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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Common Pleas Case No. 2022-CP-23-01064
Appellate Case No. 2026-000267

John R. Mensch and Shauna M. Waddell
Individually and as Personal Representative
Of the Estate of Florence Petrak Mensch and
John R. Mensch *Respondents,*

v.

Sterling Raymond Mensch, III, Individually
As Personal Representative of the Estate
of Florence Petrak Mensch and in the
former Capacity as Agent under a Power
of Attorney for Florence Petrak Mensch *Appellant.*

RECORD ON APPEAL
VOLUME III

s/ Devon M. Puriefoy
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INDEX

VOLUME I

Orders

Pleadings

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

IN THE MATTER OF:
ESTATE OF FLORENCE PETRAK MENSCH

CASE NUMBER:
2018ES2302854

SHAUNA M. WADDELL, individually and as Personal Representative of the Estate of Florence Petrak Mensch, and JOHN R. MENSCH,
PETITIONERS,

STERLING RAYMOND MENSCH, III, individually, as former Personal Representative of the Estate of Florence Petrak Mensch and in his former capacity as Agent under Power of Attorney for Florence Petrak Mensch,
RESPONDENT.

Probate hearing taken in the aforementioned matter was heard before the Honorable Debora A. Faulkner taken before Rachel H. Wood, Court Reporter and Notary Public, at Probate Court, Greenville County Square, 301 University Ridge, Greenville, South Carolina, on the 17th day of September, 2021, commencing at the hour of 9:04 a.m.

REPORTED BY: Rachel H. Wood, Court Reporter

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ALSO PRESENT: Shauna Waddell, Sterling Mensch
Erin Callahan, Brandi Larobardiere, Phyllis
Jones, Terri Anascavage, Jessie Carroll, John
Paul Baum joins at 2:06 p.m.

INDEX

(Petitioner's Exhibit Number 31 entered at close of hearing.)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

THE COURT:

Okay. I think we're ready to get on the record here today. We're here in the Matter of Florence Mensch and we are going to be continuing the testimony today of Mr. Mark Chastain. Before we begin let's plan our day. Ms. Thomason and Mr. Puriefoy, do you have other witnesses you'll be calling today?

MS. THOMASON:

No, Your Honor.

THE COURT:

Okay. And, Mr. McLeod, do you know if you will have any reply witnesses?

MR. MCLEOD:

I do not know at this moment, but I do not expect to.

THE COURT:

Okay.

MR. MCLEOD:

And I have come with a purpose and we're going to go very quickly through Mr. Chastain's --

THE COURT:

Okay.

MR. MCLEOD:

-- testimony.

THE COURT:

All right. When we have finished with the testimony what I am going to do is ask counsel for each side to do a summation. Argue what you believe the damages should be and give me supporting law on it and I'm trying to avoid the time involved in getting proposed orders from each side so that we can get on to Phase 2 of this. So if you will be keeping that in mind. That's how I would like to wrap it once we're ready for that. All the exhibits are over here. Feel free to go over there and use them as you finish up with Mr. Chastain. Make sure all your devices are turned off, please. And with that, Mr. Chastain, good morning.

THE WITNESS:

Good morning.

THE COURT:

Please come up and --

MS. THOMASON:

One thing, Your Honor.

THE COURT:

Yes.

MS. THOMASON:

This is the mysterious black notebook.

THE COURT:

That's the mysterious black book.

MS. THOMASON:

It was produced. All of the documents there were produced to Petitioners in Bates numbers 874 to 1207.

THE COURT:

Okay.

MS. THOMASON:

And so I just --

THE COURT:

All right.

MS. THOMASON:

-- didn't know if you were going to reference it.

THE COURT:

Okay. But it's not in evidence; right?

MS. THOMASON:

It's not.

THE COURT:

Okay. Great. Thank you.

MS. THOMASON:

Well, I guess it's in evidence. We stipulated to --

THE COURT:

The only thing that we're going to have in evidence is the testimony and these exhibits.

MS. THOMASON:

Okay.

THE COURT:

So if anything else needs to be submitted make sure you do that before we end the case. Good morning.

THE WITNESS:
Good morning.
THE COURT:
We've got you some water up here.
THE WITNESS:
We do.
THE COURT:
And so if you run out we will get you some more.
THE WITNESS:
Thank you.
THE COURT:
Okay. All right. Mr. McLeod, you may proceed.
MR. MCLEOD:
Thank you, Your Honor.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. Good morning, Mark.
A. Good morning.
Q. Can you please turn to page 3 of your affidavit for me?
A. Yes, sir.
Q. All right. I believe you testified yesterday that line 3 is made up of –- I'm referring to line 3 of your Summary of Financial Analysis and Findings, and that that is made up of other transfers for the benefit of Sterling Mensch from Ms. Mensch's Bank of America checking and saving account; is that correct?

A. That's correct.
Q. And you said this is made of cash withdrawals, checks written, and Chase credit card payments; is that correct?
A. That's correct.
Q. And for the Chase credit card payments were those payments on Sterling Mensch's Chase credit card?
A. That's my understanding.
Q. Okay. And did he pay his credit card directly from Florence Mensch's Bank of America account ending in 3259?
A. If you look at the exhibit you will see the ones with Chase as the payee then, yes, those were paid directly from that account to Chase.
Q. Okay. And was that Sterling Mensch's credit card that he was paying from Florence Mensch's account?
A. That's my understanding.
Q. Okay. Now, on that same page 3 of your affidavit, let's look at line 6. I think that's the one line that we haven't gone through yet.
A. Uh-huh.
Q. You have Total Expenditures by Sterling Mensch for Ms. Florence Mensch's Benefit. Can you just read that whole description of what that is?
A. Line 6.

Q. Yes.
A. "Total Expenditures by Sterling Mensch for Ms. Florence Mensch's Benefit. These items offset against the transfers and beneficial payments from Ms. Mensch's accounts made by Sterling Mensch."
Q. Okay. And what's your amount there?
A. It is 69,957.13.
Q. And the things you reviewed in coming up with that?
A. Are enclosed in the exhibit. They were from bank statements.
Q. Yeah. Can you read your documents reviewed there?
A. Bank of America statements for Florence P. Mensch ending in 7069, that's obviously a typo, and 2007. BOA statements for Sterling Mensch ending in 3259. Affidavit of John Markel, affidavit of Sterling Mensch dated March 16, 2021.
Q. Okay. And that 69,957.13 that reduces your amount; correct?
A. Correct.
Q. Okay. And then let's turn to Exhibit 6 of your Expert Affidavit. Are you there?
A. I am.
Q. Okay. Thank you. So what is this Exhibit 6? Just give me a brief synopsis of what this is.
A. We have bank statements that have been highlighted

purple or yellow based on Mr. Mensch's affidavit and based on where the money was being spent. So the purple items were the ones that were personally for Ms. Mensch and the yellow items were related to the house.

Q. Okay. And are these transactions all from Sterling Mensch's Bank of America account ending in 3259?

A. That's correct.

Q. Okay. Did you review any receipts for the transactions listed in Exhibit 6 of your affidavit?

A. We do not have any receipts.

Q. Okay. So just to be clear no receipts were provided to you to review to come up with this Exhibit 6; correct?

A. Correct. It was only the bank statements marked.

Q. Okay. So your conclusion that all these transactions listed in your Exhibit 6 are for the benefit of Florence Mensch is that completely based on the representations of Sterling Mensch?

A. And his bank accounts.

Q. Okay. Is that based on his --

A. And -- and examining some common sense analysis. For example, some of them is her prescription, Senior Pharmacy.

Q. Uh-huh.

A. That type of things. You can look on his bank statements and see what's paid and you can look on her bank statement and see that it wasn't paid.

Q. Okay. And when you reviewed John Markel's Report, the latest report, did he come up with some number for things he thought were kind of obviously for her benefit?

A. We would have to look at his report, I don't remember right off the top of my head.

Q. Okay. It's just Exhibit 1. Let me see. (Counsel reviewing documents.) I believe he has an exhibit. Let's see. Do you have that Exhibit 1 in front of you?

A. Is this the right one?

THE COURT:

The second amended?

Q. What's the date on yours?

A. Yes, I think I have it.

Q. Okay.

THE COURT:

It should be August 16th.

THE WITNESS:

Yes, ma'am. Yes, Your Honor.

Q. Okay. Can you review that and see if you can refresh your recollection on whether he gave her credit or gave Mr. Mensch some credit for that?

A. (Witness reviewing exhibit.) I'm assuming you mean in exhibits or in the narrative?

Q. I'm thinking he had a schedule and I'm not seeing it right now.
A. Okay. I'm looking, too. (Witness reviewing exhibit.)
Q. Okay. (Counsel reviewing document.)
A. In his summary I don't see any, but I could be reading that wrong on page 20.
THE COURT:
Appendix L seems to be --
MR. MCLEOD:
There we go. Thank you, Your Honor.
Q. Appendix L.
A. (Witness reviewing exhibit.)
Q. Do you see Appendix L?
A. I do see Appendix L.
Q. And he has certain items listed on there. Rolling Green Village, Geriatric Care, Senior Care Pharmacy, do you see that?
A. I do.
Q. Okay. So would you agree he's giving credit for some of those things that were obviously, you know, for an elderly person?
A. Correct. Yeah. He's giving $3,982.88 credit.
Q. And are those some of the same things that you have in Exhibit 6 with regard to the Senior Care Pharmacy, Geriatric Care, and then a Rolling Green Village

payment?

A. Correct.

Q. Okay.

A. So he had the payments on these dates for these amounts I'm assuming they're perfectly correct.

Q. Okay. And for these other amounts, you know, for example, Home Depot, Ace Hardware, Lowe's, Walmart; how did you determine if those were for her benefit?

A. I would -- because of Mr. Mensch's affidavit and I was given marked up bank statements where he had marked up the transactions and gave them to his attorneys. So I tallied those up and they fall into the whole issue with the house that we've been talking about.

Q. Okay. So, again, these were largely based on the representations of Sterling Mensch; correct?

A. And his bank accounts. That's correct.

Q. All right. In his affidavit does Sterling Mensch say what any of these specific transactions that you list in Exhibit 6 are for?

A. I don't believe so. We can look at it. I think he broadly addresses it.

Q. Okay. I think his affidavit is -- let me see the exhibit, 28.

THE COURT:

28.

MR. MCLEOD:
28. Your Honor, I'm going to grab it.
THE COURT:
Sure. Please do.
Q. So I'll hand you Exhibit 28.
A. Yes, we have the same thing.
Q. You've got it?
A. Uh-huh.
Q. Okay. Well, here. Let's go ahead and use the actual exhibit.
A. All right.
Q. All right. So in coming up with this Exhibit 6 what did you rely on in this affidavit?
A. Well, in Exhibit 6 with her care is going to be on the transfer of funds from her retirement account, use those funds for the direct care of Florence Mensch, as well as gifts to all children and their spouses. I put in over $100,000 of my own money improving the property, including but not limited to pool, theater room, fencing, counter tops, cabinets, landscaping, bonus room. And that was also extended to the other. Like he put the bonus room in over a period of time. So there were a lot of these expenses into these other improvements in the house that went on after he moved in.

