS IN THE RECORD REGARDING APPELLANT'S DAMAGES FLOWING FROM RESPONDENTS' BREACH OF THEIR FIDUCIARY DUTIES.**

**A. There was evidence in the record showing legal damages flowing from Respondents' breach of their fiduciary duties owed to Appellant.**

The Order granting summary judgment simply ignored Appellant's breach of fiduciary duty claim and applied the same standard for damages on the professional negligence to summarily dismiss without any discussion the breach of fiduciary duty claim. In a professional negligence claim, a plaintiff has the burden to show that more likely than not, but for the lawyer's negligence, the plaintiff would not have been damaged. As part of a breach of fiduciary duty claim, however, the South Carolina Court of Appeals has held that the plaintiff merely must show that she incurred damages resulting from the lawyer's breach of fiduciary duty. See *Smith v.*

*Hastie*, 367 S.C. 410, 626 S.E.2d 13 (Ct. App. 2005) (reversing the trial court's granting of defendant's motion for summary judgment and holding that "[o]ne standing in a fiduciary relationship with another is subject to liability to the other for harm *resulting from* a breach of duty imposed by the relation.") (Emphasis added). See also, RESTATEMENT (SECOND) OF TORTS § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

There was evidence in the record establishing that Respondents' had and breached their fiduciary duties to Appellant. (Affidavit of Gregory B. Adams at 2 and 4, ¶ 1(C) and ¶ 1(G); ROA \_\_). As discussed in the foregoing argument, ample evidence was in the record establishing Appellant's damages resulting from Respondents' breach of their fiduciary duties.

**B. There was evidence in the record showing the availability of equitable remedies including disgorgement of legal fees, notwithstanding any ultimate conclusion by the finder of fact of the absence of legal damages.**

The "Wherefore" clause in Appellant's Verified Complaint seeks as a remedy for Respondent's breach of their fiduciary duties "attorney's fees" and "for other such further relief as the Court deems just and proper." Because South Carolina applies the American rule that attorney's fees are not available unless provided by the parties' contract or by statute and in light of the breach of fiduciary duty claim, Appellant's prayer for recovery of attorney's fees was a prayer for the remedy of disgorgement. *Cf. Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (equitable remedy of disgorgement of profits available for breach of fiduciary duty

claim), *citing*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215-16, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002); *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 63, 644 S.E.2d 675, 679. (2007) (Toal, C.J. dissenting) (noting disgorgement results from the equitable remedy of restitution); *Wallace v. Milliken & Co.*, 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991) (stating restitution is an equitable remedy).

Appellant's breach of fiduciary duty claims should have been immune from Respondents' motion for summary judgment because one available equitable remedy is for disgorgement of legal fees, without regard to whether consequential damages are available or recovered. The causal standard to be applied is a function of the remedy sought. The remedy is the equitable restitution-based remedy of disgorgement, the purpose of which is to deter disloyalty by fiduciaries and not to compensate for Appellant's losses. Therefore, establishing the Respondents' breach of their fiduciary duties of loyalty standing alone is sufficient to trigger the disgorgement remedy without Appellant having to satisfy a "but for" causation standard to establish the specific amount and value of her compensatory damages related to her professional negligence claim.

What Appellant lost because of the Respondents' breach of their fiduciary duties was at least an opportunity to adequately present her claims in the divorce matter or develop the evidence sufficient to negotiate a more valuable settlement. As revealed in the deposition of her successor counsel, Mr. Foster, and in the verified Complaint, by the time he was engaged Appellant was emotionally devastated to the point she could no longer endure any further litigation, which

resulted in a compromise settlement to mitigate her damages with the best settlement she could obtain under the circumstances. (Foster deposition at 138:12-20, 142:6-16, 147:3-17; ROA \_\_); (Verified Complaint at 9, ROA\_\_).

The expert testimony contained in the affidavits issued by Appellant's experts create material issues of disputed fact on each element of Appellant's cause of action for breach of fiduciary duty because a disgorgement remedy is available notwithstanding her claim for compensatory damages.

