THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2009-CP-40-8705

Carolyn Mitchell Powell.....Appellant,

v.

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

FINAL RESPONDENTS' BRIEF

Charles E. Hill
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200
chill@turnerpadget.com
tbarrett@turnerpadget.com

Attorneys for the Respondents

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I. Did the circuit court properly grant summary judgment, where Powell failed to present evidence that, but for the alleged malpractice, she "most probably" would have obtained a result better than the settlement she actually received?

II. Did the circuit court properly grant summary judgment as to the entire case, where Powell's breach of fiduciary duty and disgorgement claims were based on the same alleged conduct and damages as the legal malpractice claim, and where those claims were not raised or ruled upon in the circuit court?

III. Did the circuit court properly hear and decide the summary judgment motion, where Powell failed to offer any reason why discovery had not been completed in the two years the case was pending, and where she further failed to demonstrate that additional discovery would uncover relevant evidence?

IV. Did the circuit court's Order properly convey the factual and legal bases for its decision to grant summary judgment?

STATEMENT OF THE CASE

This appeal arises from a legal malpractice action brought by the Appellant Carolyn Mitchell Powell against the attorneys who initially represented her in a divorce. The Appellant filed a Summons and Complaint in the Court of Common Pleas for Richland County on December 11, 2009. [R. pp. 66-84.] Along with the Complaint, the Appellant filed an affidavit from Gregory B. Adams pursuant to S.C. Code § 15-36-100.

The Complaint named as defendants Ashlin Blanchard Potterfield, J. Michael Taylor, and Taylor/Potterfield, as well as Golden, Taylor, Potterfield &

Barron; Reid Smith; and Price, Bird & Smith, P.A. [R. pp. 66-84.] Before any of the defendants answered, the Appellant filed a stipulation of dismissal as to the firm of Golden, Taylor, Potterfield & Barron. [R. p. 64.] The remaining defendants all filed timely Answers in February 2010. [R. pp. 111-131.][1] Discovery efforts began shortly thereafter.

In early April 2010, the Appellant identified Gregory B. Adams as an expert witness. [R. p. 1658.][2] Some ten months later, the Appellant served supplemental discovery responses in which she also listed H. Grady Brown as an expert. [R. p. 1717.] On September 12, 2011, the Appellant provided the Respondents with a copy of a report by Brown. In that report, Brown stated:

> [M]y review of the depositions and the exhibits was limited to a determination of whether or not the Taylor/Potterfield Law Firm failed to take action or took inappropriate action with respect to their representation of Ms. Powell. My review was not in any way intended to determine the nature or extent of any damages Ms. Powell may have incurred as a result of the representation by the Taylor/Potterfield Law Firm.

[R. p. 1833 (emphasis added).]

Brown's deposition took place on November 16, 2011. Brown testified he was offering no opinions concerning the Appellant's claimed damages. [R. p. 512.] Brown never expressed any opinion that the Appellant most probably would have obtained a better result in the divorce action had the alleged

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[1] The Appellant later stipulated to the dismissal of the defendants Reid Smith and Price, Bird & Smith, P.A. [R. p. 64.]

[2] The Appellant later withdrew Adams as an expert in November 2011, before re-identifying him on January 9, 2012.

breaches not occurred. The Appellant later submitted an affidavit by Brown, but it was also silent on those points. [R. pp. 1614-1626.]

On October 5, 2010, the circuit court filed a Consent Scheduling Order. [R. pp. 2-3.] The court later entered an Amended Scheduling Order on November 23, 2011. The Amended Scheduling Order established a dispositive motions deadline of March 30, 2012. [R. pp. 26-27.] It also required 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." [R. p. 26 (emphasis added).] The parties had agreed to the provisions of the Amended Scheduling Order prior to submitting it for consideration. [R. p. 33.]

After all but one of the relevant depositions had been taken, the Respondents filed a summary judgment motion on December 27, 2011. The parties then completed the final deposition (of Cantzon Foster, Powell's final divorce attorney) on January 26, 2012. [R. p. 31.] By the time that deposition was concluded, the parties had been conducting discovery for almost two years.

The Appellant did not identify any additional experts or other opinions by February 13, 2012. Shortly after that deadline passed, the Respondents filed an amended summary judgment motion. [R. p. 1546.] On March 5, 2012, the Respondents filed an affidavit from Ken Lester in support of their motion. The Appellant responded by filing an affidavit from Brown, her primary expert.

The Respondents' summary judgment motion came before the Honorable R. Knox McMahon on March 16, 2012. After conducting a full hearing, Judge

McMahon took the motion under advisement. Roughly one month later, he issued an order granting summary judgment. [R. pp. 28-43.] The stated basis was a finding that the Appellant had failed to present sufficient evidence of damages stemming from the Respondents' alleged malpractice. [R. p. 43.]

On May 11, 2012, the Appellant served a Rule 59(e) motion, which the court filed on May 15, 2012. [R. p. 1559.] The motion essentially asked the judge to reconsider and reverse his previous decision. [R. p. 1559.] The judge denied that motion in an order filed on July 19, 2012. The Appellant then commenced this appeal.

STATEMENT OF THE FACTS

After obtaining a complex, substantial settlement from her husband in a divorce action, and testifying in family court that the settlement was reasonable, the Appellant Carolyn Powell ("Powell") sued her former attorneys, claiming that but for their alleged malpractice she would have gotten a better settlement. After she was unable to adduce any evidence to this effect, however, the circuit court granted summary judgment to the Respondents.

Powell married Conrad Powell ("Conrad") in 1988, and the couple had two daughters. [R. p. 1495.] In 2004, Conrad owned the Chic Antiques business in Columbia, and Powell operated a business called Gallery 2. [R. pp. 203-206.] Neither business was particularly successful, and the couple supplemented their income by withdrawing assets from Conrad's 1999 sale of stock and from his other business and real estate ventures.

Suspecting Conrad of adultery, Powell approached attorney Ashlin Potterfield about representation in June 2003. [R. p. 207.] At this meeting Potterfield gave Powell documents containing advice for potential clients. One of these documents, captioned "To Prospective Clients: Please Read This First," included these statements: "MS. POTTERFIELD STRONGLY RECOMMENDS NO DATING ON THE PART OF HER CLIENTS DURING THE PENDENCY OF ANY DIVORCE ACTION... An Adulterous spouse cannot be granted alimony in South Carolina." [R. p. 1811 (emphasis in original).][3] Powell formally retained Potterfield in September 2003. The Powells separated in December of that year.

On August 27, 2004, Potterfield filed a complaint in Richland County Family Court, stating causes of action for separate maintenance, custody/child support, alimony, discovery, and attorney's fees. Conrad answered and counterclaimed for equitable division of the marital estate.

There followed a period of often rancorous negotiations between counsel for the parties with regard to housing and support for Powell and the children. These were complicated by evidence that Powell altered the amounts on checks made out to her by Conrad, and endorsed Conrad's name to checks made out to him. [R. pp. 250-254.] Throughout this dispute, there was considerable communication among the parties and their counsel regarding settlement possibilities. Powell rejected offers made by Conrad's attorney, however,

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[3] Potterfield testified she gave this document to Powell on June 23, 2003. [R. p. 814.] The document bears a signature which appears to be Powell's. Powell testified she was "not sure" this was her signature, but "I can't deny it." [R. p. 334.] She recognized her signature on another document, "Fee Agreement and Acknowledgements," she admittedly received on the same date. [R. p. 333.]

characterizing them as "totally not acceptable," "laughable" and "garbage." [R. pp. 310-330.]

