

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

App. Case No. 2012-212678
Lower Case No. 2009-CP-40-8705

Carolyn Mitchell Powell. Appellant,

v.

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

Of Whom: Ashlin Blanchard Potterfield; J. Michael Taylor;
TAYLOR/POTTERFIELD are Respondents.

REPLY BRIEF OF APPELLANT

PENDARVIS LAW OFFICES, P.C.,
Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret St., Suite A
Beaufort, SC 29902-5066
(843) 524.9500 tel.
(843) 524.9501 fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Lawyers for Appellant

TABLE OF CONTENTS

	<u>Page</u>
Arguments in Reply	1
I. The Trial Court Misapprehended the Testimony Required to Be Given by an Expert Witness to Defeat a Summary Judgment Motion.	1
A. Respondents were on notice that Powell's expert witness was preparing to testify regarding specific dollar amounts of Powell's damages.	1
B. The record contains expert testimony regarding damages.	2
1. Expert testimony was on the record as to damages.	3
2. Expert testimony was on the record specifically as to the availability and loss of alimony due to Respondents' negligence.	5
3. Expert testimony was on the record specifically as to the loss of value of Powell's settlement as compared to what would have occurred if Respondents had acted within the standard of care.	5
II. The Evidence Before the Trial Court Met and Exceeded the Standard Needed to Survive a Summary Judgment Motion under South Carolina Law. .	6
A. The existence of genuine issues of material facts makes summary judgment improper.	6
B. Sufficient evidence on the record and a dispute as to the inference to be drawn from that evidence makes summary judgment improper. .	9
C. Evidence on the record warrants determination by a jury making summary judgment improper.	10
D. The tort of legal malpractice does not require a higher standard of proof than all other torts in South Carolina.	11
III. Plaintiff Has Presented Sufficient Evidence to Demonstrate That Her Divorce Settlement Was the Best Available under the Circumstances Created by the Negligence of Her Lawyers.	12
Conclusion	15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 488 S.E.2d 334(1997)	13
Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004)	10
Floyd v. Floyd, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005)	14
Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801(2009)	6, 11
Murphy v. Tyndall, 384 S.C. 50, 681 S.E.2d 28 (2009)	6, 10
Toyota v. Lynch, 314 SC 257, 266, 442 SE2d 611 (1994)	14
Wright v. Ligon, 5, S.C. Eq. 166, 1824 WL 1023 (S.C.App.Eq. 1824)	11

ARGUMENTS IN REPLY

Appellant, Carolyn Mitchell Powell, wishes to brief the Court further and/or respond further to several of the issues raised by Respondents, Ashlin Blanchard Potterfield; J. Michael Taylor; and TAYLOR/POTTERFIELD.

I. THE TRIAL COURT MISAPPREHENDED THE TESTIMONY REQUIRED TO BE GIVEN BY AN EXPERT WITNESS TO DEFEAT A SUMMARY JUDGMENT MOTION.

The trial court misapprehended the nature, extent and weight of the evidence required to be given by expert witnesses in this matter. The trial court failed to recognize the full extent of the expert testimony on the record and also failed to recognize that proof of damages does not require expert opinion and can be shown by other evidence and other witness testimony. Further, Respondents' arguments rely on the notion that Powell failed to provide "sufficient evidence" of damages and ignores the law that requires her only to provide a scintilla of evidence.

A. Respondents were on notice that Powell's expert witness was preparing to testify regarding specific dollar amounts of Powell's damages.

H. Grady Brown, J.D. testified in his opinion letter incorporated by reference to his Affidavit that "[m]y review was not in any way intended to determine the nature or the extent of any damages Ms. Powell may have incurred as a result of representation by the Taylor/Potterfield Law Firm." (Affidavit of G. Brown at 1, ROA 1614). Respondents attempt to use this statement to claim that Mr. Brown did not present any expert testimony regarding damages and, in doing so, misinterpret this statement and others made by this expert. Mr. Brown was simply confirming that initially he was not hired to present expert

opinion on a dollar amount of damages. He did, however, testify that Respondents' negligence damaged Powell. (Affidavit of G. Brown at 2, 3, 4, 8, 9, 10, ROA 1615-1623).