Q. Okay. Is there -- so would you agree these are -- this is very general? This is not saying this transaction --
A. It's broad.
Q. -- on this day was for this; is that correct?
A. No, those are not written in the affidavit.
Q. Okay. All right. In your Exhibit 6 are there any -- I think you've noted some things as the hail damage. Do you remember that?
A. Say that again, sir.
Q. You have some notes in your Exhibit 6 that refer to hail damage. I believe they're on --
A. Let's see.
Q. It's on 4. Let's see. You've got one noted on 4/24/2017. Do you see that?
A. I see, yeah, on 4/24 Sherwin Williams hail paint.
Q. Okay.
A. It could be hall paint.
Q. It looks like hail paint.
A. Yeah, right. I agree.
Q. So how about on 6/12/2017?
A. Paint for hail damage. So he must have paid someone. There must have been hail damage done and so he paid those people to take care of it.
Q. Okay. And what is on 6/12/2017, what's that

transaction? What's the amount?
A. Are you talking about Davis Contracting?
Q. It's from Davis Contracting. What's the amount?
A. The amount is 10,262.24.
Q. Okay. And then 6 -- it looks like 6/29/2017. You've got --
A. The amount is $2,000.
Q. Okay. And then on 6/30/2017?
A. The amount is $4,064.88.
Q. Okay. I believe that's all the hail damage notes. So I will hand you what's been marked as Exhibit 4. It has not been admitted into evidence yet, but it has been stipulated as admissible.
MS. THOMASON:
Thank you.
MR. MCLEOD:
That's Exhibit 4. I've got it pre-marked.
Q. All right. Can you review these and then let me know when you're ready?
A. Sure. I'm assuming these are insurance checks is what they appear to be.
Q. Okay.
A. So, yeah.
Q. Who are they from?
A. They are from State Farm. All three of them are from

State Farm.

Q. Yeah. So how many checks are there?

A. There are three.

Q. Okay. And what is the amount of the first check?

A. The first check is April 4th for $19,062.64.

Q. And can you tell me the date on the check?

A. I did. April 4th, 2017.

Q. And then the next check, the second page?

A. Is April 4th, 2017 for 645.75.

Q. Okay. And I'm going to hand you another exhibit. You can keep that one kind of handy in front of you.

A. All right.

Q. I'm going to hand you what's been pre-marked as Exhibit 30. It's stipulated as admissible into evidence.

MR. MCLEOD:

Have you got the copy?

THE COURT:

Do you-all have any objection for 4?

MS. THOMASON:

No, Your Honor.

THE COURT:

Okay. We will go ahead and mark this then Petitioner's Number 4 without objection.

(Introduction of previously marked document

State Farm Insurance Checks as

Petitioner's Exhibit Number 4.)

MR. MCLEOD:

All right. I'll hand you what's been marked as Exhibit 30 and I'll ask that that be admitted into evidence.

THE COURT:

Any objection?

MS. THOMASON:

No, Your Honor.

THE COURT:

Thank you. Petitioner's Number 30 admitted without objection.

(Introduction of previously marked document Sterling Mensch Bank of America Statement March 18, 2017 to April 14, 2017 as Petitioner's Exhibit Number 30.)

Q. All right. Can you quickly tell me what this is?

A. This is a Bank of America statement for Sterling Mensch's account ending in 3259.

Q. Okay. And what's the date on the statement?

A. The date is March 18th, 2017 to April 14th, 2017.

Q. Okay. And this is Sterling Mensch's account ending in 3259; correct?

A. That's what it says, yep.

Q. All right. And on page 3 of this exhibit do you see a deposit there for 20,506.90?

A. I do.
Q. Okay. What's the date on that deposit?
A. That date is 4/5/17.
Q. And what was the date on the checks for the insurance?
A. They are 4/4/2017.
Q. Okay. And can you turn to the last page. There's a deposit slip. Do you see that?
A. I do.
Q. And can you tell me the name on that deposit slip?
A. Sterling Mensch, III.
Q. Okay. And this is his account ending in 3259?
A. It is.
Q. And do you see an amount that matches the checks on that insurance?
A. Yes, two of the checks are on this deposit slip.
Q. And what are those amounts?
A. 645.75 and $19,062.64.
Q. Okay. And does that cover what you have listed in your Exhibit 6 related to hail damage?
A. In terms of the totals matching or in terms of --
Q. The total.
A. I can total it up.
Q. If you want to total it. There's only four of them I think if you want to total them real quickly.
A. (Witness totaling checks.) Let's see. I've got one.

So I've got four checks and they total 16,499.76. Let me write that down.
Q. Okay. What's your total for all the hail damage?
A. 16,499.76. I do have a question.
Q. Yes.
A. Do we know if there was any other -- are any of these other checks associated with this hail damage?
Q. Well, that's for you to decide. I think you're the person that was supposed to determine that in the report.
A. Well, yeah, I was determining what was on the checks, but I don't know anything about the event or these checks.
Q. Yeah, I'm just asking about the amounts that you listed as hail damage.
A. So the checks you asked me to review total that amount.
Q. And what was that amount?
A. 16,499.76.
Q. And how much was received from the insurance?
A. I'll total these. (Witness totaling checks.) 22,434.89 is what the three checks total.
Q. Okay. Does it appear that based on your numbers and the insurance checks that Sterling actually made a profit on that?
MS. THOMASON:

Objection, Your Honor. There's nothing in evidence that even says. We don't have any foundation. We've stipulated to the admissible, but beyond that I mean he can't infer.

MR. MCLEOD:

I'm just asking based on --

THE COURT:

I think --

MR. MCLEOD:

-- his numbers.

THE COURT:

-- what you're doing -- I think what he's doing, Ms. Thomason, is he's adding up figures given to him through your office from Mr. Sterling Mensch and he's designated certain items as expenses for the house as the result of hail damage. And if he failed to mark other items it would appear that he paid out less than State Farm paid on a claim.

MS. THOMASON:

And, Your Honor, that would be a part of Mr. Chastain's calculation, but insinuating that he profited when we don't know all the facts around it and there could be --

THE COURT:

Well, profited in that he got more from the insurance than he paid out for the hail damage.

MS. THOMASON:

Okay. I -- well, I can handle it.

THE COURT:

Okay. So I will overrule that.

MR. MCLEOD:

All right.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. So did Sterling Mensch get more from the insurance that you have listed in your Exhibit 6 as the damages for hail damage?

A. For the four items you referred to it does appear so, but I don't know if that's all inclusive of what damage was caused by hail.

Q. I understand.

A. That event and analysis of that event wasn't in my scope. What is written in here is what came off the check memo.

Q. Yeah. And all I'm asking you is did he receive more in insurance proceeds than you have listed for hail damage in your Exhibit 6?

A. Correct. For those checks that say hail damage?

Q. Yes.

A. Those checks total more than that.

Q. Okay. The insurance checks --

A. Total more than those transactions.
Q. -- total more than your amounts; correct?
A. Yes.
Q. Okay. And you have a number of things for Aquanut Pool Care in here. And I just roughly -- I think they're around 8,000; does that sound close?
A. I think we can go with that.
Q. Okay.
A. I'd have to add them up, but I don't -- why don't we keep going. If I need to add them up can I add them up?
Q. I don't think we need to add them up.
A. Okay.
Q. Are you comfortable it's somewhere in that range of 8,000?
A. I know there's expenditures for the pool and it is on here because it falls in the whole house issue that The Court has got to deal with.
Q. Okay.
A. All of these do.
Q. So these were likely where he's buying chlorine and things like that; right?
A. That would be my understanding.
Q. Yeah. And there's almost a monthly amount in here; is that correct?

A. Yeah, I think a lot people who have pool service that they have to deal with it monthly.
Q. Okay. (Counsel reviewing documents.) Do you see the transaction on 12/21/2015? And there's actually -- there's three there so I should say do you see the cash withdrawal on 12/21/2015?
A. Correct.
Q. How much is that cash withdrawal?
A. $2,000 on 12/21/15.
Q. Okay. On 12/26/2017 you've got a transaction there for $248. Who is that to?
A. On which date again, sir?
Q. 12/26/2017.
A. The Mr. Knickerbocker check?
Q. Okay. How much was that for?
A. It was $248.01.
Q. Okay. All right. I'm going to move on to another exhibit, so you can set that aside.
A. Okay.
Q. When you reviewed the Bank of America statements for Florence Mensch, her accounting ending in 3259 (sic), did you see a transaction on April 23rd, 2018 for 259,000? Do you remember that transaction?
A. Do you have the bank statements?
Q. We can get them. Yeah, I will show you Exhibit 22,

which is a Bank of America statement. And this one has actually already been admitted into evidence. I'm just going to grab Exhibit 22.

MS. THOMASON:

I'm sorry, Tyler. What month is the bank statement?

MR. MCLEOD:

This is April 6th, 2018 through May 7th, 2018.

Q. I'll hand you what's been marked as Exhibit 22.

A. Yes, I see it.

Q. Okay. Do you see that transaction for 259,000?

A. I do.

Q. Is this from Florence Mensch's account ending in 7059?

A. Yes, it was deposited into that account.

Q. Okay. Do you know where it was deposited from?

A. It seems like I believe this was deposited from the UBS account.

Q. All right. And the next one. This is in evidence. I'm going to hand you what's already in evidence as Exhibit 21. I did make some copies of this.

THE COURT:

Is this already in?

MR. MCLEOD:

This is already in evidence.

Q. All right. And can you tell me what that statement is?

A. This statement is a UBS Retirement account statement

April 2018. Account name Florence Mensch Rollover IRA.
Q. Okay. And in that statement do you see the transaction for 259,000?
A. Yes, there's a summary of it on page 1 and the actual cash activity on page 3 I see it as well. And, again, on page 4.
Q. And you may have already said this, but on Exhibit 22 what was the date that the amount hit the account?
A. On Bank of America?
Q. Yeah, go back to the Bank of America.
A. All right. It's $259,000 and the date of deposit was 4/23/18.
Q. Okay. And I believe on page -- on Exhibit 21, page 5 of 6, do you see the date?
A. Correct. It's April 23rd for 259,000 to her Bank of America account.
Q. Is that April 23rd, 2018?
A. Yes, sir.
Q. Okay. All right. I'm going to show you what's been marked as Exhibit 29. It's stipulated as admissible into evidence, but not yet admitted.
MR. MCLEOD:
So I'll hand you Exhibit 29 and ask that that be admitted into evidence.
THE COURT:

All right. Any objection, Counsel?

MS. THOMASON:

I have no objection.

THE COURT:

Thank you. Petitioner's Number 29 without objection.

(Introduction of previously marked document UBS Account Statement January 2018 to March 2018 as Petitioner's Exhibit Number 29.)

Q. And can you tell me what this Exhibit 29 is?

A. It says UBS Retirement Account January 2018 through March 2018. The account of Florence Mensch Rollover IRA. So I haven't flipped through it yet but I'm going to say it's quarterly statement.

Q. Okay. And the quarterly date again is what?

A. January of 2018 to March of 2018.

Q. Okay. Let me see. Can you turn to page 5 of that statement?

A. Okay.

Q. At the bottom there there's a date March 20th. Do you see that?

A. March 20th, yes.

Q. And can you tell me what that is?

A. It is where stock, General Electric stock was sold. Her investment was sold. Approximately -- it looks like 28,472 shares, the price of 14.27 a share for an

amount of 406,255.80.
Q. Okay. So do you agree about one month after this sell Sterling Mensch transferred 259,000 of the UBS Retirement funds to Florence Mensch's Bank of America account ending in 7059?
A. Yes, I mean in April of 2018 he transferred 259,000. Yes, sir.
Q. Okay. And there was some stock sold on March 20th; correct, of 2018?
A. That's correct.
Q. Okay. And the amount of that stock again, what was that?
A. The sale amount or the number of shares?
Q. The actual proceeds from the transaction?
A. The proceeds were 406 -- $406,255.80.
Q. Okay.
A. And it appears it just went into cash.
Q. Okay. Can you tell from this statement if that resulted in a liquidation of the GE stock? Was there any remaining after that?
A. (Witness reviewing documents.) I don't see any additional stock on this statement. I don't -- it looks like it all went into cash.
Q. Okay. And do you know the date that Florence Mensch died?