In January 2005, Potterfield obtained a $400,000 advance on equitable distribution from Conrad, intended for Powell's use in obtaining housing. Instead, Powell used much of the proceeds for horses and a barn in Aiken, where she and the children were living, and for "inventory" for a proposed "art and design business." [R. pp. 1628-1631.]

On April 1, 2005, Powell wrote a note to Potterfield, expressing dissatisfaction with Conrad's latest settlement proposal, and suggesting the need to "change strategies and move forward toward litigation." [R. pp. 1807-1808.] She thus retained Potterfield's partner, Michael Taylor, and sent a separate retainer. Taylor undertook negotiations with Conrad's counsel.

Conrad continued to support Powell and the children financially throughout the period of negotiations. [R. pp. 1637-1639.] According to documents from the Family Court action, Conrad wrote checks to Powell or to third parties for the children in the amounts of $26,565 in 2005, and $121,143.71 in 2006. [R. p. 1638.]

In September 2005, Powell began an affair with another man. [R. pp. 77, 1204-1205.] Potterfield had given Powell a warning about engaging in such relationships during the divorce proceedings at their first meeting. [R. p. 1811.] However, Powell either did not remember that advice, or chose not to follow it.

Due to Powell's suspicions about Conrad's assets, Taylor associated Reid Smith to help him address the business issues related to the divorce. [R. pp. 277,

1335.] Smith, a bankruptcy attorney, had experience analyzing business records, uncovering hidden assets, investigating corporate procedures, and determining whether assets had been diluted or transferred. [R. pp. 1304-1306.]

Shortly after he was retained, Smith went with Taylor to Conrad's attorney's office, where they spent several hours examining Conrad's records, including his tax returns going back to 1999 and the couple's joint returns through 2003 or 2004. [R. pp. 1345, 1352.] Continuing his investigation, Smith checked the RMC records and tax assessor's offices in Richland, Lexington, Horry, and Georgetown Counties, as well as records in North Carolina. He looked at closing statements, mortgages, deeds, financial statements, and check records. Because Powell had expressed a concern that her husband was diluting assets by giving them away to his brother or accountant,[4] Smith checked the formation of Conrad's corporations to determine the identities of the shareholders and their interests. [R. pp. 1359-1362.]

On May 19, 2006, Smith sent a report to the Respondent Taylor detailing his investigation into Conrad's assets, including a timeline of the acquisition and disposition of various properties and interests, an income analysis, and an asset summary. [R. pp. 1815-1824.] At Taylor's request, Smith later took Conrad's deposition, which Powell attended. [R. pp. 369, 1366.]

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[4] Powell was never able to provide any proof for her suspicions. In her deposition, she testified, "I think there's property that (her husband) invested in and tied up that I don't know about." But she could not say what that property was. "Q. Any proof, though? Any facts, papers, witnesses? A. Not at this time." [R. pp. 372-374.]

By late 2006, Smith was confident he "had a handle on the business issues and the financial issues related to the businesses. I felt comfortable with the information that I had. I knew that there was a need to get information so that we could make sure we were pursuing settlement discussions appropriately." [R. p. 1364.] Because of Smith's familiarity with the business issues, he personally deposed Conrad on December 13, 2006. He believed Conrad was forthcoming about his business interests. As Smith later testified, "My research indicated that there had never been any attempts to dilute the assets. Carolyn had suspected it, but I didn't see any grounds to confirm those suspicions. ... I didn't see any evidence of wasting corporate assets here." [R. p. 1387.] Smith added, "I didn't see anything that indicated that there was an effort to hide assets," and his opinion in that regard never changed. [R. p. 1377.]

In January 2007, Smith prepared an updated analysis of Conrad's financial situation for the Respondent Taylor. He explained that report to Powell during a lengthy meeting. [R. pp. 1421, 1825-1829.] Smith calculated the marital estate's value at $3,119,000. [R. pp. 1825-1829.] This analysis eventually formed the basis of a settlement offer extended to Conrad's attorney on February 14, 2007. [R. pp. 1830-1832.]

On January 17, 2007, Powell terminated Taylor as her attorney. [R. pp. 284-285.] Soon afterwards, she retained Cantzon Foster to serve in his place. The court entered an order substituting counsel on January 29, 2007.

After Taylor's dismissal, Smith continued to work with Foster to represent Powell's interests. Powell still expressed doubts about Conrad's handling of his

assets, but she was never able to furnish Foster or Smith with any evidence to support those fears. As Foster later explained, "I don't recall there being any hard evidence, documentary – any documents supporting that assets were transferred. ... No hard evidence that there were additional assets to the estate." [R. p. 617.] Foster discussed with Powell the possibility of obtaining a forensic accountant to do further investigations. [R. pp. 715-716.] Foster believed a forensic accountant was advisable not because of any problem with Smith's abilities, but because Smith was counsel of record and could not testify. [R. pp. 647-651.] However, Powell declined to hire an accountant. [R. pp. 715-716.]

The Family Court conducted a *pendente lite* hearing on March 14, 2007. The subsequent order noted Powell had requested an additional lump sum payment of $250,000, which Conrad agreed to pay as a further advance on equitable distribution. Powell had requested child support of $3,000 per month, but the court ruled $1,249 "would be applicable." [R. p. 55.]

Powell and Conrad got together in April 2007 and worked out the parameters of a settlement on their own. [R. pp. 405-407, 672.] Foster then reduced their agreement to writing. [R. pp. 298, 381, 695.]

On April 27, 2007, the Powells executed a comprehensive "Complete Property, Support, and Custody Agreement" ("the Agreement") [R. p. 1783.] In it, the parties acknowledged:

> that each is familiar with the financial ability, income, expenses, assets and liabilities of the other and each recognizes and acknowledges that they are not entering into this Agreement as a result of threats duress or undue influence but as a natural consequence of the breakdown of their marriage and

> they fully recognize that each party has freely, actively, and fully taken part in the negotiations hereof over a reasonable period of time and each fully accepts the terms and conditions hereof and each party acknowledges and considers the same to be fair, just and equitable under the circumstances. [R. p. 1785.]

Among other things, the Agreement required to Conrad to do the following: (1) pay periodic "child support/property distribution," (2) pay for health insurance for the children, (3) pay for health insurance for Powell for a limited time; (4) pay for the children's educational costs, including private school and college; (5) pay for the children's sports activities, "including horses and equestrian activities, for no more than four horses and four pets," (6) pay off the mortgage on property in Aiken; and (7) transfer clear title to a residence in Columbia to Powell. [R. pp. 1783-1803.] The Agreement also contained a mutual waiver of alimony and provisions regarding automobiles, personal property, furniture and fixtures. [Id.] The Agreement concluded:

> Each party acknowledges that he and she are fully informed as to his or her legal rights and obligations; that each of them has entered into and executed this Agreement after conferring with each of their respective independent attorneys, and having such knowledge and opportunity, each of them executes this Agreement freely and voluntarily, intended to be bound forever by it...

[R. pp. 1800-1801.] Although Foster initially advised Powell against entering into the agreement, he later characterized it as "a good settlement" for Powell. [R. p. 720.]

On May 2, 2007, the parties and their attorneys appeared before Judge Anne Gue Jones, who found the parties were mutually entitled to divorce on the

statutory ground of living continuously separate and apart for a year. Her "Final Decree of Divorce and Order Approving Agreement" incorporated the Agreement by reference. Judge Jones found the Agreement to be "substantially fair," providing a fair and equitable division of the parties' marital property. She further concluded "that the Agreement has been freely, voluntarily and knowingly entered into by the parties..." [R. pp. 61-62.]