An expert witness can expand the opinions on which they are prepared to testify as more discovery is conducted evidence accumulates on the record. In fact, the attorney for Powell made it clear at the summary judgment hearing that Mr. Brown was preparing to amend his opinion to provide testimony regarding damages to Respondents.¹ (Hearing Transcript at 19:6-15, 21:4-9, ROA150-151). Mr. Brown is an active family law lawyer with more than twenty years of experience who routinely hires forensic accountants to review accounts and provide reports on the true picture of the spouses' finances. He is qualified to review the supporting accounting documents, the final report and explain those findings to a jury. In many ways, he is the best expert to present this testimony because he can demonstrate to the jury how a reasonably prudent family law lawyer would have performed and how Respondents failed to perform because he does these types of tasks on a routine basis. There is no requirement that Plaintiff stack the witness list with unnecessary additional expert witnesses when one expert witness is qualified to give testimony on multiple opinions and judicial economy prefers it.

B. The record contains expert testimony regarding damages.

Respondent claims that Powell failed to present "sufficient" expert opinions regarding her damages. However, Powell has submitted more than a scintilla of evidence of expert opinion already on the record as to her damages from Respondents' negligence,

¹ The Scheduling Order did not preclude the supplementation of expert witness testimony and the Rules of Civil Procedure require Plaintiff to supplement her responses with regards to "the subject matter on which [the expert witness] is expected to testify , and the substance of his testimony." Rule 26(e), SCRCP.

the damages from her loss of alimony, and the damages from her final divorce settlement.

1. Expert testimony was on the record as to damages:

- “[Respondents’] violations [of the standard of care] proximately caused Ms. Powell considerable damages including loss of any right to separate maintenance and support and loss of substantial value of the marital estate and her share of it due to the dissipation, transfer, and secreting of much of it by her husband during the pendency of the divorce litigation.” (Affidavit of G Adams at 4, ROA 101).
- “[T]he amount of time Mr. Taylor allowed to lapse and his failure to take certain actions, as herein below set forth, caused Ms. Powell to be unprotected and vulnerable to dissipation of marital assets by her husband for an unreasonable length of time.” (Affidavit of G. Brown at 2, ROA 1615).
- “Moreover, the original pleadings filed by Ms. Potterfield were never amended by Mr. Taylor. Therefore, from the standpoint of procedure, Ms. Powell never sought an equitable division of assets. Nor did she formally request any alimony.” (Affidavit of G. Brown at 2, ROA 1615).
- “It is my opinion that Mr. Taylor could have taken advantage of a Lis Pendens to prevent assets from being sold.” (Affidavit of G. Brown at 3, ROA 1616).
- “[Respondents] could have obtained a restraining order (whether by consent or by temporary motion) to preserve assets.” (Affidavit of G. Brown at 3, ROA 1616).
- “[Respondents] could have hired a forensic account that specializes in tracing of assets.” (Affidavit of G. Brown at 3, ROA 1616).
- “[Respondents] could have obtained a temporary hearing and gotten an order of discovery and other relief in a binding order.” (Affidavit of G. Brown at 3, ROA 1616).
- “[Respondents] could have obtained a verified financial declaration establishing income and assets from the opposing party under oath.” (Affidavit of G. Brown at 3, ROA 1616).
- “It is my opinion that all of the above would have been beneficial to Ms. Powell by protecting and preserving assets and by identifying assets or supplementing and verifying information obtained directly from the opposing party. Had these tools and procedures been used, and used promptly, assets could have been preserved or their status controlled, settlement negotiations

could have proceeded based on verified information and delay avoided.” (Affidavit of G. Brown at 4, ROA 1617).