A. I do not know that I can tell you right off the top of my head. It was April.

Q. Okay. You testified three days after April 23rd I think?

A. Whatever number of days. I mean that date –– was her date of death in April?

Q. Okay. Yeah, and you may not –– my question may have been a tough question because I said, you know, three days before she died did Sterling transfer 259,000 to ––

A. Yes, so whatever that date prior to that I'm good with that.

Q. Okay.

A. I agree that's her date of death.

Q. April 26th, 2018; is that correct?

A. Yeah, that's –– I don't have that in front of me anymore, but, yes.

Q. Okay. And so three days before Florence Mensch died on April 23rd, 2018 Sterling Mensch transferred 259,000 of the 409,652.44 that was in the account from Florence's account, UBS Retirement Account, to the joint account; is that correct?

A. To her account, yes.

Q. To Florence Mensch's account?

A. Right.

Q. And was Sterling a joint owner on that account?
A. That month? What's the month?
Q. We're in 2018 at this point.
A. Yeah, whatever the title is absolutely.
Q. Okay.
A. The page I have doesn't have -- it just says Florence Mensch at the top, but you probably have the very first page.
Q. All right. Then you were discussing the drop in GE stock with Respondent's counsel some yesterday. Do you remember that?
A. Yes, I was answering questions about it.
Q. Okay. Is this sale after the stock after had dropped substantially?
A. Is the -- we said it lost -- I'll tell you. The change in market value during these three months was -- it lost 90,586. I'm reading that from the front of the document in the lower right corner. In front of the UBS statement.
Q. Do you have John Markel's Report, Exhibit 1?
A. I think. I've got me a little desk up here. Okay.
Q. In John Markel's Expert Report if you'll turn to I believe it is schedule -- it's the very last schedule. Appendix O.
A. Appendix O?

Q. Yeah, I believe it's on page 41.
A. Oh, here we go.
Q. It starts on 41.
A. Okay. I'm there.
Q. All right. Can you tell me what this appendix is?
A. The title is The Estate's Monetary Losses Resulting from the Failure of Sterling Mensch, III to Diversify the Assets of Ms. Mensch.
Q. Okay. And can you turn to page 42 for me?
A. Okay.
Q. And do you see his chart in the middle of the page?
A. I do.
Q. Do you see on 12/31/2015 the General Electric Company, how many shares are there?
A. General Electric there are 33,447.778.
Q. Okay. And what is the share price?
A. It's $31.15.
Q. And what's the value of the holdings?
A. The value of that line is $1,041,898.28.
Q. You say the loan, but this is stock?
A. Say it again? I said that line.
Q. Oh, you said line.
A. Line. I'm sorry. I'll try to be more clear. Yeah, line.
Q. Okay. So the total value on 12/31/2015 is

1,041,898.28; is that correct?
A. That's what it says.
Q. And then by 2018 on the date that this stock was sold what was the amount again? I think it 400 –- 406,000. I'm sorry 409,652.44; is that correct?
A. I agree with you. Yes.
Q. All right. Thank you. And have you reviewed John Markel's analysis in this Appendix O?
A. No, I have not.
Q. Okay. Do you have an opinion on how you would value the drop in this stock assuming that it was a lack of diversification? How would you value the damages on that?
A. Well, first of all, the drop in the stock is a drop in the stock. I mean it dropped for everybody that owned it.
Q. Yeah.
A. Who owned it on those dates and times that it was dropping. So –- and I'm not –- I mean I wasn't –- I don't have the information to evaluate any damages. I would need all the information about did he have the authority to do anything about it.
Q. Yeah. Without going into liability on it how would you value that? Is there a method that you've used in the past?

A. Well, we would have to take into account where the stock was prior to it. All of the amounts that were taken out. So, for example, you just -- when you asked me about the change in value there were also distributions taken out. So not all of that change in value was due to a decrease in the value of the security.
Q. Okay.
A. They also took money out.
Q. And I'm just asking not about this specifically, but in general how would you value something like this? Have you ever heard of the Yardstick Method?
A. I've heard of the Yardstick Method. There's also looking at what the damages would -- you know, you have -- there are other cases where people are recommended to take a course of action and say a trustee doesn't take that course of action and the asset is devalued, you can go back and look at what its historical growth trend was. You can use present value analysis. There's a number of them available.
Q. Is the Yardstick Method an acceptable method?
A. I think it's one of the acceptable methods.
Q. It is. Do you know if it's based on learned treatises?
A. I'm sorry?
Q. Is it based on learned treatises? Is it based on --

has it been used for a long time?
A. That's my understanding, yes.
Q. Okay. So if you were asked to do this analysis would you use the Yardstick Method?
A. I would probably use several different methods.
Q. Okay.
A. And then give them weight as to how relevant each one of them is. It's similar to valuing a business.
Q. Okay. But the Yardstick Method would be an acceptable one?
A. It can definitely be one, yes.
Q. All right. And I believe you testified yesterday you have some financial expertise; is that correct? I don't remember your exact statement.
A. Uh-huh.
Q. But you have --
A. Correct. Yes.
Q. What are just your general qualifications on --
A. I mean I have a degree in finance. I have 29 years of practicing as a consultant specialist, contract CFO, 15 years of doing litigation support.
Q. Okay. So in your expert opinion is it prudent to keep the majority of an elderly person's money in one stock?
A. Are we talking about this case or are we talking about in general?

Q. In general.
A. In general, you know, people have to have asset allocations that they're comfortable with and we typically find in older people that you would want to get them to a situation where they're more diversified, but they make their own decisions.
Q. Do they make their own decisions if they're not competent?
A. Well, unfortunately they do. We have personally dealt with the issue because Alzheimer's and dementia and all those things, they don't come on like a car wreck. So there's a continuum there and unfortunately it's hard -- you know, every situation is different and people don't recognize it most of the time until it's far too later. It's a very, very difficult situation as everybody knows that deals with it.
Q. And if a person is incompetent or incapacitated is it, their Power of Attorney if they accept that appointment, it is their duty to diversify assets?
MS. THOMASON:
Objection, Your Honor. I think this I beyond the scope. It's legal.
THE COURT:
That's a legal conclusion. Sustained.
MR. MCLEOD:

All right.
Q. In your expert opinion in this case do you think it was prudent for Sterling Mensch to keep the majority of Florence Mensch's stock in one stock?
A. I can't really comment on it. I don't have all the other information.
Q. Okay. All right. I'm going to turn back. This is when I'm very close to finishing, but turn back to your page 3 of your affidavit.
A. I'm there.
Q. All right. We've gone through all the lines 1 through 6; is that correct?
A. I believe we have.
Q. And then what are your –- what's your line 7?
A. No costs for any tax related issues or losses are included in this report. More information is needed to determine a calculation of these issues.
Q. Okay. So why did you not calculate the damages from the taxes?
A. If you look on the second, the next page, I did. I took the high number I got from you in your office and included it. But it's subject to change because my understanding from our meeting in your office was that we are appealing penalties and interests so there's going to be a final yet to be determined amount. But I

took the maximum amount.
Q. Yeah, we're talking about taxes that are owed by the Estate. That's what you're listing in your next page; is that correct?
A. Well, it's the -- those taxes -- I'd have to look at the return to tell you if they're owed by the Estate or if they're owed by Ms. Mensch. Either way they have to come out of these funds would be my assertion.
Q. Okay. But I'm talking about calculating damages for the amount of damages from liquidation of retirement accounts, mismanagement of the funds.
A. Uh-huh.
Q. Did you go into any kind of analysis on that?
A. No, because I hadn't -- a couple of things. Number one, and I think we covered it as well in our conversation is the tax itself had to come out no matter what. So any money coming out of the retirement account was going to be subject to income tax paid by Ms. Mensch while she was still alive in her tax rates.
Q. But there were amounts taken in addition to the amount that had to come out; correct?
A. Correct. And that -- is your basis in asking me that saying that no one should ever take out more than the required minimum distribution?
THE COURT:

Let him ask the questions.

THE WITNESS:

I'm sorry, Your Honor.

Q. Yeah, I'm just asking did you perform an analysis on -- not based on the facts, but the fact that there was more taken out than was required that year?

A. No, there is no analysis about that at all.

Q. Okay. Do you disagree with how Mr. Markel calculated the taxes in his Amended Affidavit and Report?

A. Do you offhand know what appendix that's in?

Q. He goes through some analysis starting on page 2. So let me see. (Counsel reviewing documents.)

A. Which line?

Q. I'm looking for it. Go ahead and review it and see if you can.

A. Okay.

Q. Because you have reviewed this report; correct?

A. I got this report when I came here.

Q. Okay. So you haven't reviewed this exact report?

A. No, this one was updated and I didn't get that until I came here.

Q. Okay. (Counsel reviewing documents.)

A. (Witness reviewing exhibit.)

Q. All right. I believe it starts on 18. And it says Row 2 Appendix D, but you can look at paragraph 18. He

goes through a summary.
A. (Witness reviewing exhibit.)
Q. That's actually page 5, paragraph 18.
A. Yes, I'm reading it. (Witness reviewing exhibit.) Appendix F is what it says. Appendix F.
Q. I want to make sure you're looking at the right report. Mine says Appendix D.
A. Section 18?
Q. It's page 5, paragraph 18.
A. Right. So paragraph 18 has three lines on page 5. So it says Appendix D comprises the avoidable income taxes generated by IRA distributions to Ms. Mensch in excess of the amount of mandated minimum requirement distributions for the particular year. And then it goes on Ms. Mensch -- then it comes down. She incurred -- the last sentence Appendix F in this report shows how I derived Ms. Mensch's excess income taxes in the amount of 163. So I think it's probably two -- both appendix items.
Q. Okay. Yeah.
A. Yeah. And then -- so D is a summary.
Q. Okay. You've got Appendix D.
A. And F. So you're talking about Appendix F is avoidable income tax?
Q. Yeah.

A. Well, I do disagree if that was your question.
Q. That's my question.
A. Yeah, I disagree with it.
Q. Why do you disagree?
A. Because we discussed some of this yesterday. We have years where the requirement in the distribution and her income from her pension and her Social Security and then she gets a little bit of interest income, which most of it is tax reported, not cash received. And so it wouldn't cover all of her expenses. And then when we add the gifts into it in order to cover the gifts that they all three received you would have to have more than that and I have a particular notion in cases like this and people are in situations where they have care and things like that, that determining anything that above the required minimum distribution is somehow a wrong way to manage your finances I can't say that for people. That's their decision to make.
Q. Is there a benefit to keeping the money in a tax deferred account for as long as possible?
A. It depends on whether you need the money or not.
Q. Do you know how much she was getting in Social Security and pension?
A. It's in our numbers, but the pension was roughly 1,400 and I think the Social Security is around 1,500.