In the hearing before Judge Jones, Powell testified she was not under the influence of "alcohol, drugs, medication or stress" that would affect her ability to understand the terms of the Agreement or the court proceedings, she had sufficient knowledge of Conrad's current financial condition to allow her to knowingly enter into the Agreement, she believed the agreement to be fair to both sides, and she wanted the court to approve it. [R. pp. 283-284.]

STANDARD OF REVIEW

When an appellate court reviews a decision to grant summary judgment, it applies the same standards that governed the trial court under Rule 56, SCRCP. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003). Under Rule 56, summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the conclusions and inferences to be drawn from the facts are undisputed. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990).

When a court rules on a motion for summary judgment, it must view the evidence, and the inferences reasonably to be drawn from that evidence, in the light most favorable to the nonmoving party. *Id.* However, a party bearing the

burden of proof on a particular claim must factually support each element of that claim, and a "complete failure of proof concerning an essential element [of that claim] necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

On those issues where the nonmoving party will have the burden of proof, it is that party's obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Baughman v. AT&T*, 306 S.C. 101, 410 S.E.2d 537 (1991). In such a situation, the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id.*

ARGUMENT

I. Powell failed to present evidence that, but for the alleged malpractice, she "most probably" would have obtained a better result than the settlement she actually received.

The circuit court examined the full record and determined Powell had failed to establish she most probably would have received a more favorable outcome if the claimed malpractice had not occurred. In doing this, the court did not impose any new or heightened standard. The court simply applied well-established law to the facts of this specific case. Thus, the circuit court's decision is not as broad as Powell contends, and it certainly is not a departure

from the law that has been in place for a number of years. Viewed in this proper context, the circuit court's decision is correct and should be affirmed.

A plaintiff asserting a legal malpractice must prove the following elements: (1) an attorney-client relationship, (2) the attorney's breach of the standard of care, and (3) damages to the plaintiff proximately caused by that breach. *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). In order to prove damages in this context, a plaintiff "must show that he or she 'most probably' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Id.*, 561 S.E.2d at 657. When the underlying result involved a settlement, the plaintiff can satisfy this requirement by showing he or she "most probably" would have received a larger settlement or "most probably" would have prevailed at a trial. *Id.* at 175, 561 S.E.2d at 657. Determining the success of the underlying claim (*i.e.* whether the plaintiff most probably would have prevailed) is a question of law for the trial court to determine. *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005). "[A] decision of that question on summary judgment motion is appropriate." *Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988).

Here, there was no dispute about the existence of an attorney-client relationship, and the circuit court concluded a factual question existed as to a breach of the standard of care.[5] Consequently, the only basis for the circuit court's decision was a finding that Powell failed to present sufficient evidence of

[5] The Respondents disagree with the circuit court's conclusion in that regard, but a discussion of the "breach" issue is unnecessary for purposes of this appeal.

damages proximately caused by any breach. This represents the narrow scope of the issue on appeal.

Contrary to Powell's charges, this appeal does not require the Court to evaluate a potential change to the governing standards for legal malpractice cases. The circuit court did not invoke or apply any new standards. The court never stated all legal malpractice claims require expert evidence of damages. Rather, the court concluded expert evidence was necessary in this case due to the complicated nature of Powell's claimed damages. Thus, this Court does not have to consider what types of evidence might or might not be required in other scenarios. The Court's only task is to determine whether Powell could satisfy the "most probable" standard based on the current record.

This analysis must begin with the result Powell actually reached in her divorce action. At the conclusion of that litigation, Powell received a sizable settlement from her ex-husband. Pursuant to a settlement agreement, Powell's ex-husband was required to do the following things: (1) pay periodic child support and property distribution, (2) pay for health insurance for the children, (3) pay for health insurance for Powell for a limited time; (4) pay for the children's educational costs, including college; (5) pay for the children's sports activities, "including horses and equestrian activities, for no more than four horses and four pets," (6) pay off the mortgage on property in Aiken; and (7) transfer clear title to a residence in Columbia to Powell. [R. pp. 1783-1803.] The attorney who represented Powell at the time of the settlement considered it to be "a good settlement" with "provisions regarding property division [that] were fair." [R. pp.

719-720.] Powell negotiated many of the settlement's terms herself and later asked the Family Court to approve it. [R. p. 680, 770-771.]

It is important to understand the nature of Powell's divorce agreement because it establishes the baseline for her claimed damages in this case. Powell had to prove she most probably would have obtained a better result, which means she first had to establish the value of the actual settlement. Otherwise, there would be no basis for comparing the real and hypothetical results. This made a full and complete explanation of the settlement's value to Powell a necessary precursor to her damages claim. As demonstrated below, however, Powell failed to present sufficient evidence on that point.

The record before the circuit court contained a copy of the settlement agreement and testimony by Powell's then-attorney that it was fair and reasonable. But the record did not contain any explanation about the specific terms of the Agreement or how to place values on them. For example, the Agreement required Powell's ex-husband to pay for the children's medical insurance and their college educations, but it did not set forth any monetary values or limitations for those items. The same is true for the ex-husband's obligation to pay for the children's sports activities and the real estate assets involved in the agreement. No witnesses testified to supply that missing information. Consequently, there is no way to determine the value of the settlement Powell obtained for herself and her children.

Furthermore, this is not a situation where Powell could have handed a copy of the agreement to a jury and allowed it to determine a value on its own.

The agreement is 21 pages long, not including an exhibit and an appendix. It consists of legal concepts and terminology and would be largely, if not completely, indecipherable to a layperson. The testimony of someone with knowledge and experience in domestic relations law would have been necessary to explain the agreement's provisions to the jurors. That is the only way they could gain a sufficient understanding of the agreement and its value to Powell. Without that understanding, the jurors would have no basis for comparing the agreement to any hypothetical alternative result. Yet, Powell failed to present any explanatory evidence to the circuit court, and her disclosed experts did not discuss this issue in their deposition testimony or affidavits.

This failure doomed Powell's claim because it prevented her from proving she most probably would have obtained a better result but for the alleged malpractice. How could a jury possibly reach that conclusion when it could not even fully grasp what benefits Powell actually received, or the values of those benefits? This is why Powell needed to present expert testimony on this element of her claim – not because of some rule requiring it in all cases, but because the circumstances of her specific case mandated it. A jury simply could not comprehend the complexities of the Agreement and its value without the assistance of a legal expert. Therefore, regardless of what evidence Powell did or did not present with regard to the hypothetical "no malpractice" result, her claim failed as a matter of law because she did not prove the worth of her actual result.

Even if the record could establish the value of the actual settlement, Powell's claim still fails because she did not present sufficient evidence of a "most probable" better result. At the summary judgment stage, Powell made arguments and vague suggestions about what she might have received if the Respondents had done things differently. But she offered nothing to show those results were likely, let alone "most probable." In essence, Powell's arguments on this issue amounted to little more than a recitation of the allegations from her Complaint. While reliance on those allegations might arguably have been justified in opposing an initial motion to dismiss, it was legally insufficient to withstand the Respondents' summary judgment motion. Powell bore the burden of presenting evidence to support her claimed damages, and she failed to meet that burden.

On appeal, Powell argues the alleged malpractice cost her a more favorable result in three ways. The Respondents will address each argument separately below. Suffice to say, however, that Powell continues to rely on allegations rather than record evidence to support those claimed damages. For that reason, her appellate arguments do not demonstrate any error.