Fiduciary duties are duties of the highest standard required by law of any agent relative to the agent's principal, which include the duties of loyalty, disclosure, confidentiality, obedience, reasonable care and diligence, and full accounting. Fiduciary law in South Carolina encompasses the specific set of actors, including lawyers, who furnish services to others in matters where the agent has knowledge superior to that of the principal and on which the principal has entrusted to the agent.<sup>1</sup> The law subjects fiduciary agents to a legal doctrine that embodies, among other things, remedial measures intended to prohibit fiduciaries from misappropriating or misusing entrusted property or power, as the evidence shows the Respondents accomplished in this matter.

The fiduciary obligation arises from the superiority of the lawyer in

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<sup>1</sup> A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another, *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004), and a client-lawyer relationship is by its nature a fiduciary relationship. *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2012 WL 3524812 (S.C. Aug. 15, 2012); *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011); *Holtz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991).

relationship to his client because:

A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. **Assurances of the lawyer's competence, diligence, and loyalty are therefore vital.** Lawyers often deal with matters most confidential and vital to the client. A lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results. **Special safeguards are therefore necessary.**

Correlatively, adequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help. The law encourages clients to consult lawyers and limits the liability to third persons of lawyers who act vigorously for their clients. **Requiring lawyers to protect their clients' interests with competence, diligence, and loyalty furthers those goals.**

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000) (emphasis added) (internal section references omitted).

Courts have allowed clients to seek equitable remedies when lawyer-fiduciaries breach their duties of loyalty because prophylactic remedial measures are needed and designed primarily to deter fiduciaries from taking advantage of the fundamental trust in these relationships. Courts have allowed breach of fiduciary duty claims against a lawyer notwithstanding a lack of actual financial harm where the remedy sought furthered the public's interests in deterring actions by lawyer-fiduciaries that undermine client confidences and trust. See *Fulton Nat. Bank v. Tate*, 363 F.2d 562, 571-72 (5<sup>th</sup> Cir. 1966) (applying Georgia law); *Hendry v. Pelland*, 73 F.3d 397, 401 (D.C. Cir. 1996); *In re Estate of Corriea*, 719 A.2d 1234,

241 (D.C. 1998) (plaintiff's inability to quantify damages suffered did not prevent disgorgement remedy); *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (ruling that clients suing their lawyer for breach of fiduciary duty need prove only that their lawyer breached the duty, not that the breach caused them any injury); *Rocco v. Glenn, Rasmussen, Fogarty & Hooker, P.A.*, 32 So.3d 111, 116-17 (Fla. 2d D.C.A. 2009) (defendant-lawyer may be liable for nominal damages for a breach of fiduciary duty even if the plaintiff-client cannot prove actual damages). See also 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.5:108 (2d ed. Supp. 1997) (explaining that, in a breach of fiduciary duty claim, the breach of loyalty is the harm and the client is not required to prove causation or specific injury). Establishing the existence of a fiduciary duty and breach are generally sufficient to support equitable remedies for a plaintiff-client pursuing an action for breach of fiduciary duty. Providing an equitable remedy in the absence of harm seeks to protect fiduciary relationships by discouraging fiduciary disloyalty. See *Hendry*, 73 F.3d at 402.

To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule. It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty. Removing the disincentive of forfeiture except when harm results would prompt an agent to attempt to calculate whether particular conduct, though disloyal to the principal, might nevertheless be harmless to the principal and profitable to the agent. The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships

of trust by discouraging agents' disloyalty.

*Burrow v. Arce*, 997 S.W.2d at 238.

Appellant urges the Court not to be distracted by language from breach of fiduciary duty cases summarily stating the elements of the claim require proof of proximate cause and actual damages. See e.g., *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2012 WL 3524812 (S.C. Aug. 15, 2012); *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011). Careful scrutiny of these cases reveal the relief sought in those cases was only for compensatory damages and sometimes punitive damages, but not disgorgement. See, e.g., *RFT Management Co., L.L.C.*, 2012 WL 3524812 at \*2 (compensatory damages sought for lost value in investment properties); *Spence*, 395 S.C. at 151, 716 S.E.2d at 922 (compensatory damages sought for lost life insurance proceeds). In this matter, Appellant's prayer for attorney's fees seeks disgorgement of the legal fees paid by Appellant to Respondents. Appellant's breach of fiduciary duty claim seeking an equitable remedy (in addition to her claim for compensatory damages) should not have been dismissed simply because proof of damages is not required for this remedy.