- “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 [not] timely comply with the IRS code and therefore a tax was incurred 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.” (Affidavit of G. Brown at 4, ROA 1617).
- “In my view, one of the most important elements of a domestic relations case is the preservation and maintenance of marital assets once representation has begun. The loss of control over the assets, or the dissipation of the assets, could be prejudicial to a client, particularly if that client is not titled with the asset and would have no knowledge as to the appropriateness of the terms associated with the sale or be entitled to the use of the proceeds from the sale. It is prudent to have the court approve any such sale or, at a minimum, not allow a sale to occur without the consent of opposing counsel and a plan for how it is to be handled.” (Affidavit of G. Brown at 8, ROA 1621).
- “It is my opinion that several actions could have or should have been taken which would have benefited [sic] Ms Powell with respect to an equitable distribution. First, it appears that the Complaint that was ultimately filed well over a year after representation had begun did not seek an equitable division in its prayer. Nor did it seek any alimony or a request for a temporary hearing.” (Affidavit of G. Brown at 9, ROA 1622).
- “Moreover, the South Carolina Rules of Family Court require that the parties file a financial declaration within 45 days of the date the suit is filed or at a temporary hearing, whichever occurs first. The documents I have seen suggest that neither party ever filed a financial declaration or served the same on the other party. The financial declaration would have listed in considerable detail the assets and the values of the assets claimed by both parties. The obtaining of a financial declaration of Mr. Powell would have been extremely valuable to Ms. Powell not only because it helps clarify what needs to be done in discovery, but it also enhances her knowledge of the assets, provides an under oath basis for identifying and valuing assets for which negotiations for settlement can be based and creates an element of perjury should the disclosure by the opposing party turn out to be inaccurate.” (Affidavit of G. Brown at 9, ROA 1622).

2. Expert testimony was on the record specifically as to the availability and loss of alimony due to Respondents' negligence:

- "It also does not appear that a financial declaration was ever prepared for Ms. Powell. Without any determination of the true expenses Ms. Powell was incurring, I believe it would be difficult to counsel her with regards to the amount of support, whether alimony or child support, she would need. Although alimony apparently became a contested issue, it is clear to me that Ms. Powell would have been entitled to some level of support. No specific amount was ever ordered until years after representation began and Ms. Powell could have been subject to the whims of Mr. Powell with respect to the payments he was making to her prior to any formal court order." (Affidavit of G. Brown at 10, ROA 1623).
- "[C]hild support and alimony are both based upon earnings ability and not necessarily the actual earnings of a party. The documents I have seen do not reflect any discussion regarding Mr. Powell's earnings ability and the impact this would have on the alimony and support issues. In fact, Ms. Potterfield stated in her deposition that she did not think Ms. Powell may be entitled to alimony because Mr. Powell had no income. That seems to beg the question to me as to what he is capable of earning and it does not appear to me that this determination was ever made or looked into." (Affidavit of G. Brown at 10, ROA 1623).
- "Furthermore, it appears that Ms. Powell could have shown that her husband committed adultery as a result of a private investigator's report. Ms. Potterfield stated in her deposition she did not think that Mr. Powell's adulterous conduct would have had an impact on Ms. Powell's adultery claim. I would disagree because the South Carolina alimony statute states that marital misconduct is a relevant factor a court considers in an alimony situation." (Affidavit of G. Brown at 10, ROA 1623).
- "Additionally, the alimony statute requires that a spouse's earnings ability and the marital assets they are to receive are additional factors which need to be considered." (Affidavit of G. Brown at 10, ROA 1623).

3. Expert testimony was on the record specifically as to the loss of value of Powell's settlement as compared to what would have occurred if Respondents had acted within the standard of care:

- "The documents I have seen suggest that Ms. Powell was never informed that the settlement offers ultimately made by her attorneys were within the 'realm of reason'. It was proposed that she get \$500,000 as an advance. Mr.

Powell only offered \$400,000 and this amount was accepted.” (Affidavit of G. Brown at 8-9, ROA 1621-1622).