(A) There is no evidence of hidden assets in the marital estate.

Powell claims the Respondents' malpractice prevented her from getting a full accounting of the marital estate, which, in turn, resulted in a lower amount coming to her in the property division. This assertion rests solely on conjecture stemming from Powell's personal distrust of her ex-husband, and it has no record support. An extensive investigation during the divorce litigation uncovered no

attempts by the ex-husband to conceal or shift assets from the marital estate, and Powell found nothing during discovery in this case. Simply put, there is no evidence of any hidden assets despite countless efforts to find them. As a matter of law, therefore, Powell cannot possibly show a greater property division amount was a most probable alternative result.

When Powell voiced her suspicions about her ex-husband, the Respondent Taylor associated attorney Reid Smith to address those concerns. [R. pp. 277, 1335.] Smith, who was experienced in determining if assets had been diluted or transferred, conducted an extensive investigation. [R. pp. 1304-1306.] Smith examined several years' worth of the ex-husband's financial documents. [R. pp. 1345, 1352.] He checked the RMC records and tax assessor's offices in Richland, Lexington, Horry, and Georgetown Counties, as well as records in North Carolina. [R. p 1359.] Among other things, he looked at closing statements, mortgages, deeds, financial statements, and check records. Smith also investigated the ex-husband's businesses. [R. pp. 1359-1362.]

After his thorough investigation, Smith believed he "had a handle on the business issues and the financial issues related to the businesses" and was "comfortable with the information that [he] had." [R. p. 1364.] As Smith testified, "My research indicated that there had never been any attempts to dilute the assets. Carolyn had suspected it, but I didn't see any grounds to confirm those suspicions. ... I didn't see any evidence of wasting corporate assets here." [R. p. 1387.] Powell's final attorney in the divorce action (Cantzon Foster) ultimately used Smith's investigative findings as the basis for a settlement proposal. [R. pp.

610-613, 1830-1832.] Like Smith, Foster never saw any evidence the ex-husband hid or misappropriated assets of the marital estate. [R. p. 309.]

Despite many years of investigation and discovery, no one ever found evidence of financial misconduct by the ex-husband. A substantial amount of time and effort went into the inquiry, but it did not produce the kinds of results for which Powell had hoped. Thus, the entire process ended back where it began: with Powell having suspicions, but nothing to support them.

This undisputed fact undercuts Powell's entire argument. Powell contends the Respondents should have acted quicker and more diligently in their investigations into the marital estate, and that their failure to do so prevented her from obtaining a better result. Even if one were to accept the first part of that theory,[6] the second part fails due to a lack of evidence. Powell has never proved her ex-husband concealed assets. This raises the following question: what exactly were quicker or more diligent investigations supposed to have found?

Powell has never provided an adequate response to that question. She argues only that such efforts might have uncovered some wrongdoing or located additional assets. She also claims some other expert – one not identified by the deadline established by the circuit court – was looking into that issue and might have provided findings to one of her disclosed experts for them to use. That tactic was an attempt to maneuver around the Amended Scheduling Order, and the Court should not condone it. Nevertheless, this argument does not aid

[6] The Respondents contend their investigative efforts were timely, diligent, and well within the applicable standard of care. Yet the Court need not reach that issue in light of Powell's evidentiary failures.

Powell's cause because she has never provided any specific information about what the new expert would say (either directly or through another expert). Thus, Powell is still left with the same problem: all she has to offer are vague guesses about what further investigations might have discovered.

Powell appears to suggest the Respondents could have found things during the divorce action that she cannot uncover now. But that assertion still rests on conjecture. No evidence shows there was anything to find in the first place. This is not a situation where history has revealed financial misconduct that went undiscovered at the time. No one has ever found any misconduct, and again, Powell is left only with personal suspicions about what her ex-husband might have done and guesses about what more investigation might have found.

Powell's expert affidavits fail to fill in those gaps. The pre-discovery affidavit of Gregory Adams, which was never updated, gave nothing but a conclusory statement suggesting more investigation could have protected Powell. It does not explain how, though. The affidavit of Grady Brown makes only the preposterous statement that "a clear picture of all the marital assets was never obtained." [R. p. 1617.] This assertion ignores all of Reid Smith's efforts on behalf of the Respondent Taylor, as well as Powell's satisfaction with her level of knowledge about the marital estate when the Family Court approved the settlement. In addition to that deficiency, Brown's affidavit fails to create any issue of fact because it does not say anything about what further investigation would have found. As a result, Brown's affidavit is simply a restatement of Powell's unsupported suspicions.

At the summary judgment stage, that kind of speculation is insufficient. Powell's burden is to produce real evidence showing the alleged malpractice deprived her of a "most probable" better result. If she cannot point to anything the Respondents failed to discover about the marital estate, how can she possibly meet that burden? Powell has failed to demonstrate the marital estate was worth more than the Respondents believed, and she has likewise failed to establish what larger or better settlement she would have received if that extra worth had been found. Consequently, Powell's argument does not provide any basis for reversal.

(B) Powell has not proved she most probably would have received alimony.

Powell next argues the Respondents prevented her from receiving alimony by failing to warn her about the consequences of a romantic affair during the divorce proceeding, and by not having the Family Court approve an early property distribution advance. These assertions do not withstand serious scrutiny because Powell bases them on assumptions rather than evidence. Powell has failed to establish she most probably would have received alimony if the Respondents had acted differently. This failure gave the circuit court more than a sufficient basis for granting summary judgment.

As a threshold matter, the record does not support Powell's assertion that the Respondents failed to warn her about the legal ramifications of adultery during the divorce litigation. In fact, the record contradicts it. At their first meeting about representation, the Respondent Potterfield gave Powell a

document captioned "To Prospective Clients: Please Read This First." [R. p. 1809.] That document included the following passage:

> MS. POTTERFIELD STRONGLY RECOMMENDS NO DATING ON THE PART OF HER CLIENTS DURING THE PENDENCY OF ANY DIVORCE ACTION. ... An adulterous spouse cannot be granted alimony in South Carolina.

[R. p. 1811 (emphasis in original).] Powell received this document as part of her initial consultation with Potterfield about a possible divorce action on June 23, 2003. [R. p. 814.]

Although Powell did not specifically admit receiving the document, it bears a signature that appears to be hers. During her deposition, Powell said she was "not sure" it was her signature on the document, but she conceded: "I can't deny it." [R. p. 334.] Significantly, the signature on that document resembles one that appears on another document Powell admittedly received at that meeting. [R. p. 333.] Powell acknowledged the signature on the other document as her own. [R. p. 333.]

As this evidence demonstrates, the Respondent Potterfield cautioned Powell against beginning an affair during the divorce litigation. The document Potterfield gave Powell specifically warned about adultery's effects on alimony under South Carolina law. Powell was unable to deny she received and signed this document. Therefore, the record creates only one reasonable inference: the Respondent Potterfield did advise Powell against dating during the divorce litigation. This prevents any finding that the Respondents breached the standard of care in this regard, let alone that any breach led to damages.

Powell next suggests the Respondents caused her damages by not obtaining the formal signing and approval of a partial property distribution agreement in January 2005. According to Powell, Family Court approval of such an agreement in January 2005 would have protected her right to receive alimony because her adulterous relationship did not begin until September 2005. There are two related flaws in Powell's theory.