The causal standard applied is a function of the remedy sought by the fiduciary principal, because restitutionary remedies – including fees disgorgement – evades the rigid requirements of “but-for” causation due to the purposes underlying the remedies. The proper causal standard for the breach of fiduciary duty claim in this case should involve consideration of cases where the remedy sought was some form of equitable relief, such as disgorgement or other forms of

restitution, the nature of which are founded on policy goals to deter conduct inconsistent with the fiduciary's duties. Under these circumstances and with the evidence in the record before the trial court compensatory damages were available under a breach of fiduciary duty theory. Notwithstanding the compensatory damages, Appellant should have been allowed to proceed to trial seeking 1) the equitable remedy of disgorgement and 2) punitive damages for Respondents' breach of their fiduciary duties.

Appellant respectfully requests this Court reverse the trial court's order granting summary judgment based on the trial court's failure to recognize evidence in the record meeting the standard of proof for Appellant's breach of fiduciary duty claims against Respondents.

**III. THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT ON THE GROUNDS THAT ANY SUCH RULING WAS PREMATURE BECAUSE DISCOVERY IS INCOMPLETE.**

The trial court erred in granting Respondents' motions for summary judgment because discovery was on-going and incomplete, and genuine issues of material fact exist as to make any ruling on the motion for summary judgment premature and improper.

The premature ruling on the motions for summary judgment prevented Appellant from obtaining necessary information to oppose quite a number of disputed facts material to the claims Appellant asserted. In this case, the lack of discovery and the facts on the record show that genuine issues of material fact still exist. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact in the moving party is entitled to judgment as a matter of law."

*McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct.App. 1998) (reversing lower court's grant of summary judgment in legal malpractice matter). "[S]ince it is such a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Doe v. Batson*, 338 S.C. 291, 297, 525 S.E.2d 909, 912 (Ct. App.1999), *affirmed in part, vacated in part, remanded, Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001). Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Appellant objected to the trial court ruling on Respondents' motions for summary judgment on the grounds that discovery has not been completed. (Hearing Transcript at 19:6-20:1; ROA\_\_\_). The Amended Scheduling Order did not contain a deadline for discovery and discovery in this case was still on-going. (Amended Scheduling Order; ROA\_\_\_). While the scheduling order did set a deadline for the disclosing of *additional* expert witnesses, a deadline for discovery was not established. (Amended Scheduling Order; ROA\_\_\_). At the time that summary judgment was granted, counsel for Appellant were consulting with a forensic accountant to determine the exact amount of her monetary damages and the money she most probably would have received but for the negligence of her divorce lawyers. This evidence could have been presented through either the experts, Dr. Gregory B. Adams or H. Grady Brown, Canzton Foster or through Appellant's former

husband or through Ms. Appellant herself. The trial court failed to recognize that for the purposes of summary judgment, sufficient evidence of damages was in the record, and that Appellant was not obligated to concerning the specific amounts of Appellant's damages was not required to be proven to a "mathematical certainty." See *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996) ("[T]he general rule for recovery of damages which requires that the evidence should be such as to enable the factfinder to determine the amount of the damages with reasonable certainty.") (citing *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981)).

The trial court acted prematurely in granting summary judgment because genuine issues of material facts regarding Appellant's damages existed and because discovery was incomplete.

Respondents were on notice that a consulting expert in the field of forensic accounting was working on a comprehensive damages report for submission and consideration by Appellant's expert, H. Grady Brown, and that Appellant would be timely supplementing her discovery responses. (Hearing Transcript at 19:6-20:1; ROA \_\_). In addition, the record shows that Appellant's current expert witnesses were ready to review the findings of the consulting expert and if the existing experts agreed with these findings, then the existing experts were prepared to adopt, disclose, and present the findings as to the specific financial damages suffered by Appellant due to the Respondents' misconduct. (Hearing Transcript at 19:6-20:1; ROA \_\_). In addition, the Order misapprehended the limitations and requirements of the scheduling order in this matter. As the Order properly noted, the scheduling