Q. Okay.
A. Something like that. So, you know, that's about 3,000 a month. And we know that her other expenses just to live were a 40 to $60,000 range a year plus she had to pay taxes. But she also because the gifts were given taxes had to paid out on those gifts as well.
Q. Yeah, I think you're making a liability argument more and I'm just asking the analysis of --
A. Yeah, but I disagree with it because he's just saying that -- what this page is telling me number one, I don't see where he's got the required minimum distribution listed. I'd like to know what that was for each year, but I don't see it anywhere.
Q. Well, in his summary on page 5 that Row 18 he goes through his -- how he came up with up it.
A. Okay. Where is the summary again?
Q. Okay. It's page 5, paragraph 18.
A. Okay. Right. I mean he's basically saying that the income taxes were avoidable simply because they were more than the required minimum distribution.
Q. Okay. And he says a lot more. Do you want to just read that paragraph and that may give you a good idea?
A. You want me to read the whole paragraph?
Q. You can read it to yourself.
A. Yeah, I have. I was actually going to pull out

something we just talked about.
Q. I'm just asking you to focus on his report and --
A. Okay.
Q. -- how he came up with it.
A. All right. So we're on 18, Appendix D. It shows the avoidable income taxes and it says then that on Appendix -- he said --
Q. Let's just start from reading -- read for me on page 5 that paragraph 18. Can you read that for me?
A. Sure. "Row 2 of Appendix D comprises the avoidable income taxes generated by IRA distributions to Ms. Mensch facilitated by Sterling Mensch, III in excess of the amount mandated for minimum required IRA distributions for a particular year. Under Treasury Regulations 1.408-8 Ms. Mensch like all other tax payers over the age of 70-1/2 were obligated to make a required minimum distribution of the aggregate at the beginning of year balances in all of her IRAs. Note: Ms. Mensch reached the age 70-1/2 in 2003. The amount of the required minimum distribution would be based on a formula tied to her actuarial remaining life expectancy. However, in years 2011, 2012, 2015, 2016, and 2018 Sterling Mensch, III caused Ms. Mensch's IRA distributions to exceed the required minimum distribution in those years. It should also be noted

that other liquid assets in Ms. Mensch's portfolio could have been used to cover her living expenses as well as to satisfy the specified required minimum distribution. As an unfortunate consequence Ms. Mensch incurred state and federal income taxes during those years for which she otherwise would not have been obligated, but for the actions of Sterling Mensch, III (in ciphering off the proceeds for his own benefit). Appendix F in this report shows how I derived from Ms. Mensch's excess in avoidable income taxes of $163,420 along with the associated pre-judgment interest of $37,107 through August 17th 0f 2021."

Q. Okay. And if you were going to make this analysis as an expert, you know, if you were asked to make this, how would you go about it?

A. I would have to do a cash flow of everything that went in and out and look at all her personal expenses and all of her financial obligations less the income sources she has outside of the retirement account.

Q. Okay. But just based on the facts as they're laid out here how would you go about determining that absent liability and all that stuff? We're talking about how your method for doing it.

MS. THOMASON:

Objection, Your Honor. I think that's been asked and answered a couple of times.

THE COURT:

Yeah, Mr. McLeod, I think he answered that. Tell me what else you're thinking. I mean he said he would have to know all of her income, all of her expenses, all of her assets available to help defray expenses to determine if more than the RMD would be required to get her through any individual year. So what are you asking him to do other than make those calculations to determine if they are indeed were sufficient or if he -- if she needed excess.

MR. MCLEOD:

I think I'm just asking for his -- and that's pretty much it. He's kind of saying in general that's how he would determine it.

Q. But once you get there then how do you -- do you have a method? Would you use the actuarial table? Would you use, you know, what is your method?

A. Okay. To determine the RMD you can use the actuarial tables. The good thing about this particular case is the RMD is on all the statements. And what seems to be not evident in his report and probably why I disagree is number one, he never says what the RMD is. Number two, he never says what her expenses were and number three, and this part is really important, Counselor, the RMD is declining rapidly based on what's being taken out. So that's why I feel like it's an arbitrary thing because if you take out 100,000 –- if you're going to take out $60,000 to pay gifts you're really taking out 80 or $90,000 when you include the tax. And so if the gifts are paid it had to come out of the –- the retirement account because she had no other funds to pay the gifts. Everyone got their gift. No one gave the gift back. So in this specific case how do we make a judgment that the gifts were wrong?

Q. Okay. Well, we'll go into that. So we talked yesterday about who made those gifts. Who signed those checks.

A. Correct.

Q. Who was that?

A. Sterling Mensch.

Q. Okay. If she was running low on money and needed the money why is he making gifts?

MS. THOMASON:

Objection, Your Honor.

MR. MCLEOD:

He's bringing it up.

MS. THOMASON:

He doesn't have that knowledge about why he's making them. He just knows he did and who received them.

THE COURT:
Okay. I will sustain it in that I think the proper question would be in your expert opinion would it be wise to give gifts for a person in her circumstances and have him answer that as an expert financial person.
MR. MCLEOD:
Okay.
Q. She said it perfectly. Can you answer it?
THE COURT:
Just pretend he asked the question.
THE WITNESS:
Okay. Gotcha.
Q. Yeah, that question. She said it, too.
A. Yeah, she did do it. She's really good. All right. So there's -- there's still more things in there like I don't -- other than the --
Q. Just answer that question first.
A. Well, I am.
Q. Okay.
A. It's simple. And the facts in this case that I've been exposed to I actually don't know much about her health other this issue of dementia and everything. So whether it's wise or not I don't know. I will give you this one definitive thing that's very specific to this case and it's very important and that is the retirement

accounts were titled with the Estate to be the beneficiary. So as I said yesterday the big problem is you're taking a huge tax payer cut right off the top because it's not titled with the children as the beneficiaries.
Q. Well, we're getting --
A. So that's really important.
Q. We're getting to the -- but you're expert, so we can talk about it, the Secure Act. That kind of changed things. You know about the Secure Act; right?
A. Yeah, I've heard about the Secure Act. Yes.
Q. Okay. So you do still get some deferral, it's just not as good as it used to be; is that right?
A. Yes, but that's not what I'm speaking of. Correct. Currently now is like five years. Some are of the lifetime beneficiary. It depends on which year they died, but it can be a short as five years you've got to liquidate that.
Q. Okay. But it can be ten years; correct?
A. It can be. It all depends on the date of death and whether this is person was a spouse or a child. And there's just some conditions laid out. The point I'm actually making though is this beneficiary as I understand it the Estate is the beneficiary of the IRA.
Q. Okay.

A. So, therefore, it's going to not -- it's going to pay income tax very simply. $12,500 and above it's 37 percent. So that's higher.
Q. But there's at a least a five year deferral for --
A. Yes, there -- there would be.
Q. And there are work-arounds where you can get it to be a ten year? Are you aware of those?
A. Yeah, all that can but the tax rate won't change.
Q. But you could defer it for ten years; is that correct?
A. Correct. Yes, I agree with you that there are circumstances that allow that, but the rate will not change. It will still be higher than probably these individuals' personal income tax rates.
Q. So they would not have had to pay tax right when Ms. Mensch died; right?
A. Correct.
Q. They would have gotten another deferral; correct?
A. Correct.
Q. Okay. And, again, now I'm going to butcher the question because she said it so beautifully and I --
MR. MCLEOD:
Do you want to ask him again, Your Honor?
THE COURT:
No.
THE WITNESS:

Well, okay, I might be a little lost.
Q. In your expert opinion is it wise or advisable to transfer or --
MR. MCLEOD:
Your Honor, can you ask him?
THE COURT:
No. I'm sorry. You've got to do it.
Q. All right. In your expert opinion is it wise to make gifts if the person is in need of money?
A. Yeah, if they're in need of the money, no. That's not wise.
Q. Okay.
A. That's common sense.
Q. Okay. I did butcher it, didn't I? All right. We're going to finish up now. Number -- we've got one more -- well, we have two more. Line 8 of your page 3 of your affidavit.
A. Line 8?
Q. Yeah, your line 8.
A. Correct.
Q. What does that say?
A. It says, "No interest is included in this report and will be added once final amounts are determined."
Q. Okay. And what are you speaking to there?
A. I'm speaking to that I have included no interest for

anything under any reason in this report because it will be up to The Court to determine it and then once we know that could be added to this.

Q. So once the final amount was determined there would be some interest amount?

A. Right. In other words, I wasn't making any determine of that. That wasn't my role in what I was asked to do, but I felt like it needed to be addressed so that's how I addressed it.

Q. And in other cases for in your expert opinion is there usually some interest amount on damages?

MS. THOMASON:

Objection, Your Honor. We've ruled on the interest.

THE COURT:

We've ruled there's not going to be any pre-judgment interest. Is that what you're talking about?

MR. MCLEOD:

Well, I'm just going over his report what he means right now. I mean this is his Expert Report that I'm asking about right now, but I will probably get into that area and I want to just go ahead and can I proffer that testimony?

THE COURT:

Under proffer you can.

MR. MCLEOD:

I'll proffer when I get to that point. I'm just asking him about why he had this in his report and I'm going to get into why and it's probably going to get into that area, so.

THE COURT:

Okay.

MR. MCLEOD:

I mean I –- I think –-

THE COURT:

And you're looking at number 8 and my I understanding is that he hasn't included any interest because he doesn't know how to compute interest because the final amount is what we're all here to try to figure out.

MR. MCLEOD:

And he's saying that some will be added once final amount is determined.

THE COURT:

Right. If The Court awards it.

MR. MCLEOD:

Yeah.

THE COURT:

Yeah.

MR. MCLEOD:

And I think part of –- and I don't want to get back in –- and I'm not going get back in the pre-judgment interest argument, but in general I think –- I think it's going to be hard to actually get to making the Estate whole or what it would have been without addressing some interest figure. I think that what he's saying is once we have that damage number then that could be determined.

MS. THOMASON:

Your Honor, there's no –- there's no evidence there and if interest has been –- pre-judgment interest has been determined then this line of testimony is just –-

THE COURT:

When you say –- when you're talking about interest do you mean if –- if this had been handled properly from the beginning and there was more money left to administer in her Estate than what was available, she would have earned interest on the money that went for uses other than for her benefit. There would have been interest accumulating in some account for those funds and you're trying to figure out what that would have been if we –- if it had all been handled correctly; is that what you're trying to get to? Like compounded interest in a checking account or interest in the retirement account if the withdrawals hadn't been made; is that what you're trying to get to with the interest?

MR. MCLEOD:

If that's what he means. That's what -- I'm trying to ask him what he means in his report by that.

THE COURT:

Okay.

MS. THOMASON:

Mr. Markel was asked on the stand in his report he did no analysis --

THE COURT:

I remember that. He didn't do an analysis about lost interest just from the non-use of the funds. He didn't -- he didn't know what that was. I do remember him testifying that he didn't make an analysis on that.

MR. MCLEOD:

Okay.

THE COURT:

So we know that pre-judgment interest is not coming in except under a proffer. He is saying he can't compute -- well, once you -- ask him what he means by when he used the word interest in number 8.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. What do you mean when you use the word interest in number 8?

A. I mean the net beneficial payments of Mr. Mensch once The Court decides what that is and they assign a rate of interest or an amount or anything of that nature

that can be added here.
Q. And what type of interest rate are you referring to?
A. The statutory interest ordered by The Court once they say this is it. And I will tell you the reason these are in here is because when I did these and I reviewed Mr. Markel's report for the benefit of the people receiving the report and ultimately The Court, we have to look down and say, "This person said these things. This person said those things." So I'm not leaving them off and not addressing them. I wanted to include them with a brief explanation and say that, you know, it can be dealt with later. But what I meant was it is not pre-judgment interest at all. It would be any interest that The Court says needs to be paid by Mr. Sterling Mensch or a rate or a methodology that needs to be applied.
Q. And in your affidavit I think you kind of address it right there in number 9 of your affidavit, paragraph 9, it's on the next two pages over.
A. Number 9. Paragraph 9.
Q. Yeah. You see paragraph 9 on -- there's no page numbers on this. If you go from your page 3, 4, 5 of your affidavit.
A. Okay. Yeah, here we go. Nine, right.
Q. Yeah. Can you read that one?