First, Powell has not provided any legal support for the notion that approval of a partial agreement in January 2005 would have protected her from the consequences of future adultery. Powell makes this assertion without citing any authority or giving any further explanation. When the applicable law is considered, Powell's argument fails.

The governing statute for alimony awards states, in relevant part:

> In proceedings for divorce from the bonds of matrimony, and in actions for separate maintenance and support, the court may grant alimony or separate maintenance and support in such amounts and for such term as the court considers appropriate as from the circumstances of the parties and the nature of case may be just, pendente lite, and permanently. No alimony may be awarded a spouse who commits adultery 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.

S.C. Code § 20-3-130(A) (emphasis added). Powell apparently contends the formal signing and approval of a partial property distribution agreement would have legitimized her later affair for purposes of alimony. In making that claim, Powell is reading a key missing word into the statute. Powell presumably

believes the statute means to say "(1) the formal signing of a partial written property or marital settlement agreement." But the word "partial" does not appear in the statute. Powell cannot now rewrite the section to include that word simply because it might aid her in this case, especially when she cites no authority for that interpretation.

At this point, it is necessary to understand the nature of the agreement Powell reached with her ex-husband in January 2005. The ex-husband agreed to pay Powell $400,000 as an advance on an eventual equitable property division. [R. pp. 234, 942.] This payment resolved nothing about the nature or specifics of that property division, and it did not provide closure for anything in the divorce action. Thus, it would be a stretch to call this payment a "property or marital settlement agreement." It was simply an advance for which the ex-husband would receive credit when the parties reached that kind of final agreement.

Yet, even if the ex-husband's payment could be construed as some sort of "settlement agreement," it was only partial. The initial payment from the ex-husband resolved nothing other than Powell's entitlement to receive at least that amount. The parties continued to debate and litigate issues concerning the value of the marital estate and how it should be divided. They did not reach a final, complete agreement until the spring of 2007. Regardless of whether any signed agreement had existed for the advance payment, it could not have been anything more than a partial resolution of a much larger, ongoing dispute.

As noted above, § 20-3-130(A) establishes a bar on alimony for a spouse who commits adultery before a divorce proceeding has been fully resolved. However, the statute also recognizes and accounts for the time lag that often occurs between reaching a final settlement agreement and having that agreement approved by the Family Court. Thus, the statute removes the adultery penalty upon the entry of a permanent order or (where applicable) when the parties sign a final settlement agreement. In other words, after parties have signed a final settlement agreement, the statute does not force them to wait to engage in other relationships simply because the Family Court has not yet approved it. The statute treats the signing of the settlement agreement as the *de facto* final resolution that ends the adultery penalty.

What § 20-3-130(A) does not do is end that penalty for anything other than a full and final agreement or order. The statute says nothing about partial or temporary agreements, and interpreting it to apply to such things would defeat the statute's purpose.[7] In creating this section, the General Assembly intended to deter divorce litigants from having other relationships while their action is pending. Reading item (1) to include partial or temporary agreements would create an exception that would swallow that rule. Litigants could formally sign a token partial agreement early in the divorce action and then do whatever they pleased for the rest of the litigation. The legislature could not have intended to

[7] As the Respondent Taylor explained in his deposition, for a written agreement to be approved and end the adultery penalty, "it would have to be a comprehensive full settlement agreement." [R. pp. 1103-1105.]

create such a toothless provision. Therefore, Powell's interpretation of the statute is erroneous.[8]

The second problem with Powell's argument is that she has failed to present evidence she most probably would have received alimony if the Respondents had acted differently. Powell certainly believes she was entitled to alimony and has stated as much, but that personal opinion does not constitute evidence. The allegations of her pleadings, upon which she relies in her primary brief, also do not qualify as evidence.

To meet her burden of proof on this issue, Powell needed to present expert testimony from someone experienced in domestic relations law. No layperson could explain why someone would be likely to receive alimony, and a jury would need expert guidance on that issue. The expert would need to do the following: (1) explain what alimony is, (2) go through the factors a Family Court judge considers to determine whether alimony is appropriate, and (3) express an opinion the person most probably would have received alimony under a given set of circumstances. None of that occurred in this case.

Powell identified two experts: Gregory Adams and Grady Brown. Neither gave an explanation about how Family Court judges evaluate claims for alimony. Neither discussed the specific circumstances and factors that would have been involved in an alimony claim by Powell. And most significantly, neither stated to a reasonable degree of legal certainty that Powell most probably would have

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[8] Again, Powell does not cite or discuss this statute in her primary brief. However, this is the only interpretation that would support the argument she attempts to make regarding the availability of alimony.

received alimony if the Respondents had represented her differently. Powell now argues different actions by the Respondents could have preserved her ability to seek alimony,[9] but that assertion is not evidence, and even if it were, it would not satisfy the "most probably" standard for damages.

Furthermore, alimony awards are not mandatory or automatic. The statute says a judge "may grant alimony" unless adultery occurs before certain events. S.C. Code § 20-3-130(A) (emphasis added). This indicates decisions on alimony awards are discretionary, which means the ability to request alimony does not guarantee an award. *See Degenhart v. Burris*, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004) (alimony decisions are addressed to the "sound discretion" of the family court judge). Given the discretionary nature of alimony decisions, an expert opinion that Powell could have sought alimony but for the alleged malpractice does not aid Powell's cause. Powell needed to present an expert opinion that she most probably would have received alimony, but that type of opinion is absent from the record. Consequently, Powell's alimony-related arguments do not constitute sufficient evidence of damages, and the circuit court properly granted summary judgment.

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[9] In her primary brief, Powell appears to cite page 3 of the Affidavit of Grady Brown as support for this assertion. The Respondents respectfully submit no such statement appears in that document. However, even if it did, that kind of general statement would not be sufficient. *See Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (conclusory statements in expert affidavit about possible legal actions that could have been taken were insufficient to withstand a summary judgment motion when they did not address the likelihood for success of those actions).

(C) There is no evidence of any tax-related damages.

Powell also claims that "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." [Appellant's Brief, p. 13.] Again, though, Powell has not presented any supporting evidence for this assertion.

Powell cites only the affidavit of Grady Brown for her statement about increased taxes. The referenced portion of the affidavit reads as follows:

> For example, regarding the sale of the beach property, Mr. Taylor's deposition indicated that this property was sold and that $1,000,000 was placed into an account and the balance of $700,000 was placed into another account. This was done in order to be able to obtain a Section 1031 Tax Free Exchange. It appears did [sic] opposing party did [sic] timely comply with the IRS code and therefore a tax was occurred which otherwise would not have been incurred had he timely complied. By monitoring this situation or having court control over it, taxes might have been saved and this asset would not have been diminished in value.

[R. p. 1617 (emphasis added).] There are at least two reasons why this statement fails to support Powell's argument. First, as the emphasized language indicates, Brown stated that different actions "might" have resulted in tax savings. That is a far cry from an opinion that such savings were "most probable." Second, the passage neither reveals an amount for the hypothetical tax savings, nor explains how they would have made the eventual settlement agreement better for Powell. Brown would have had to demonstrate those things, at a minimum, for his statements to have any relevance.

In short, there is no evidence Powell suffered any tax-related damages. Even if some additional taxes occurred – and that is by no means certain – nothing in the record proves those extra taxes resulted in a lower settlement than the one Powell most probably would have received without them. This is not a connection that can simply be inferred, or that a jury could make without expert assistance. Thus, Powell needed sufficient expert testimony to support this claim, and she failed to present any.

(D) The applicable case law supports the circuit court's decision.