order provided that "Plaintiff shall identify any *additional* expert witnesses by February 13, 2012, and shall simultaneously provide the experts' resumes together with the opinions as to which they are expected to testify." (Order granting Motions for Summary Judgment at 1; ROA \_\_) (Emphasis added). The scheduling order only put limitations and requirements on naming additional expert witnesses and their opinions by February 13, 2012. (Amended Scheduling Order; ROA \_\_). The scheduling order in no way affected the existing expert witnesses or limited Appellant's ability to continue preparing this case for trial. No limitations were imposed prohibiting the use of consulting experts to prepare forensic accountant reports for use by previously named experts or limiting the existing experts' ability and duty to supplement their testimony according to Rule 26(e), SCRCP. No limitations were placed on fact witnesses such as Appellant's former husband or Appellant's ability to testify as to financial documents, transactions and damages of which they had personal knowledge.

The Court and all parties were placed on notice that Appellant had hired a forensic accountant who was working diligently to prepare a detailed damages report to supplement the previously named expert witnesses opinions regarding the specific damages suffered by Appellant. (Hearing Transcript at 19:6-20:1; ROA \_\_). Discovery was ongoing per Rule 26(e), SCRCP, and not limited by the scheduling order; therefore, summary judgment was premature.

Appellant respectfully requests this Court reverse the trial court's order granting summary judgment and allow the opposing party to have a full and fair opportunity to complete discovery; summary judgment was premature.

**IV. WHETHER THE TRIAL COURT ERRED IN GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BY MISSTATING OR FAILING TO APPREHEND FACTUAL ALLEGATIONS CRITICAL TO THE MATTER.**

The trial court erred in granting Respondents' motions for summary judgment by misunderstanding several factual allegations critical to the proper resolution of this matter. "In determining whether any triable issue of fact exist, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *McNair*, 330 S.C. at 341. The law in South Carolina is very clear, "[i]f triable issues exist, those issues *must* go to the jury." *Id.* at 342 (emphasis added). If further inquiry into the facts of the matter is helpful to clarify the application of the law than summary judgment is not appropriate. See *id.* "All ambiguities, conclusions, and inferences arising from the evidence *must* be construed most strongly against the movement." *Id.* (emphasis added); see also *True v. Monteith*, 327 S.C. 116, 489 S.E.2d 615 (1997). In the matter at hand, the trial court misunderstood multiple facts which caused a misapplication of the law and resulted in an appropriate granting of summary judgment.

The trial court's Order contains several instances of inaccurate factual allegations. For example, in its Statement of Facts, the Order cited as fact that "[o]n April 1, 2005 Appellant terminated Potterfield and separately retained Respondent Taylor to represent her." This is simply untrue. In 2005, Respondent Potterfield transferred to the role of primary attorney to her partner, Respondent Taylor, which is reflected in the record. (Potterfield Deposition, 222:18-224:18; Taylor Deposition, 28:24-29:21). Respondent Potterfield remained responsible for Appellant's divorce

action and did not file a motion or obtain an Order reflecting her alleged withdrawal as required by Rule 11(b), SCRCP.

In addition, the Order omitted factual allegations that are contained in the record and were integral to the proper resolution of Respondents' Motion for Summary Judgment. For instance, the Order twice listed the financial details of Appellant's final divorce settlement, but failed to frame those details in context by reporting the total assets of Appellant's former husband. Not only do the citations to the financial details of Appellant's divorce settlement inaccurately reflect Appellant's true damages, the Order omitted any reference to the alimony Appellant lost as a direct result of Taylor/Potterfield's failure to advise her in the divorce matter. The Order described the final divorce agreement as placing "significant financial obligations on Mr. Powell" but omitted the fact that the obligations on Mr. Powell were far less than Appellant contends they should have been and may not have been significant at all considering his full financial assets. (Order granting summary judgment at 3, ROA\_\_). The Order also omitted reference to the expert witness opinions, which are in the record. For example, the record reflects the opinions by Appellant's expert, Grady Brown, that Respondent Taylor breached the standard of care by failing to have proper monitoring of a Section 1031 Tax Free Exchange, which financially harmed Appellant by incurring a tax which otherwise would not have it been incurred had Respondent Taylor timely complied. (Affidavit of H. Grady Brown at 4; ROA\_\_). The Order further omitted reference to the record where Appellant hired Respondents in July 2003 giving Respondents' urgent instructions to file an action for divorce based on her former husband's adultery,