- “[I]t appears that there is no way her attorneys could have known whether the offers made by either party were within the ‘realm of reason’ because there was no clear picture provided by Mr. Powell to verify the existence or value of substantial marital assets or determine his earnings ability. In short, it would appear that decisions were being made about settlement offers, including whether the terms of offers to be made to opposing counsel and opposing counsel's offers, for consideration, without the ability to evaluate their reasonableness under the circumstances. In my opinion, this is an ineffective and inappropriate manner in which to negotiate the resolution of a domestic relations case.” (Affidavit of G. Brown at 9, ROA 1622).
- “[H]ad Taylor/Potterfield engaged in discovery, hired an expert and obtained a financial declaration from Mr. Powell early on, it is possible that a reasonable permanent settlement could have been reached either before suit was filed or shortly thereafter which addressed the alimony issue favorably to Ms. Powell. If so, subsequent adulterous conduct on her behalf would have been irrelevant.” (Affidavit of G. Brown at 11, ROA 1624).

II. THE EVIDENCE BEFORE THE TRIAL COURT MET AND EXCEEDED THE STANDARD NEEDED TO SURVIVE A SUMMARY JUDGMENT MOTION UNDER SOUTH CAROLINA LAW.

A. The existence of genuine issues of material facts makes summary judgment improper.

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. See Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801, 802 (2009). “Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30

(2009). “Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted.” *Id.*

In this matter, genuine issues of material fact exist to such an extent that even the Respondents’ brief contains numerous references to these disputed facts. For instance, Respondents put a great emphasis on Respondent Potterfield delivering a document to Powell entitled “To Prospective Clients;” however, there is no evidence on the record that Powell ever received this document, read this document, or discussed the document with her lawyer. See INITIAL RESPONDENTS’ BRIEF at 5, 22. As Respondents point out, Potterfield claimed in her deposition that she informed Powell about the risks of an affair after separation (Potterfield Depo. at 33:16-24, ROA 814) and Potterfield denied ever receiving this advice, did not recall receiving the “To Prospective Clients” documents and did not recognize a signature verifying receipt that Potterfield claimed to be Powell’s. (Powell Depo. at 159:20-160:4, ROA 333-334). The advice, or lack of advice, regarding personal relationships after a multi-year separation and the sufficiency of that advice are material facts that directly relate to Respondents’ negligence and Powell’s damages. These facts are at issue and a jury must determine the accuracy and weight of the evidence for each party, which makes summary judgment improper.

A second genuine issue of material fact is whether Respondents failed to properly protect Powell’s interest when Respondents allowed the husband to have unilateral control of a 1031 exchange of a significant marital asset. Respondents claimed that their failure to act was proper (Taylor Depo. at 109:1-20, ROA 1171) while Powell has presented testimony from two experts that Respondents’ conduct fell below the standard of care

concerning the 1031 exchange. (Affidavit of G. Adams at 3-4, ROA 100-101); (Affidavit of G. Brown at 4, ROA 1617). The disputed testimony concerning the 1031 exchange is material to Respondents' negligence and Powell's damages and warrants jury determination.

A third genuine issue of material fact is whether Respondents' delay in prosecuting Powell's matter harmed Powell. For instance, Respondents testified to various reasons to support their decisions not to act or to delay acting, such as: choosing not to file a lis pendens on the marital property; choosing not to move to protect the tax savings on the 1031 exchange proceeds; choosing to delay two years before filing a Separate Support and Maintenance Agreement; and choosing to wait four years before hiring a bankruptcy attorney to review the marital assets. (Taylor Depo. at 17:23-19:3, 39:10-21, 73:21-76:8, 109:1-20, ROA 1079-1081, 1101, 1135-1138, 1171). Powell's experts presented testimony that these delays fell below the standard of care and caused financial harm to Powell. (Affidavit of G. Adams at 3-4, ROA 100-101); (Affidavit of G. Brown at 2, 3, 4, 8, 9, 10, ROA 1615-1623). The evidence regarding these issues is properly one for the jury and not summary judgment.