As the circuit court noted, this Court's decisions in *Hall v. Fedor*[10] and *Doe v. Howe*[11] are on point and support the decision to grant summary judgment to the Respondents. Although both cases involved civil litigation rather than a divorce action, the governing principles are the same. Therefore, this Court should affirm based on the reasoning and results in *Hall* and *Doe*.

In *Hall*, the plaintiff had been arrested on suspicion of a drug-related offense. The solicitor later dropped the charge, and the plaintiff asked the defendant, his criminal defense attorney, to pursue a civil action against the arresting officer. The defendant initially declined, but later agreed to assist with the case, which ultimately settled for $30,000. The plaintiff then filed a legal malpractice case against the defendant based on alleged breaches of the standard of care. The circuit court granted summary judgment to the defendant, and this Court affirmed.

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[10] 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)

[11] 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005)

The Court found that even if there had been some breach of the standard of care, summary judgment was appropriate because the plaintiff failed to demonstrate he "most probably" would have received a better result but for the malpractice. 349 S.C. at 176, 561 S.E.2d at 658. The record contained evidence the plaintiff's settlement was a very good outcome. For example, the defense attorney from the underlying case called the settlement an "excellent result" for the plaintiff, and one of the plaintiff's other attorneys admitted it was "a pretty good settlement." *Id.* The record contained no evidence indicating the plaintiff would most probably have obtained a better result without the malpractice. As the Court observed, "considering the absence of any admissible evidence presented by [the plaintiff], and in light of the evidence presented by [the defendant], [the plaintiff] failed to show he 'most probably' would have received a settlement amount greater than $30,000." *Id.* at 177, 561 S.E.2d at 658. Therefore, summary judgment was warranted.

The plaintiff in *Doe* was an adult who was sexually molested by a teacher while he was a student at Porter-Gaud School. The plaintiff retained the defendant to pursue a claim against the school. Although the defendant warned that the plaintiff would have problems with the statute of limitations, he made a claim against the school, which was settled for $88,000. The plaintiff later learned other abuse victims with a different attorney had overcome the statute of limitations obstacle and received settlements of roughly $2,000,000 each. When the plaintiff discovered he could not rescind his settlement, he brought a

malpractice action against the defendant. This Court affirmed the circuit court's decision to grant summary judgment on the malpractice claim.

In its opinion, the Court noted the plaintiff had presented expert testimony that he "most probably would have defeated Porter-Gaud's defenses if his case had been filed and zealously pursued." 367 S.C. at 444-45, 626 S.E.2d at 31. However, the Court concluded this testimony was insufficient to meet the burden of proof for establishing damages in a malpractice case. As the Court explained:

> The trial judge held [the expert's] statements were insufficient to defeat [the defendant's] summary judgment motion because [the expert] never explicitly stated [the plaintiff] most probably would have recovered more than the $88,000 he received in his settlement with Porter-Gaud. [The plaintiff] takes issue with this holding, asserting he had to show only that he "most probably would have been successful" in the underlying action but for the alleged malpractice and therefore did not need expert testimony regarding the amount that he would have recovered. We disagree with both arguments.
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> * * *
>
> We further agree with the trial judge's reliance on the fact that [the expert] never stated "that [the plaintiff] 'most probably' would have received more than the $88,000 he received in his settlement with Porter-Gaud." It appears to us that the trial judge, in citing this factor, was not imposing an additional requirement for [the plaintiff's] *prima facie* case, but rather was considering an alternative course through which [the plaintiff] could have avoided summary judgment.

Id. at 445, 626 S.E.2d at 31-32 (emphasis added). Based on that reasoning, the Court concluded the plaintiff had not presented sufficient evidence of damages, and it affirmed summary judgment for the defendant.

Hall, in particular, bears striking similarities to the present case. Just as in *Hall*, there is evidence demonstrating Powell obtained a favorable result in her underlying litigation. For example, Powell's final divorce attorney has testified she received "a good settlement." [R. p. 720.] And just as in *Hall*, the record contains no evidence Powell most probably would have received a better settlement without the alleged malpractice. Powell simply presented nothing to support such a conclusion.

Doe is also similar to the present case, albeit in a slightly different respect. Like Powell, the plaintiff in *Doe* presented expert testimony about what the defendant attorneys should have done differently. The expert testimony also made vague statements about better representation leading to different results for the plaintiff. Yet, the expert in *Doe* never stated or explained why the plaintiff "most probably" would have received a more favorable outcome if the attorneys had followed the standard of care. Thus, the mere presence of expert testimony was not enough; the expert had to express an opinion that satisfied the "most probably" standard, and he failed to do so.

Powell's case suffers from the same fatal flaw. Neither of her experts stated an opinion that Powell most probably would have received a better result in the divorce action if the Respondents had done things differently. Neither of them revealed any assets of the marital estate the Respondents failed to preserve or discover. Neither of them explained how or why Powell would have received alimony absent the alleged malpractice. And neither of them demonstrated any tax penalties that Powell sustained. In short, Powell's experts

failed to provide any support for the damages she now claims to have suffered. Without such evidence, Powell's claim could not proceed.

Significantly, the circuit court did not hold that expert testimony was necessary to prove damages in all malpractice cases. Whether or not such a requirement exists is a question for another day, as it has no bearing on the result here. The circuit court concluded only that the lack of expert testimony was fatal to Powell's case because it prevented her from meeting the "most probably" standard. The types of damages Powell sought (*i.e.* loss of assets from the marital estate, alimony, and tax penalties) were not the kinds of things a jury could evaluate without expert guidance. Like the plaintiffs in *Hall* and *Doe*, Powell needed expert testimony to show she most probably would have gotten a better settlement absent any malpractice. But also like the plaintiffs in *Hall* and *Doe*, Powell failed to present such evidence. Therefore, the results in *Hall* and *Doe* are controlling, and the Court should affirm.

(E) Powell failed to present evidence of any damages related to her breach of contract claim.

Powell appears to argue the Court should reverse because the circuit court's Order did not specifically refer to her breach of contract theory when it granted summary judgment. This argument fails for at least two reasons.

First, this issue is not preserved for appellate review. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Powell never

raised her breach of contract arguments in the circuit court, and the judge did not rule on them. As a result, this issue is not properly before the Court.

Second, even if the issue were preserved, it would not lead to reversal because Powell never alleged or proved any "breach of contract damages." Powell alleges the Respondents breached the standard of care in representing her, and as a result, she sustained damages. As previously discussed, however, Powell has not presented evidence sufficient to support any claimed damages. In other words, she has failed to demonstrate the alleged malpractice caused her to get a lesser settlement.

Just as this failure doomed Powell's malpractice claim, it is fatal to any breach of contract claim because the damages being sought are the same. Powell has never shown any separate damages she allegedly suffered due to a breach of contract, as opposed to a breach of the standard of care. Regardless of whether the alleged breach sounded in contract or tort, the damages Powell claims to have suffered were identical. Therefore, Powell's inability to prove any damages for malpractice also terminates any contractual claim.

Powell seems to argue the same evidence can constitute proof of damages for breach of contract, even if it falls short of the standard for malpractice damages. But if that were the case, legal malpractice plaintiffs could always get around the malpractice damages standard simply by reframing the case as one for breach of contract. This would lead to an absurd result in which the same evidence of damages could be sufficient or insufficient based solely on

the name of the legal theory the plaintiff used. The Respondents respectfully submit this is not the law of South Carolina.