proof of which Appellant simultaneously provided to Respondents. *Id.*

Also omitted from the Order is the fact that it took over a year for Respondents to file a complaint on Appellant's behalf and the complaint failed to include the adultery of Appellant's former husband. In addition, the Order omitted the fact that Appellant terminated Respondents because they were unable to resolve her divorce matter almost four years later. Further, the Order mentioned that Respondents hired Reid Smith to "address the business issues in the marital litigation" but omitted that Reid Smith had absolutely no training, background, or experience as a forensic accountant. The Order also mentioned that the expert affidavit of Dr. Adams had not been updated or amended but omitted the fact that the affidavit contains his expert opinions as to Respondents' duty, Respondents' breach of duties, causation, and Appellant's damages.

By misunderstanding or omitting key factual allegations, the trial court was led to inaccurate conclusions of law. "Even when there is no dispute as to evidentiary facts but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *McNair*, 330 S.C. at 341-42. The trial court's misunderstanding of the facts of this matter created a misapplication of the law in granting summary judgment. Because genuine issues of material fact were in the record, summary judgment was improper.

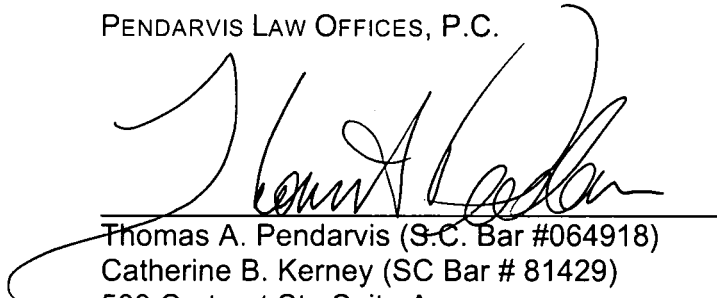
Appellant respectfully requests this Court reverse the trial court's order granting summary judgment based on the factual misstatements and omissions contained in the orders.

#### **CONCLUSION**

Based upon the errors in the ORDER GRANTING DEFENDANTS' POTTERFIELD, TAYLOR AND TAYLOR/POTTERFIELD'S MOTION FOR SUMMARY JUDGMENT dated April 23, 2012, and in the ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT dated July 19, 2012, both of those Orders should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read "Thomas A. Pendarvis", is written over a horizontal line. The signature is fluid and cursive.

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Lawyers for Appellant Carolyn Mitchell Powell

Beaufort, South Carolina

November 28, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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Case No. 2009-CP-40-8705

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Carolyn Mitchell Powell. . . . . Appellant,

vs.

Ashlin Blanchard Potterfield; J. Michael Taylor;  
and TAYLOR/POTTERFIELD . . . . . Respondents.

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**PROOF OF SERVICE**

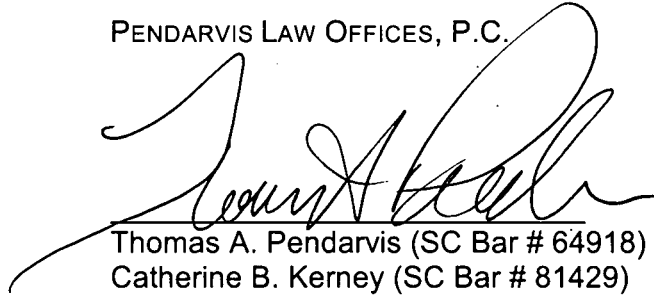
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I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of INITIAL BRIEF OF APPELLANT and APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL on counsel for Respondents: Ashlin Blanchard Potterfield; J. Michael Taylor; and TAYLOR/POTTERFIELD by depositing a copy of the same in the United States Mail, postage prepaid, on the 28<sup>th</sup> day of November, 2012 addressed to Charles E. Hill, J.D., TURNER, PADGET GRAHAM & LANEY, PA, PO Box 1473 Columbia, SC 29202.

RECEIVED  
DEC 03 2012  
SC Court of Appeals

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

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

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November 28, 2012

Beaufort, South Carolina