A fourth genuine issue of material fact is whether Respondents negligently handled the financial reporting and investigating in Powell's divorce matter. Respondents claim that they made a judgment call and had various reasons for not preparing a financial declaration for Powell or requiring one from her husband. (Taylor Depo. at 67:11-69:11, ROA 1129-1131). Respondents also claim that they did perform an investigation of Mr. Powell's assets by hiring Reid Smith to review the accounting. (Taylor Depo. at 73:21-76:8, ROA 1135-1138). However, Powell has presented expert testimony that it was below

the standard of care not to prepare a financial declaration on her behalf because a financial declaration was necessary to determine a clear financial picture of her assets in order for Respondents to properly advise her regarding financial settlements. (Affidavit of G. Brown at 9, 10, 11, ROA 1622-1624). Powell also has presented expert testimony that Respondents fell below the standard of care by not requiring a financial declaration from Mr. Powell in order to preserve marital assets from the outset. (Affidavit of G. Brown at 9, 10, ROA 1622-1623).

Powell claims she was damaged because Respondents conducted no review of Mr. Powell's accounting until four (4) years after the divorce was initiated. (Powell Depo at 175:8-21, ROA 349). Powell also presented expert testimony that claimed hiring Reid Smith, a bankruptcy lawyer, instead of an experienced forensic accountant was below the standard of care. (Affidavit of G. Brown at 9, ROA 1622). Powell's experts have testified that Respondents could have determined a more accurate picture of the marital estate before Powell's husband had time to transfer, hide or use assets. (Affidavit of G. Brown at 9, ROA 1622). All of these genuine issues of material fact require a jury determination and are not proper for summary judgment.

In its granting of Respondents' motion for summary judgment, the trial court failed to view evidence and inferences in the light most favorable to Powell and instead did the exact opposite. Summary judgment was improper.

B. Sufficient evidence on the record and a dispute as to the inference to be drawn from that evidence makes summary judgment improper.

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Ellis v. Davidson*, 358 S.C. 509, 517-518, 595 S.E.2d 817, (Ct. App. 2004). That is to say, not a scintilla of evidence has been presented by the entire discovery process to support a plaintiff’s claims. Further, “[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party.” *Id.* at 818. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Id.* at 821-822. “Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.” *Id.* at 822.

The record in this matter has demonstrated numerous issues of material fact detailed above. Not only has evidence supporting these facts been presented, but Powell also presented expert testimony supporting the inferences and conclusions to be drawn from the evidence on the record. In several instances in this matter, the evidentiary facts and the conclusions to be drawn from them are in dispute. The determination of the accuracy and weight of the evidence and the conclusions to be drawn therefrom are within the purview of the jury and are not a matter to be determined by summary judgment.

C. Evidence on the record warrants determination by a jury making summary judgment improper.

“When evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury.” *Murphy*, 384 S.C. at 54. “At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.” *Id.*; see

also *Hancock*, 381 S.C. at 330. More than a scintilla of evidence on the record supports Powell's claims and damages, as evidenced by testimony from a legal ethics expert and a family law lawyer expert. Respondents have testified inapposite to many of the genuine issues of material fact. Summary judgment should have been denied because there is more than an scintilla of evidence and more than one inference to be made from that evidence - all warranting determination by a jury.

D. The tort of legal malpractice does not require a higher standard of proof than all other torts in South Carolina.

The Supreme Court has ruled that South Carolina cases applying a preponderance of the evidence burden of proof required the non-moving party to submit only a "mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330. The Court also has ruled that in cases applying the federal law or in cases where there is a heightened burden of proof, "there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." *Id.*

Professional negligence claims against lawyers have long been recognized as a tort in South Carolina requiring a burden of proof in which the plaintiff must prove her claim by a preponderance of the evidence. See e.g., *Wright v. Ligon*, 5, S.C. Eq. 166, 1824 WL 1023 (S.C.App.Eq. 1824). Therefore, Powell only needed to submit a scintilla of evidence to support her claims of malpractice and damages caused by Respondents. Powell submitted far beyond the necessary scintilla, but certainly has submitted at least a scintilla, of evidence in support of her claims for legal malpractice. To hold otherwise subjects this legal malpractice claim to an improper standard of proof than all other torts in South Carolina. If this were the law, lawyers would be provided a greater protection from claims

of professional negligence than any other professional in the state.