A. Yes, "I excluded any treatment of tax issues as there is more information needed to determine the costs that may have been caused due to Mr. Mensch's actions and I exclude the computation of interest on any losses or damages. They can be calculated when the final amount is determined based on statutory rates."

Q. All right. So what are you referring to by statutory rates?

A. If The Court -- whatever The Court were to award or whatever South Carolina is going to say the statutory rate needs to be that can be added to this as a part of it. It's not included in what I've presented.

Q. Okay.

MR. MCLEOD:

And, Your Honor, the next part I'm going to get into is probably proffer.

THE COURT:

Okay.

MR. MCLEOD:

So I'll just said this is under proffer.

THE COURT:

All right. Thank you.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Let's see. So you're talking about statutory rates there. Do you mean -- do you know the section of the statute? Is it the legal rate of interest statute?

A. It will be whatever the rate is that The Court determines. You know I'm not a lawyer and I'm not -- we can look it up. Typically those things I have looked and whom ever I'm working for and they'll tell me, okay, it's going to be this rate or we're going to see what the judge says and that type of thing.

Q. Okay.

A. So it just simply hasn't be calculated because it's got to be determined.

Q. But when you say statutory rates are you referring to the legal rate of interest? What other statutory rates are you referring to?

A. Yeah, I guess that would be the legal rate of interest.

Q. Okay. And I believe you stated earlier that you relied on John Markel's affidavit dated February 12th, 2021; is that correct?

A. Yeah, I reviewed it. It was one of the documents.

Q. In that document did it have pre-judgment interest calculated?

A. Yes, he has pre-judgment interest calculated in several places I believe.

Q. Okay. So in coming up with your report you knew that pre-judgment interest was an issue; correct?

A. No, I was -- I was excluding pre-judgment interest from

the beginning. There was -- it was how to figure out how to make the Estate whole. I excluded anything to do with any interests whatsoever.
Q. But you saw that it was in John Markel's Report; right?
A. I did.
Q. Okay.
A. Right.
Q. And did he calculate amounts of pre-judgment interest at the statutory rates?
A. I don't know. I haven't -- do you want to look at it?
Q. You can look at it.
A. (Witness reviewing report.) Do you know which paragraph?
Q. Let's see. (Counsel reviewing report.) And which report are you looking at?
A. I'm looking at Mr. Markel's --
Q. Is it -- what is the date on it?
A. August 16th, 2021.
Q. Okay.
THE COURT:
What are we looking for, Mr. McLeod?
MR. MCLEOD:
We're looking for pre-judgment interest.
THE COURT:
Well, he's got it -- Appendix N. He's got it on a

chart from 2013.

THE WITNESS:

On N?

THE COURT:

And then he has it of course on Appendix E. Each line has one.

THE WITNESS:

Yeah, he's got it throughout all of these.

MR. MCLEOD:

Yeah, I'm looking for his analysis just how he calculated it.

THE WITNESS:

That's what I was looking for. I don't see one on just interest. (Witness reviewing exhibit.)

MR. MCLEOD:

(Counsel reviewing report.)

THE WITNESS:

It looks like it's just subtotals from the end result of his calculation.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Okay. It's in almost every paragraph.

A. That's what I was saying

Q. So I think we know what he's using to calculate it, but do you see pre-judgment interest kind of throughout the whole report?

A. Correct. I don't see anything separating it out, but, yes, he has that included.
Q. Okay. And would you agree he was using the statutory rates to calculate that?
A. Oh, I'm assuming he would be, yes.
Q. Okay. And when did you start reviewing John Markel's Affidavit? What kind of --
A. Maybe the first one I saw was in March and it was -- because he had two at the beginning. I don't know I have it exactly right. I think there was one on February 12th-ish. And there was one that was amended from that, so I think the amended one from that is what I used in the beginning and then I -- we discussed that one in your office right before trial and then this one came out and I have not gone through this in detail here, you know, in This Court.
Q. Okay. (Counsel reviewing documents.) All right. In Exhibit 1, his Expert Report, can you turn to number 16?
A. 16?
Q. Yeah.
A. Okay.
Q. That's paragraph 16 of his affidavit. Are you there?
A. Yep, I see it.
Q. Can you read that?

A. Sure. "The South Carolina statutory rate of pre-judgment interest is set each January on a year-by-year basis by order of the South Carolina Supreme Court. Simply stated the rate is based on the earliest published January prime rates plus four percentage points. For judgments entered into during the time frame of January 15, 2021 through January 14th, 2022, the statutory pre-judgment interest rate was set at 7.25 percent. So, I used 7.25." Yeah. I agree with that.
Q. Okay. And the last thing I want to go back to page 3.
MR. MCLEOD:
I'm going to end my proffer right there.
THE COURT:
Okay.
MR. MCLEOD:
If that's all right.
THE COURT:
Thank you for noting that.
MR. MCLEOD:
Yes, Your Honor.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. Okay. Let's look at the last line. We've gone through all these lines. Let's look at 9.
A. Uh-huh.

Q. What does 9 say?
A. It says, "The above calculations do not reflect any share from the Estate."
Q. Okay. And what do you mean by that?
A. I mean that all of the -- everything on this one page doesn't take into account if Mr. Mensch has anything, any share of the Estate payable to him or due him.
Q. Okay. But then you go through a calculation on the next page; right?
A. Yes, sir.
Q. In that calculation you list the assets of the Estate; is that correct?
A. Yes, sir. That's correct.
Q. And you list there it's line 4 of that page. It's the page right after page 3. This would be page 4. You said UBS IRA.
A. Uh-huh.
Q. And what's your amount there?
A. 153,864.24.
Q. And I believe you testified earlier that there's going to be some tax on that amount; is that correct?
A. There will be tax on all the amounts.
Q. Okay. Do you know what that might be taxed at?
A. It's going to be taxed at the 37 percent. Well, are you going to take it all at one time?

Q. It probably -- I don't know exactly. But let's assume you take it out all at one time.
A. Yeah, so if it's all at one time then we will subtract 12,500 and multiply it times 37 percent.
Q. Okay. Is that the highest rate of interest?
A. That's the tax rate we're talking about.
Q. Tax rate. Is that the highest tax rate?
A. Well, that's the tax rate for estate income. So it's just a $12,500 threshold and above that it's that amount.
Q. Okay.
A. Yeah.
Q. So it would be around 37 percent you think?
A. Yeah, it would be -- well, I went and looked it up as of 2018 to be clear. When I say 30 something percent I'm talking about, you know, in 2018. So it could be a little bit different now. I just need to look it up. I don't think it is, but --
Q. Okay.
A. -- I don't know.
Q. But in general trust income, estate income is usually taxed at the highest rate; is that correct?
A. I looked -- I looked it up and 37 percent was the federal rate over 12,500 in income for estate -- for income to estates.

Q. Okay.
A. Yeah.
Q. That applies if an IRA is payable to an estate?
A. Correct.
Q. Okay. So the actual amount there is going to be much less; is that correct?
A. Than the 153?
Q. Yes.
A. Yes.
Q. Okay. And we aren't going to know that exact amount until it's actually taken out of the higher rate; is that correct?
A. Correct.
Q. Okay. And on Sun Trust you list an amount there. What date did you have that number, that 119,000?
A. So I got it early from you on Thursday before trial because we didn't have it prior to that. And then I think Friday Ms. Thomason was sent some documents. So I can look those dates up, but it would have been those dates or the month end right before.
Q. Okay.
A. Do you have those?
Q. All I'm asking that amount is probably going to change; correct?
A. Yes, I'm assuming you've got to -- you've got to pay

some stuff.
Q. You've got to pay some attorney's fees; correct?
A. Whatever needs to be paid, yeah.
Q. Yeah. John Markel's expert fees; is that correct?
A. If that's not been paid.
Q. Okay. So the amounts there are going to change; correct?
A. Yes.
Q. Okay. And then number 3, the State Street Non-Probate Account. That's a non-probate account; correct?
A. Correct.
Q. Okay. So that would be -- it wouldn't be in the Estate calculation; correct?
A. Correct. There was a decision because of the cash and expenses I wanted to represent kind of all of the cash that's at stake because there are so many expenses here, plus there could be others coming.
Q. Do you know who the beneficiaries on that account are, the State Street?
A. The State Street account? I'm assuming that it's all three.
Q. It's all three of the children?
A. Each of the children are included.
Q. Each of the children. Are you assuming or do you know?
A. I'm assuming that. I do not -- I'm not looking at that

to tell you that.
Q. Okay.
A. If you've got something for me to look at I can.
Q. No, that's okay. Did we discuss that in our meeting?
A. We discussed it in our meeting and then I believe everybody in the room was familiar with, "Okay, we're going to trial now and it's next week," and so, you know, we all kicked into pretty high gears when we left your office and so you sent that the next day. I took it, you know, right off of there. I mean I started the spreadsheet sitting in your office with you reading it to me.
Q. And when we were sitting there do you remember saying what you thought would be left in the Estate?
A. I remember we discussed it. I can't remember exactly what the amount I said.
Q. Do you remember saying that it would be around or less than 50,000?
A. No, I don't remember that.
Q. You don't remember that?
A. No. I remember asking. I know I was very concerned though. I may have said less than 100, but I don't remember exactly the number I said. You know we had a lot of numbers that we were discussing.
Q. Yeah. And you were sitting there calculating things on

your computer; right?
A. Right. Right. And I might have that in my computer. I really took notes in there. So you could be correct, but I don't remember that that's exactly what I said.
Q. And you've got various expenses there listed that reduce that amount. Are those certain amounts on say federal taxes?
A. Right. I put them in there and then you notice on the expenses I noted that it assumes they're paid but without any respect that changes are going to occur and different amounts to be paid. I expect all of the expense amounts to be different. These were the expenses as I understood them on 8/12/21.
Q. Okay. Do you agree those are -- those could change?
A. I agree now and I agreed then. Yep.
Q. Okay. And line 19 what's your line 19 there?
A. It says, "Add back net damages."
Q. And what's your number there?
A. 473,636.37.
Q. Okay. And so are you taking the net amount from what you have as the assets minus the expenses and the GE pension repayment, that gives you line 18; correct?
A. Yes, sir.
Q. So the difference between line 5 and line -- what is that?

A. 16.
Q. My eyes are failing. 13? 209 -- oh, you're right. Yeah. Line 4 and line 16, the difference between that is 135,205.82 according to your calculation?
A. Right. It's the 291,890.80 less the 156,684.98.
Q. Okay. And then you add that net damages; right?
A. Correct.
Q. That gives you a total Estate value. And then you're splitting -- it looks in 22, 23, 24 you've cut that into thirds?
A. I divided it by three, yes, sir.
Q. Okay. And you've got a share for Sterling Mensch there; correct?
A. Yes, sir.
Q. Okay. And then in line 29 you're adding back the net damages -- or you subtract the net damages from Sterling's share; is that correct?
A. Line 29 I'm taking the net damages from the summary on page 3 and then I'm subtracting out Sterling's share of the Estate for 202,947.40 to come up with the amount we that we need to go back into the Estate based on these -- these numbers of 270,688.97.
Q. So in this this is not calculating a net damages amount; is it? This is calculating a -- where you're giving Sterling a credit; right?

A. Well, you remember it goes back to what needs to go back into the Estate to make it whole and one of things I was trying to accomplish is what's a methodology that I could very simply go through that. And with the whole idea that it's obviously subject to change. That's what I've indicated in all the parts of my report. That based on this information this is how I arrived at the 270,688.97 needs to go back into the Estate.

Q. And then in line 34 through 37 can you go through that calculation?

A. Yes. It was the Estate value before the damage repayment, the 135,205.82 adding back the damage amount that needs to go back into the Estate of 270,688.97 and that would be the total of the Estate left for Shauna and John and then divide that by two. And I'm proofing the 202,947.40 each number. It's just my way of proofing that that number is correct. I'm double checking myself.