Powell's reliance on *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010), is misplaced. In *Manios*, the plaintiff sued his former attorneys over their handling of a complex loan transaction. The plaintiff asserted separate causes of action for legal malpractice and breach of contract. A jury eventually returned a defense verdict on the malpractice claim, but awarded damages to the plaintiff for breach of contract. Significantly, though, the plaintiff alleged and presented evidence of damages stemming from the breach of contract that were <u>different</u> than those claimed under the legal malpractice claim. *Id.* at 146, 697 S.E.2d at 655. Thus, the jury was able to award those damages for breach of contract, even though it rejected the malpractice claim.

In the present case, Powell did not allege or prove any separate damages specifically related to the alleged breach of contract.[12] As noted above, she claimed the same types of damages under both legal theories. Therefore, *Manios* is distinguishable, and summary judgment should be affirmed.

II. <u>The circuit court properly granted summary judgment as to the entire case, including any breach of fiduciary duty and fee disgorgement claims.</u>

Powell also argues the circuit court erred in dismissing the entire case without specifically ruling on her claims for breach of fiduciary duty and

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[12] In her Complaint, Powell included breach of contract as a separate cause of action, but the damages pled in that cause of action were identical to those sought in the malpractice cause of action. [R. pp. 81-82.]

disgorgement of legal fees. These arguments fail as a matter of law and do not provide any basis for reversing the circuit court's decision.

(A) Fiduciary Duty

Powell's arguments about her claims for breach of fiduciary duty are not preserved for review. Although Powell's Complaint included a cause of action for breach of fiduciary duty, she did not raise any issues concerning fiduciary duties at the summary judgment stage. The Respondents' summary judgment motion did not seek a partial remedy or a ruling as to only certain causes of action. [R. p. 1546.] The motion requested summary judgment as to the entire case. Yet, Powell did not address her breach of fiduciary duty arguments in the memorandum she filed in opposition to the motion. [R. pp. 1550-1558.] She also failed to raise those issues during the summary judgment hearing. In short, Powell did nothing to inform the circuit court she considered her breach of fiduciary duty claim to be separate and distinct from the malpractice claim for purposes of the summary judgment motion.

Powell made no mention of any breach fiduciary duty issues until her Motion to Alter or Amend pursuant to Rule 59(e), SCRCP. By that time, however, it was too late to preserve the issue. *See Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (an issue raised for the first time in a Rule 59(e) motion is not preserved for appellate review). Thus, this issue is not properly before the Court.

Even if the issue had been preserved, Powell's claim for breach of fiduciary duty fails because the law treats it as the equivalent of the malpractice

claim. As the Supreme Court has noted, "when a legal malpractice claim and a breach of fiduciary duty claim arise from the same material facts, the breach of fiduciary duty claim should be dismissed as duplicative." *RFT Mgmt. Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 337, 732 S.E.2d 166, 173 (2012) (citing *Aller v. Law Office of Carole C. Schriefer*, 140 P.3d 23 (Colo. App. 2005)).

Here, there is no question all of Powell's claims arise from the same material facts. Powell did not allege any new or different facts in her Complaint when she set forth the breach of fiduciary duty claim; she merely incorporated by reference the facts for the malpractice claim. [R. p. 82.] Furthermore, Powell sought the same damages in both the malpractice and breach of fiduciary duty claims. The two claims are identical for all practical purposes.

In *RFT*, *supra*, the plaintiff sued its former attorneys for legal malpractice and breach of fiduciary duty. The trial court treated the two causes of action as one and the same, finding the fiduciary duty claim was "redundant." 399 S.C. at 335, 732 S.E.2d at 173. The Supreme Court upheld the trial court's decision, explaining:

> A claim for breach of fiduciary duty, as a general matter, is distinguishable from a claim for legal malpractice because it can arise in contexts other than one involving an attorney-client relationship. ... In the current matter, however, RFT's claim for breach of fiduciary duty arose out of the duty inherent in the attorney-client relationship and it arose out of the same factual allegations. Thus, RFT's claim for legal malpractice necessarily encompassed a breach of the fiduciary duty an attorney has to his or her client. ...
>
> Although RFT now argues a breach of fiduciary duty claim *could* be distinguishable from legal malpractice, RFT does not set forth any specific facts that

> demonstrate its breach of fiduciary duty claim *is* distinguishable because it arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts. Consequently, we hold the breach of fiduciary duty claim is duplicative.

Id. at 336-37, 732 S.E.2d at 173 (emphasis in original). If "RFT" were replaced with "Powell," this passage would perfectly describe the present case. Accordingly, this Court should affirm.

(B) Fee Disgorgement

Powell also argues she is entitled to equitable relief in the form of disgorgement of the fees she paid to the Respondents. This issue is not preserved for appellate review because Powell neither raised it, nor obtained a ruling on it in the circuit court. *See Wilder Corp.*, *supra*, 330 S.C. at 76, 497 S.E.2d at 733. In fact, Powell did not even raise this issue in her Rule 59(e) motion. She made no mention of it at all until her Appellant's Brief. This was not sufficient to preserve the issue. *Id.* ("It is axiomatic that an issue cannot be raised for the first time on appeal").

In fact, not only did Powell fail to raise this issue in the circuit court proceedings, she also neglected to plead a claim for equitable relief in her Complaint. The Complaint did not include any equitable theories, and it never requested disgorgement of fees as a form of relief for any of the three legal claims. Powell argues (again, for the first time on appeal) that a general request for "attorney's fees" in the "wherefore" clause of the Complaint constitutes a prayer for an equitable remedy. However, even the most generous reading of the "wherefore clause" could not support Powell's contention. The request for

attorney's fees was a boilerplate provision addressing Powell's fees incurred in this case, not a claim for disgorgement of fees in the underlying case. Any other interpretation would make a mockery of the pleading rules. Therefore, Powell waived any such claim at the outset of this action, and even if she did not, she failed to preserve it for appellate review. In either case, this Court should disregard Powell's arguments on this issue.

III. The circuit court's decision to grant summary judgment was not premature.

"A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case; and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Health Systems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 37 (Ct. App. 2009). Here, Powell has failed to satisfy either of those requirements.

Powell has never provided a "good reason" why she did not have sufficient time to conduct discovery. In fact, Powell has not offered any explanation at all. Powell failed to give the circuit court a good reason why discovery could not be completed prior to the summary judgment hearing, and her Appellant's Brief is also silent on that topic. This means the Court does not have to determine whether or not a stated reason is "good" enough. There is no explanation for this Court to evaluate.

The lack of any stated reason is not surprising given this case's procedural history. Discovery began in early March 2010, and the summary

judgment hearing took place on March 16, 2012. Thus, Powell had two years to conduct discovery. During that time, Powell's attorneys served and answered written discovery, produced and received documents, and participated in numerous depositions. Powell also identified two expert witnesses. Although neither of those experts specifically addressed Powell's claimed damages, she presumably knew as soon as she retained them which topics they were, and were not, prepared to address. At the very least, it is reasonable to attribute that knowledge to her. Nevertheless, in all that time, Powell never identified an expert to address her damages.[13]

Given those circumstances, it is difficult to imagine what "good reason" Powell could provide for not being able to complete discovery. She had two years to develop evidence to support her case, and the means of obtaining the evidence she lacked was always within her control. She simply did not do it. Therefore, Powell fails the first prong of the test set forth in *Guinan*.

Even if a good reason existed, Powell has not shown "why further discovery would uncover additional relevant evidence." *Guinan*, 383 S.C. at 54, 677 S.E.2d at 36. Powell argues only that she had hired a forensic accountant to evaluate her claimed damages at some point after the expert disclosure deadline. This general statement, in and of itself, is not sufficient to meet the second prong of the *Guinan* test for three reasons.