Where there is a scintilla of evidence presented, as it was before the trial court in this case, the question of the weight of that evidence and the inferences to be drawn therefrom is a determination to be made by the jury. The trial court's order should be reversed.

III. PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE TO DEMONSTRATE THAT HER DIVORCE SETTLEMENT WAS THE BEST AVAILABLE UNDER THE CIRCUMSTANCES CREATED BY THE NEGLIGENCE OF HER LAWYERS.

Based on the unappealed finding of facts and conclusions of law in the prior Order denying Respondents' first motion for summary judgment, it is the law of the case that Powell mitigated the damages caused by Respondents when she entered into her divorce settlement because it was the best settlement she could receive under the circumstances. These findings and conclusions were made clear in the settlement document itself, the testimony of Powell, the testimony of her final divorce lawyer, Cantzon Foster, and in an order from the trial court denying Respondents' first motions for summary judgment.

Powell's settlement documents reads:

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.

(Complete Property, Support, and Custody Agreement at 3, ROA 1785) (emphasis added).

The settlement document itself acknowledges that Powell accepted the settlement terms but that only was because the negligence of her lawyers had left her in the circumstances of being emotionally and financially drained from a *four year* legal battle over her divorce.

In addition, Powell testified numerous times in her deposition that she entered into the divorce settlement because it was the best she could get under the circumstances. (Powell Depo at 53:5-25, 114:1-16, 221:21-222:9, 222:22-224:9, ROA 227, 288, 395-398). And her final divorce lawyer testified that he advised her against signing the agreement because he felt that they did not have a full picture of the finances of Mr. Powell and he wanted time for a forensic accountant to review Mr. Powell's accounting. (Foster Depo at 126:1-127:3, 134:7-135:5, ROA 712-713, 720-721). Further, the court's order held that Ms. Powell's settlement was the best she could do under the circumstances and that the settlement should not be used against her in this legal malpractice action because she had a duty to mitigate. (Order Denying Motion for Summary Judgment at 3, ROA 13).

[T]he fact the client has accepted the benefit of the settlement and judicially sought to enforce its terms are not bars to maintenance of a malpractice claim. To hold otherwise would be to absolve the client of the duty to mitigate damages, and to require her to forego whatever benefit she is entitled to under the settlement in order to maintain a suit against her attorney, which if successful will result in a recovery only in the amount of the difference between the settlement entered and the amount it would have been but for the attorney's negligence. In other words, the client would be bound by the settlement... but would be denied its benefits.

Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 71, 488 S.E.2d 334, 335 (1997).

Under the trial court's Order, the law of this case is that "[i]n the underlying domestic

proceedings, the Plaintiff mitigated her damages by accepting the best settlement she felt was available under the circumstances of her four year divorce proceeding.” (Order Denying Motion for Summary Judgment at 3, ROA 13). The law of the case doctrine holds that an unappealed ruling becomes the law of the case. See *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005) (citing *ML-Lee Acquisition Fund, LP. v. Deloitte Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997)); *Toyota v. Lynch*, 314 SC 257, 266, 442 SE2d 611, 616 (1994). Respondents did not appeal the Order Denying Summary Judgment and therefore that Order has become the law of the case.² And the law of the case in the trial court’s order does not allow Respondents to argue that Powell’s family court settlement was reasonable.³ Instead, it is the law of the case that Powell was required to enter into the settlement agreement in order to mitigate her damages because the settlement agreement was the best she could get under the circumstances.

[CONCLUSION AND SIGNATURE ON FOLLOWING PAGE]

² Respondents chose not to file a cross appeal regarding the trial court’s order denying their first motion for summary judgment.