Q. Okay. So at the end of the day if this were correct the only amount Sterling has to pay back is that 270,688.97; correct?

A. Under these scenarios and under my chart on the previous page as I -- as the numbers are on there now that would be correct.

Q. Okay. And in your expert opinion does that reflect the actual damages here?

A. In my expert opinion and what I put in my chart is I think there's going to be some additional amounts and, obviously, it's up to –- The Court is going to also make a decision. That's why we're here. This was based on everything that I have in the report, and the summary. I've obviously said I've excluded any interest. I've excluded anything about the taxes. So to the extent that those things change, and obviously, assuming these expenses are the same. If they change it would change. What I do feel like we have here is a really good framework. So back to the question. Yes, for the numbers that I've represented here plugged into this methodology 270,688.97 would be the amount. Am I saying that that is the final amount? I'm not saying that. I've said there are –- there are areas that are going to be fluid and The Court will make that determination.

Q. And number 37 can you read that line for me?

A. Which one?

Q. Line 37.

A. "Per person estate share to be paid to each Shauna and John the line 35 divided by two. This matches the total amount per sibling in lines 22 and 23.

202,947.40."
Q. Okay. But under this analysis you're not saying that Sterling pays them each 202,947.40; are you?
A. No. No, I'm not.
Q. You're saying the total is 270,688.97; correct?
A. Yes.
Q. That's the total amount he would have to pay back?
A. Correct. Based on all the assumptions here.
Q. Okay.
MR. MCLEOD:
Your Honor, could I just have a five-minute break and then I think I'm done.
THE COURT:
Let me ask him one question.
MR. MCLEOD:
Okay.
THE COURT:
And then we'll take a break.
MR. MCLEOD:
All right.
EXAMINATION BY THE COURT:
Q. Mr. Chastain, when you were talking about your amount of damages the 270 and then yesterday you testified that maybe you had made an error about the pool, the 39,000.

A. Yes, ma'am.
Q. Would that change that 270?
A. Yes, ma'am, it would.
Q. And how would it change that? Would you add that to the 270?
A. It would -- it would increase the amount on my chart, page 3.
Q. Right.
A. By that amount and then, yes, ma'am, it would -- all those changes would flow right through. But that way you bring it on that one line.
Q. So if we add 39,000 to 270 would we have what you would project to be the amount based on the numbers used?
A. Yes, Your Honor.
Q. Okay.
MR. MCLEOD:
And, Your Honor, can I follow-up with just one question?
THE COURT:
Okay.
EXAMINATION BY MR. MCLEOD:
Q. In that same chart that we're referring to there with the 39,700 you also said there were other numbers that could be higher or could be lower, it could be anything; right?

A. Well, I -- yeah, I didn't say they could be higher, they could be lower, they could be anything. I mean you said that, but I said that on some of those that they -- they were estimates and they were conservative estimates.
Q. Are you sure you didn't literally say they could be higher or they could be lower?
A. Maybe I did. Maybe I did then.
Q. Yeah.
A. But I know we were having a spirited discussion about it, but, no, those numbers in there are the upgrades and other things that were put into the house.
Q. Yeah. And, again, the pool and the surround sound stereo system that was prior to 2010?
A. Yes.
Q. Yes. It was more like 2007; right?
A. It would have been -- let's just assume that it was -- that was all in there when he moved in.
Q. Okay.
A. I mean I don't have any better way to say it than that.
Q. Yeah. So would you agree that your damage numbers is off; is that correct?
A. Yes, the 39,500 that we discussed.
Q. But do you still think you should count the pool and the --

MS. THOMASON:

Objection, Your Honor. That's a legal. He just took the total and that would be for The Court.

THE COURT:

Right. Right. That's something that we will have to decide as a matter of what fits to the law of the case.

MR. MCLEOD:

All right. That's fine.

THE COURT:

But I believe from just a numbers standpoint given what he was provided to work with he is saying that the 270 should be increased by the 39,000 and change, whatever that was.

THE WITNESS:

Yes, Your Honor.

THE COURT:

Okay. So 40,270 that's 310, something around there.

THE WITNESS:

Yes, Your Honor.

MR. MCLEOD:

Thank you, Your Honor. No further questions.

THE COURT:

All right. We will –- are you going to have some cross?

MS. THOMASON:

I am.

THE COURT:

Okay. All right. So let's take a break till 11:00. So we'll be in recess.

(Off the Record 10:40 a.m. –- 11:06 a.m.)

THE COURT:

You may have a seat. Mr. Chastain, if you will come up and get in your familiar chair. All right. Mr. McLeod?

MR. MCLEOD:

I have no further questions, Your Honor.

THE COURT:

All right. Re-cross. I'm sorry not re-cross.

EXAMINATION BY MS. THOMASON:

Q. All right, Mr. Chastain, I'm going to start with what's precious on everyone's mind just to clarify. In your calculation of the Estate value and damages to be repaid to the Estate in the chart prior. This one is the summary.

A. Okay.

Q. Petitioner's Exhibit 3.

A. Uh-huh.

Q. Petitioner's 3. If you will look at that and you testified a minute ago the 39,000 should come back on. Would you go through the calculation just –- I know

you'll have to use your calculation, I'm sorry to put you on the spot, but I just want to make sure. That 39,000 would be added to that total 473 number; right?
A. That is correct. I mean I don't want to get technical with everybody. Technically we would take it away from that one line, but, yes, we can add it to the total. So 473,636.37 plus -- it was 39,500? Let me look.
THE COURT:
700.
A. 39,700. That would be 513,336.37.
Q. Okay. So then if you go to the next page in your formula how you've got it calculated you would instead of -- where you've that got line 19, add back net damages, instead of 473 it would be that 513 number?
A. Correct.
Q. And so then that would change the total to be divided; is that right? I just want to make sure we've got the understand.
A. Yes, that's correct.
Q. Okay. And so could you run through that all the way to the bottom and see what your calculation is just so we've got it for The Court?
A. Sure. (Witness making calculation) 513,336.37. 135,205.82 which was the Estate value before damages repayment plus 513,336.37 is going to give me a new

total of 648,542.19. Divide that by three. Each beneficiary would be 216,180.73. And I'll take -- on line 29 the 473,636.37 becomes 513,336,37. The 202,947 becomes 216,180.73. So that total is 297,155.64 and that would replace the 270,688.97.

Q. Okay. All right. And so that fully takes into account the 39,700 that would change your number?

A. Yes, it does.

Q. And I'm assuming your number would also change and this is what you meant by fluid is, for example, if they are able to negotiate the tax penalties and interest in?

A. Correct. That will be one of the numbers.

Q. Now, I know that you did not include any tax analysis in the actual report but you did do a summary of tax that you reviewed and it's already in evidence.

A. Correct.

Q. And we've referred to it. Do you have that right there that you can --

A. (Witness reviewing documents.)

THE COURT:

Are talking about Exhibit 3?

MS. THOMASON:

Yes.

THE COURT:

If you don't have it I've got it right here.

MS. THOMASON:
I know we've got you fumbling with papers.
THE COURT:
You can use this one.
THE WITNESS:
Yes, this is the one.
EXAMINATION RESUMED BY MS. THOMASON:
Q. Okay. And on this document you've gone through categories of expenses, taxes, they're totaled and then you included the actual cost for facility expense and medical for each year?
A. Correct.
Q. And then the gifts are at the bottom. Now, the total taxes is the taxes associated with the gifts? For example, 2014 you've got 13,828. Is that number inside of the 28,801?
A. Yes, it is.
Q. Okay. Okay. And so you fully accounted for the taxes each year based on the distribution here?
A. Correct.
Q. Under expenses, taxes, federal, state, total; that includes all taxes associated with the gifts or otherwise?
A. Correct.
Q. Okay. Now, the testimony that you gave that Mr. McLeod

was talking to you about in terms of the RMD and you stated that, you know, you have to see what the person's needs are. So I'm going to show you --

MS. THOMASON:

This was the last exhibit you have I think, Tyler, 21.

Q. It's the UBS April 2018 account statement.

THE COURT:

Is this already in evidence?

MS. THOMASON:

Yes, ma'am. I think it is, Your Honor.

THE COURT:

What number?

MS. THOMASON:

Do you have it?

THE WITNESS:

Exhibit 21?

MS. THOMASON:

Do you have it, Your Honor? Okay.

Q. So now, this is for 2018. I want to refer you back to this for example. I'm sorry. Okay. So for this year only, let's look at it. You said it would decline year to year, but can you tell us what the current RMD was that year?

A. (Witness reviewing exhibit.) The RMD is located on page 4. On page 4 at the bottom right underneath details of your RMD you'll see it says RMD amount was 33,568.67.

Q. And so based on that if Ms. Mensch's expenses just for the facility and the medicals is 62,000 by then, the RMD would never have covered just her --

A. Under that scenario it would not.

Q. Okay. This is Petitioner's Exhibit 2. It has the GE Mutual Funds, UBS, and this would be GE Mutual Funds January of 2015 through December of 2015. It's attached to other -- I'll hand you this copy and you can speak from it. Now, this is a summary it appears. January 1, '15 to December 31 and this is the total portfolio. Well, I'll ask you. What makes up the investments there?

A. In here there is the GE stock and there's 33,447.778 shares valued at December 31st of 2015 at $31.15 a share for a 1,041,898.29 and that represents 78 percent of the holdings. And then there's an asset allocation of the two Elfun Funds and -- I'm sorry. One Elfun Fund for domestic growth fund, Elfun Trust Fund. That's $279,819.11. So the total portfolio value is $1,321,717.39.

Q. And that was for '15. That was after 2014 gifts and the end of 2015 after tax on that had been paid?

A. Correct.

Q. Now, so at that time the mutual funds, the stock funds, and the stock were held here?
A. Correct.
Q. In GE Mutual Funds. I'm going to show you the next. On the next page is January 2016 to December 2016 when it was divided. So this one a State Street Global Advisors.
A. Uh-huh.
Q. So December 31 the funds were still with GE and January 1st what is in State Street holdings now?
A. As of December 30th, 2016 the ending value was 88,347.69.
Q. And what was the beginning?
A. The beginning balance was 279,819.11.
Q. Okay. And so the mutual funds went in and then this gives a year, the entire year overlook; is that right for these funds?
A. Yes.
Q. And on that same I'm going to show you UBS for 2016. Does that look like the stock went into UBS? So the mutual fund went to State Street and the stock when to UBS when GE said I'm done for the year 2016?
A. Right. Well, this one is November 2016 through December 2016.
Q. And what was the ending balance?

A. The ending balance was --
Q. For the stock?
A. For the common stock was 899,715.20. There was also 13,795.97 in cash.
Q. Okay. So the total value was 913,511 that's in there?
A. Correct.
Q. And that's one year later after the million three?
A. Correct.
Q. But this doesn't have the 277 that went in for the mutual funds of -- that 1.3 included stocks and --
A. And the mutual funds.
Q. So they divided.
A. Uh-huh.
Q. The stock went here and the 277 went here.
A. Yeah. And there was a distribution there as well.
Q. Now, during those years because we now know on her -- you've included her expenses year by year in your analysis?
A. Right.
Q. And so year by year we know that she needed more than her required minimum distribution or at least in the last, you know, '15, '16 and '17. But the gifts that came out as well do you know where those came from? Were they distributed from the fund? And if you don't it's okay if you look. But were they distributed from

the mutual funds or was stock sold?
A. I believe in some case they were from the mutual funds. The statement you had had a distribution on there.
Q. (Counsel reviewing documents.) So we've gone through these gifts before, but the distribution -- so when you're looking at that and you see $88,000 at the end of 2016 and it was 277 to begin with, there's distributions coming from there for those -- for the gifts at least for 2015 and '16, coming from the mutual funds?
A. Right.
Q. The mutual funds had 277, there had to be distributions for the gifts?
A. Right. It would be her distributions for whatever she needed and the gifts that were being made.
Q. Okay. And there's been a lot of talk about the tax -- well, let me go back. And so we hear about selling stock, liquidating stock. Liquidating stock is just selling it; right?
A. Say it again.
Q. Liquidation just means selling it; right?
A. Right. Right.
Q. And so at the time that the mutual fund was gone the only place to then go to for money would have been the stock; is that right?