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[13] Furthermore, Powell had the opportunity to retain a forensic accountant before the current action even began. Powell's final attorney in the divorce action recommended that she hire such an expert to further investigate her ex-husband's assets before agreeing to any settlement, but Powell declined. [R. pp. 238-239.] That took place early in 2007, nearly five years before the summary judgment hearing.

First, a party retaining a paid expert or consultant does not constitute "uncovering" new relevant evidence. This was not a situation in which Powell demonstrated a need to get additional evidence from the Respondents or some third party over whom she had no control. Powell could have retained a forensic accountant at any time during the two years of discovery. And she certainly could have hired and disclosed such an expert prior to the expiration of the expert deadline contained in the Consent Amended Scheduling Order. As discussed above, Powell has never given any reason for why she failed to do so.

Second, nothing in the record demonstrates a report from Powell's undisclosed forensic accountant would have constituted "additional relevant evidence." Powell assumes the report would have been relevant, but she has never provided any information to allow a court to evaluate that assumption. Powell told the circuit court only that she had hired a forensic accountant to write a damages report. Powell gave no indication of what the report would say, or even what types of damages it would address. Powell did not even identify the accountant by name at the summary judgment hearing. Even if the accountant had not completed a report prior to the hearing, Powell could have at least obtained some specifics in order to show further discovery was likely to lead to additional relevant evidence. As the record stands, however, there was no way for the circuit court to reach that conclusion, and there is no basis for this Court to do so. Any decision on that question would be the result of speculation, which means Powell has not met her burden under *Guinan*.

Third, accepting Powell's argument on this issue would effectively condone her attempt to maneuver around the Amended Scheduling Order to which she consented. That order contained a deadline of February 13, 2012, for Powell to disclose any additional experts or opinions. Powell did not name any new experts before that date passed. Instead, she planned to defeat the deadline by hiring a forensic accountant, calling him or her a "consulting expert," and introducing the undisclosed accountant's report through one of the previously identified experts. [R. p. 152.] Regardless of what Powell now calls him or her, the accountant was nothing more than a new expert hired to address issues her existing experts could not. Had Powell disclosed the accountant for that purpose prior to the expert deadline, the situation would be different. As things stand, though, Powell is attempting to benefit from making an end-run around the Amended Scheduling Order. This Court should not allow it.

Powell has failed to provide any good reason for not being able to complete discovery despite having two full years to do it. She has also failed to identify what specific additional evidence she would have uncovered or to demonstrate why it would have been relevant. Consequently, Powell has not satisfied the requirements of the *Guinan* test, and her claim that the summary judgment ruling was premature must fail.[14]

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[14] Powell also suggests summary judgment was premature because the Amended Scheduling Order did not contain a discovery deadline. Yet, very few civil cases in South Carolina's circuit courts have discovery deadlines. If a formal closing of discovery were necessary for a summary judgment motion to be ripe, such motions could almost never be decided because additional discovery would almost always be possible. This is not the law of South Carolina, and Powell has cited no authority to prove otherwise.

IV. The circuit court properly conveyed the factual and legal bases for its decision to grant summary judgment.

As her final argument, Powell asks this Court to reverse based on several perceived factual errors in the Order. However, Powell fails to show how any of those alleged mistakes or omissions affected the circuit court's ruling. For this reason, this issue does not provide any basis for a reversal.

Some of the alleged errors and omissions are patently irrelevant to the circuit court's ruling. For example, Powell takes issue with a statement in the Order that she terminated the Respondent Potterfield in April 2005, and she faults the court for omitting references to the length of time it took the Respondents to file the divorce action and their failure to conclude that action in a timely manner. None of those things have anything to do with the basis for the circuit court's decision – *i.e.* Powell's failure to present sufficient evidence of damages. The same can be said about Powell's complaint that the Order did not mention attorney Reid Smith's lack of training as a forensic accountant. Even if otherwise true, these assertions simply have no bearing on the issues on appeal.

Powell also contends the Order is deficient because it does not list the total value of the marital estate and omits references to the alimony she claims to have lost. As argued above in Section I, however, Powell failed to produce evidence to show either of those things. Indeed, that is the very reason the circuit court granted summary judgment. The circuit court could not include

references to evidence it did not believe existed.[15] Thus, Powell's contention on this point also fails to demonstrate any reversible error.

Finally, Powell faults the Order for not discussing her experts' affidavits in detail. As previously discussed, those affidavits did not provide any sufficient evidence of damages. The affidavit of Grady Brown mentioned hypothetical tax savings if the Respondents had acted differently, but it did not state any monetary amounts or explain how those savings would have led to a better settlement for Powell. The affidavit of Gregory Adams contained nothing but a vague, conclusory statement about damages Powell sustained, and it never said Powell most probably would have received a better result had the alleged malpractice not occurred. Given those deficiencies, there was no reason for the circuit court to discuss the affidavits in the Order. Furthermore, regardless of whether the Order discussed the affidavits, they were included in the record, and the circuit court considered them.

The Order clearly sets forth the legal basis for its decision to grant summary judgment, and it includes the facts relevant to that conclusion. That is all the Order was required to do. Powell's arguments on this issue are merely attempts to restate her substantive challenges to the circuit court's actual ruling. Therefore, this issue does not reveal any basis for reversal.

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[15] The only record evidence the marital estate's value came from attorney Reid Smith. This was the value used in the negotiations that led to the actual settlement Powell received. Including that figure in the Order would not have helped Powell, as she now contends that number was too low. As for the value of the "lost" alimony, there is no record evidence showing Powell most probably would have received any alimony, let alone what the amount would have been.

CONCLUSION

After agreeing to a divorce settlement years ago, Powell now wishes she had received something more. She played a personal role in negotiating the agreement, and she told the Family Court judge on the record that she felt the settlement was fair and should be approved. Yet, in hindsight, Powell has for some reason changed her mind about the result of her divorce action. While that response is not uncommon for litigants after participating in a legal action, this type of "buyer's remorse" is not the proper basis for a legal malpractice claim.

Powell is not happy with the way the Respondents handled her case, and she blames them for alleged breaches of the standard of care. But what Powell has not done – even after years of discovery – is present evidence showing she most probably would have received a better result in the divorce action if the alleged malpractice had not occurred. That failure is fatal to her case under existing South Carolina law, and the circuit court properly granted summary judgment for that reason. Therefore, this Court should affirm the result below.

Respectfully submitted,

R. Hawthorne Barrett
Charles E. Hill
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200
chill@turnerpadget.com
tbarrett@turnerpadget.com

Attorneys for the Respondents

RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Respondents, certifies that this Final Respondents' Brief complies with Rule 211(b), SCACR.

R. Hawthorne Barrett

Charles E. Hill
R. Hawthorne Barrett
Turner, Padget, Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200
chill@turnerpadget.com
tbarrett@turnerpadget.com

Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2009-CP-40-8705

Carolyn Mitchell Powell.....Appellant;

v.

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

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **26th day of March, 2013**, served a copy of the **Final Respondents' Brief** upon counsel for the Appellant by causing it to be deposited in the United States mail, first class postage prepaid, addressed to: Thomas A. Pendarvis, Esq. and Catherine B. Kerney, Esq.; Pendarvis Law Offices, P.C.; 500 Carteret St., Suite A; Beaufort, SC 29902.

Charles E. Hill
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

March 26, 2013

Attorneys for the Respondents