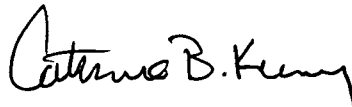
³ Despite Respondents’ claims to the contrary, Powell’s expert witness, Grady Brown, J.D., is fully qualified to testify at trial regarding the value of the settlement agreement, explain the provisions of the settlement agreement to the jury and testify that Powell most probably would have received a better settlement and, with the aid of the forensic accounts reports and supporting documents, explain the full dollar value of Powell’s damages.

CONCLUSION

For all of the above reasons, the trial court should be reversed and this matter should be remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (S.C. Bar #064918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret St., Suite A
Beaufort, SC 29902-5066
843.524.9500 tel.
843.524.9501 fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Lawyers for Appellant Carolyn Mitchell Powell

Beaufort, South Carolina

April 1, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

App. Case No. 2012-212678
Lower Case No. 2009-CP-40-8705

RECEIVED

APR 02 2013

SC COURT OF APPEALS

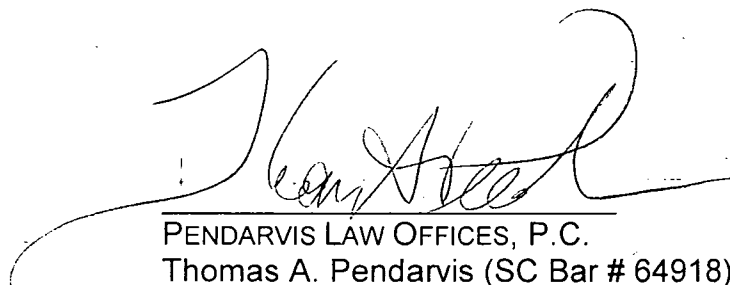
Carolyn Mitchell Powell. Appellant,

vs.

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

Certificate of Counsel

The undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.



PENDARVIS LAW OFFICES, P.C.
Thomas A. Pendarvis (SC Bar # 64918)
500 Carteret St., Suite A
Beaufort, SC 29902-5066
(843) 524.9500

Beaufort, South Carolina
April 1, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

App. Case No. 2012-212678
Lower Case No. 2009-CP-40-8705

Carolyn Mitchell Powell. Appellant,

vs.

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

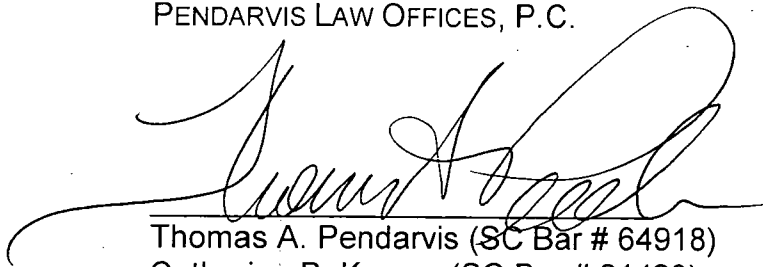
PROOF OF SERVICE

I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the BRIEF OF APPELLANT; (1) copy of the REPLY BRIEF OF APPELLANT and (1) copy of the CERTIFICATE OF COUNSEL on counsel for Respondents: Ashlin Blanchard Potterfield; J. Michael Taylor; and TAYLOR/POTTERFIELD by depositing copies of the same in the United States Mail, postage prepaid, on the 1st day of April, 2013 addressed to Charles E. Hill, J.D., TURNER, PADGET GRAHAM & LANEY, PA, PO Box 1473 Columbia, SC 29202.

RECEIVED
APR 02 2013
SC COURT OF APPEALS

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', with a long horizontal flourish extending to the left.

Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

500 Carteret St., Suite A

Beaufort, SC 29902-5066

(843) 524.9500 tel.

(843) 524.9501 fax.

Thomas@PendarvisLaw.com

Carey@PendarvisLaw.com

Lawyers for Appellant, Carolyn Mitchell Powell

April 1, 2013

Beaufort, South Carolina