A. That was the only other asset she had that could generate cash.
Q. And in Mr. Markel's report, Mr. McLeod had you read it earlier, he said that there were other liquid assets that she could have -- that could have been used as opposing to liquidating the stock. But isn't it true they used the other assets before selling the stock? They only sold stock in that last year.
A. Yes, that's my understanding.
Q. Now, when we're talking about unneeded distributions, but anything that we took over the RMD because she didn't have a lot withheld anyway from that, anything that was taken had to have taxes paid; correct?
A. Correct.
Q. And so the RMD definitely for that year would not have covered her expenses for that year plus the taxes for the prior year?
A. Are we talking about 2015?
Q. We can use 2015 as an example.
A. Okay. Yeah, her -- right in 2015 she had $66,000 of taxes and 59,300.70 in expenses, so, yes, it without -- was that year the 33,000 RMD?
Q. No, that was 2018.
A. Okay.
Q. We can go back to that year if you need to to get RMD.

A. Yeah, to answer your question I will just need to know what the RMD was.
Q. All right. Here's '17. (Counsel reviewing documents.)
MS. THOMASON:
Bear with me one second, Your Honor.
THE COURT:
Take your time.
Q. I'm going to hand you this and see while we're looking for that do you -- that's the State Street and it has the UBS behind it, but for example that year I think is -- I believe that year is a full 2016 year.
A. Okay. (Witness reviewing document.) So, okay. Here's 2016.
Q. Yes.
A. It's got the distribution and the distribution was 208,727.
Q. Is the RMD on that one?
A. Let's see. State Street.
Q. They kind of changed the format. Rather than take up more time we can just work off of -- let's use 2018. We won't have exact numbers on expenses, but let's use that for the RMD.
A. No, I don't -- okay. Yeah, the distribution.
Q. Just for, you know, analysis. So for 2018 if the RMD was 33,000 but you have the taxes that would have been

owed for 2017 --
A. Right.
Q. -- that would be due in 2018, I think they were 101,000 or something like that. So those taxes would be due. The 33,000 won't cover her expenses at all, but it also won't pay the 100,000 plus of the prior year's taxes?
A. That's correct.
Q. Okay. And so at a minimum you've got to do a distribution to pay both. Now, those taxes -- there's no way to get the money out without paying taxes and he had to get money out to even cover --
MR. MCLEOD:
Your Honor, I'm going object. I really don't want -- you're testifying a little bit. Just maybe don't lead quite so much. I really don't want to object, but I think you've got to be careful with that.
THE COURT:
Well, I'm going to let her do that. Go ahead.
Q. So, money is being pulled from there until the stock is sold. Now, over the course of the -- of 2017 we talked about the value of the stock decreasing and you said you'd have to -- you know, you weren't sure how quickly that went. But on this one, for example, it was 496 at the beginning and it lost value of $90,000 and you said that was within three months?

A. Yes.
Q. And so when we look at the beginning of 2017 and we see what the value was we know it dropped that much.
A. Uh-huh.
Q. Even if stock was sold. Okay. So then we get to 2018 and we talked about the 259 that was taken out. Do you know what else was paid from that 259? What's he paying for?
A. So I know incomes taxes were paid I believe, federal and state income taxes were paid. Funeral expenses would have been paid and --
Q. What about the facility charges?
A. Anything. Right. I'm sure there was in addition to funeral expenses other balances due of that last month.
Q. Now, if that had been taken just before she died I think you testified if it had come to the Estate the tax rate is higher?
A. That's correct.
Q. And it couldn't have rolled over and been deferred because they had to have the money to pay expenses; right?
A. Say that again.
Q. They couldn't have just rollover the 409 that was left in the value of the stock because there's been testimony that it could rollover and be deferred five

years or ten years. Well, that's true unless you need the money out?

A. Right. They had expenses they had to pay and bills to pay and things like that. That would be the only source very quickly to get to it.

Q. Okay. And these are all of the assets she had minus the house? I mean these are her investments?

A. In the time period that everyone has established that we're talking about, yes. I don't know in detail of things before 2013.

Q. Looking at that amount and how quickly the stock dropped, isn't it true that Mr. Mensch, Mr. Sterling Mensch, his interest was aligned with his siblings in terms of wanting to diversify that if he could? In other words, if it went up they all benefitted, if it went down all three of them suffered the loss?

A. Correct.

Q. And so, you know, from a common sense standpoint Mr. Mensch would have wanted as quickly as possible to diversify if he could?

A. Yes.

Q. Now, when he -- when he sold the stock and moved it to cash and then he paid bills, but the taxes are -- they actually were a little bit lower based on your effective tax rate than the 37 percent and in some

years it could be significantly lower in her individual name as opposed to paying taxes out of the Estate?
A. That is correct.
Q. And Mr. Mensch and his siblings would have paid taxes on the gifts if they had taken them out of the Estate; is that not -- is that not true? Taxes would have been owed no matter what?
A. Whether the Estate was the beneficiary or they were the beneficiary?
Q. If the money had all flowed to the Estate and then they took -- in other words, if the 228,000 in gifts had not been taken during her lifetime, but rather flowed to the Estate that 228,000 may have 37 percent taxes on it?
A. Assuming it was still in the IRA when it came out under that scenario, yes, they would have had -- for whatever year they took it, subtract $12,500, the federal tax would be 37 percent. There would also be state tax.
Q. Okay. Now, there's also been testimony or we talked about that the only thing Mr. McLeod referenced that did you think that the total amount of value damages was -- well, it's 270 now, but it was 296 based on your earlier, do you think that's the total damages and I just want to clarify. That's not what the total is because you've also taken into account what he would

have received had this never happened, everything would have been, you know, the same. All three beneficiaries would have gotten 215 -- 216,947 anyway. So really the amount of damage you're attributing is that 513,000 that he's paying back; is that correct?
A. You're saying if -- if the monies had not been --
Q. I mean your damage number isn't the 296. It's the 513; right?
A. Yes. Yeah, 513.
Q. To make the Estate whole?
A. Uh-huh.
Q. Now, in Mr. Markel's report he did reference penalties and interest for not filing taxes on time. I think it was 13,000 and something. And so in his report, and if you need to look at it that's fine, the penalties and interest, outside of the taxes that would have been taken no matter what, the penalties and interest that he attributed for late filings was about 13,000 and that's what you've not addressed in your report --
A. Correct.
Q. -- because we just don't know it would be or it wouldn't?
A. I don't have all the notices and everything.
Q. Okay. And then the 2018 taxes that you have included the 95,000 you didn't parse out what interest and

penalties were realized while Mr. Mensch was PR versus when the Petitioner was PR? It's just the total penalties and interest?

A. Correct. I did not do that. And if you look at the tax notices there's some dates in there that would lend itself to that.

Q. Yeah. I think we already have taxes notices in evidence and if your testimony is it shows the date on any given day what the interest is --

A. It tells by range and everybody in this room is qualified to figure that out. Yeah, it's very clear.

Q. Let's talk about an insurance check and payments and you've already explained that, but did you give any credit to Mr. Mensch for payment of premiums or anything like that in insurance?

A. Payments of the premiums for the house?

Q. Uh-huh.

A. They would not -- no, I did not give him any actual credit for State Farm and all of that. No.

Q. So any money left over from insurance proceeds, if there were monies, did you include that in your damages calculation? I'm assuming no.

A. The expenses would all be in here. The insurance checks I had not seen until today.

Q. Okay.

A. So I haven't –- I have all the damages in there and, you know, it's matter for others, but he paid the insurance premiums but the checks were made out to both of them.
Q. Okay. And you've also not given any credit for the appreciation value of the house?
A. No.
Q. Okay.
A. No, it's all been the result of a cash outflow.
Q. Okay. But from an investment standpoint real estate is an investment and it's an appreciating asset; right?
A. Generally, yes.
Q. In terms of a value to the Estate?
A. You mean in terms of increasing in value?
Q. Yes.
A. Yes.
Q. Did it benefit the Estate –-
A. Correct.
Q. –- when it appreciated?
MS. THOMASON:
I think that's it.
THE COURT:
Thank you. Any re-cross?
MR. MCLEOD:
I have a few, Your Honor. Just one moment.

EXAMINATION BY MR. MCLEOD:
Q. I want to clarify one thing that you just said a few minutes ago. I'm confused when you just said that Sterling only sold stock in the last year. What did you mean by that?
A. You mean literally the last calendar year?
Q. That's what I had heard.
A. No, the stock was sold when we all discussed it on that exhibit.
Q. Yeah, that's exhibit -- John Markel's Exhibit O?
A. Somebody handed me UBS April 2018. It was -- and maybe before that. Didn't you and I discuss a 400-something-thousand dollar?
Q. Yes.
A. The stock went to cash?
Q. Yes.
A. So that happened whenever we were talking about it.
Q. Well, I think that -- that may be what you were referring to just in that last year when that -- the stock was sold the month prior to the 259. We went through that whole thing.
A. Right. The last year means 2018 I think for what we're all talking about.
Q. Okay. And why are you saying -- I just heard this sentence is "That Sterling only sold stock in that last

year." I just want to make sure we're clear that he sold some stock prior to that; correct?

A. He -- somebody will have to help me.

MS. THOMASON:

Your Honor, I think just for verification when because we're talking about some of it was in actual stock, some of it was in a mutual, a stock mutual fund. And so the mutual fund was liquidated and distributions were taken prior to selling.

THE COURT:

So the mutual funds were cashed out before the stock?

MS. THOMASON:

Right. And any sell of stock that you see in GE, and, Your Honor, can look at it, was internally in the company because they had to sell to get the dividends out at that point. So it's not -- and you can see it internally.

THE COURT:

Does that help you, Mr. McLeod?

MR. MCLEOD:

I don't -- no, because I don't know if that's totally true.

THE COURT:

Okay.

MR. MCLEOD:

At one point the GE stock in the Elfun Trust Mutual
Fund were in the same UBS account; right?

MS. THOMASON:

No, they were in the GE Mutual –- I mean GE Mutual Fund
together and then when they went out the stock went to
UBS and the mutual fund went to State Street Global.
That was by GE's direction.

THE COURT:

So it looks like Exhibit 24 is State Street Global
Advisors and it's in the summary there. They have the
Elfun Trust Fund, which previously was in GE. And then
UBS had the GE stock; is that correct? Okay.

MR. MCLEOD:

And so you're saying at one point the Elfun Trust Fund
was in the GE stock account?

MS. THOMASON:

GE managed all of it. Their own stock trust, which is
the Elfun Trust, and the stock itself.

MR. MCLEOD:

Okay.

MS. THOMASON:

And so they managed everything and then they –- do we
need to go off the record?

MR. MCLEOD:

Well, we can.

MS. THOMASON:
I don't want to testify for you.
MR. MCLEOD:
Yeah. Well, what I'm getting at is when it was in that GE stock account I mean some of the Elfun Trust Fund was sold; right?
MS. THOMASON:
But that wasn't stock. That was a mutual fund.
MR. MCLEOD:
But it was sold?
MS. THOMASON:
Oh, yeah, which is they weren't liquidating stock until then.
MR. MCLEOD:
Okay. And what I'm getting at is he had the ability to sell that; right?
MS. THOMASON:
That was under GE. No, that his mother. But when GE outsourced it the stock had to go a different place because he couldn't -- that had controls on it from the company. They sent it out to UBS and mutual funds to State Street because UBS was just going to hold it. And so how that asset allocation was made up he did not have authority to change the asset allocation. He could sell. He couldn't say sell this. The only way

to do that once he had authority to sell the stock and invest into whatever he wanted to once he could.

MR. MCLEOD:

Well, he had a Durable Power of Attorney so how could he not sell stock?

THE COURT:

Okay. I think --

MR. MCLEOD:

Yeah, we're getting into arguments.

THE COURT:

-- we should go off the record. If you-all want to talk about this I don't want to -- I want my record clear. So do you-all want to go off the record and talk about it and then we'll go back on and then -- it might be a cleaner record if we do that.

MR. MCLEOD:

I think I -- and I think I can clear this up. What I'm getting at is that we're not saying --

THE COURT:

You want to go ahead with the questions then?

MR. MCLEOD:

Yeah.

THE COURT:

Okay.

MR. MCLEOD:

I think so.

THE COURT:

Okay. All right.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. Because all I'm asking is -- I'm just clarify when you said that stock was only sold in that last year you're talking about one specific thing, but there was other times where stock was sold. Can you make transfers out of an account without selling some stock if that account is made up of stock? How do you do that to a bank account?

A. No, I -- so are you saying that there's -- there were some small transactions of stock being sold?

Q. Well, do you have to sell the stock in the account to make transfers to a bank account?

A. You do if you're selling this GE stock. If you're selling mutual funds you'd essentially sell them as well. I mean they literally -- there's a net asset value of share price and, you know, you redeem them that way if you look at the statements.

Q. And just in general I mean if you have an account, a retirement account, brokerage, to make a transfer to a bank account you have to sell the stock; right?

A. Yes, if you're going to put it in cash you have to liquid -- you have to sell or liquidate whatever asset or portion thereof you want to.

Q. Okay. And in your expert opinion if Ms. Mensch needed the money that bad couldn't Sterling have sold the house that he was living in for 13 years? At some point he could have sold that house; right?

MS. THOMASON:

Objection, Your Honor. There's been no testimony that she needed it that badly. What we've shown is there was this much money and that gifts were made at a time when she still had a million –- I mean he couldn't even have sold the house for that.

THE COURT:

I'm going to overrule that because it was an asset in her portfolio that technically could have been sold to generate money and someone could with the proper analysis determine does that make sense than paying the taxes for an excess RMD or does it make more sense to sell the house. Which way would result in the best scenario for Ms. Mensch? So I'm going to let him ask that.

Q. All right. So, again, in your expert opinion if Ms. Mensch needed the money could he have sold the house instead of liquidating retirement accounts?

A. We would have to go through an analysis like Your Honor just mentioned to see because I would have to know how much the house appreciated. You know where -- to actually calculate what's the cash available to get out of it, so there would have to be an analysis done in order to answer that question.

Q. I guess another thing you would look at is this a personal residence? Because if it's personal residence you're not going to pay any tax on it; correct? You've got an exemption; correct?

A. That's correct. We already know by what actually happened on the note that it's not going to qualify as a personal residence.

Q. Because she wasn't living there; right?

A. Yes.

Q. Because Sterling was living there; right?

A. Because she signed a Second Home Rider on the note that said it would not be her primary residence. You're the attorney. That would be the real determining fact.

Q. But I can sign any kind of Rider I want but if I move into the house and it's my personal residence I can get that exemption; correct?

A. You can get there if you have no other personal residence, yes, sir.

Q. Okay. So the only reason that selling the house would have generated a tax is because it wasn't her personal residence; correct?

A. That I think would be correct. Yes. If she wasn't living in it and she sold it it would generate cash. Yeah.

Q. It would generate tax --

A. A capital gains. Right.

Q. -- per taxable capital gains rate; right?

A. Yeah. Capital gains rate.

MS. THOMASON:

Objection. Your Honor, we've already gone through this. We already know she was in a home by this time. She wouldn't have been able to live there.

THE COURT:

Right.

MS. THOMASON:

No matter what.

THE COURT:

Right. And if the question to Mr. Chastain is what kind of taxes would happen should Mr. Sterling Mensch have decided to sell the house and the six percent is the annual property tax accessed against property that is the primary legal residence of the owner. So we know that the six percent would have to be paid and they would prorate it at the closing. The other capital gains tax maybe he knows because he's an expert in this type of thing, maybe because of her age she would be exempt from capital gains I'm not sure. Not everybody has to pay capital gains. And then the next thing is what kind of cash would it have gained because what was the mortgage at the time? After you pay the mortgage off what would that have netted to her use for her expenses? So I think that. You'd have to look at that and then you look at all of the tax that she would have to pay for RMDs and selling stock and all of the penalties. You know all of that stuff and see which scenario resulted in the best situation for her. So with that you can ask him your next question.

MR. MCLEOD:

About those factors.

EXAMINATION RESUMED BY MR. MCLEOD:

Q. So in your expert opinion would –- if he would have chose to sell the personal residence, instead of all of this stock in her retirement account, would that eliminate a liability? Would the mortgage be paid off?

A. If he sold the house there wouldn't be any mortgage. It would be paid off at the sale.

Q. Yeah. So would that eliminate a liability of hers?

A. If it was her liability, yes, it would be gone.

Q. Okay. And depending on the sales price she might have a gain or a loss, we don't know that, but I will speculate on real estate values at the time. But in

theory she has a gain or a loss if that happens; right?
A. Correct.
Q. And that's based on what the property is sold for; correct?
A. And selling costs, all the things Your Honor just said, you know, how much is the mortgage balance, all of those things.
Q. But with a property held, you know, over a year you do get capital gain rates; correct?
MS. THOMASON:
Objection, Your Honor. This is so far beyond my redirect.
THE COURT:
Yes, it is. And I've given you a lot of latitude, Mr. McLeod.
MR. MCLEOD:
All right.
THE COURT:
But we need to kind of reel it back in.
MR. MCLEOD:
Okay.
EXAMINATION RESUMED BY MR. MCLEOD:
Q. You mentioned in your testimony a few minutes ago that you had not seen the insurance checks related to the hail damage until today; is that correct?

A. That is correct.

Q. Okay. So do you think you have the information you needed to create a fully accurate report?

A. I think I do. I didn't see those checks till then. They have a role that they play and when you -- it all came up before I still think at the end of the day that -- it gets messy because the checks are made out to both of them, which is the right thing for the insurance company to do. So it was a little bit of muddy water there. I was thankful that it's a smaller amount relative to the overall issue of the case. But if they're -- there was a time and a place to really unpack all that there would be some kind of small credit that would be an amount that would be an adjustment. I do feel confident it's not a material adjustment. We're talking about a gross amount of 5 or $6,000. Subject to there could have been some other repairs that were associated with the hail damage and it just wasn't put on the memo of the check. We're dealing with a long time ago that all that happened. So I still think the report is very accurate.

Q. Okay. And in your expert opinion would this all have been a lot easier if Sterling Mensch would have just kept the accounts, you know, what's for Florence Mensch keep it in her account? Why are we transferring? You

know would you agree with that?
A. That calculating all this would be easier?
Q. Yeah.
A. Absolutely.
Q. Yeah. In your expert opinion was there any benefit to transferring from Florence's account to her account?
MS. THOMASON:
Objection, Your Honor. Again, we're way beyond.
THE COURT:
Yeah. I don't believe she talked about that, Mr. McLeod, when she got him –- when she did her redirect.
MR. MCLEOD:
All right.
THE COURT:
I'm going to have about three questions of this witness that I'm going to let you-all follow-up with just my questions.
MR. MCLEOD:
Yeah.
THE COURT:
But –-
MR. MCLEOD:
And, Your Honor, I think I'm done anyway.
THE COURT:
Okay. All right. I'm going to have about three

questions and then I'll let you-all follow-up if you have anything.

EXAMINATION BY THE COURT:

Q. Mr. Chastain, in these Bank of America statements, and these are the statements from Sterling Mensch's bank account, when you looked at these statements to make your report did you see any deposits of funds into this account that came from anywhere else other than from Ms. Florence Mensch? Like Mr. Mensch's paycheck? Mr. Mensch's tax refunds? Things that normal people put in their checking account, did you see things like that in his account?

A. Yes, there were other deposits that were not just beneficial payments that he made to himself from her accounts. Those deposits were not analyzed.

Q. Okay.

A. But, yes, I saw the deposits.

Q. There is actual other money in this account?

A. Correct.

Q. Okay. I know we haven't talked about it and the statements that I'm looking at just for that particular month doesn't show anything coming from like an employer or anything of that nature. Okay. This Bank of America account is held by Mr. Sterling Mensch, POD Macy Shea Mensch. That's payable on death; right?

A. Yes, ma'am.
Q. So unless you know something different than I know should something have happened to Mr. Mensch resulting in his death all the money in this account from Ms. Mensch or from his own income, all of that then would go to his daughter; correct?
A. That's my understanding.
Q. Okay. Now, when you testified earlier that this RMD -- well, I believe it was 2018 was $33,000 and her expenses for the later year was 62,000 and that that would not cover because 33,000 is less than 62,5; correct?
A. Especially with her taxes when you add that in.
Q. Right.
A. Yes.
Q. Her expenses that you added together here would -- she also got I believe you said somewhere around $3,000 a month in Social Security and a pension?
A. Yes, Your Honor. On the top.
Q. Okay. So her Social Security and pension were around 16,000 or so a year. It was 16,000 in 2012, 2013 and '14, 2015 and 2016. That's Social Security. And then the pension so if you add -- if I what I want to know what her income was that came into her account for her use that wasn't tied up in a mutual fund or a stock or

anything else I would add 16 and 17 together and come up with somewhere around 34,000?

A. Yeah, let's say we look at 2016 we round it 17 for Social Security and then just 18 for the pension. It's 35,000 that other income line.

Q. Okay.

A. It doesn't appear to be cash she actually gets. It's more interest, you know, that's being credited, kind of like short-term capital gains or -- she's not actually receiving I don't believe.

Q. Well, she actually gets Social Security money; right?

A. Yes. No, she gets the Social Security. She gets the pension. Underneath you'll see there's other income, a small amount.

Q. Uh-huh.

A. I don't know that she gets 100 percent of that.

Q. All right. I'm not worried about that right now.

A. So that's 35 or 36,000 I think is the right range.

Q. Okay. I'm just trying to figure out she's getting in cash like Social Security and the pension check and that comes up to about 35,000; right?

A. Yes, Your Honor.

Q. So if her yearly expenses are 62,000 you subtract 35 from that because that's what her pension and Social Security is. So you subtract that from the 62 and it's

like 27 that she's short, somewhere around there.
A. Plus her taxes.
Q. Okay. So the 33 RMD would cover that 27. I don't know how much the taxes are, but the 33 RMD if she got that for that year plus the 27 that she's from pension and Social Security that would –- that's 60,000 right there.
A. Yes, Your Honor. The one factor that gets muddy and it's –- is those payments that he was making that were for her she would probably have either all or some subset of those expenses that we don't have on that chart.
Q. Such as?
A. So like the prescriptions that he paid for his mom those are not in these expenses.
Q. You have medical and other expenses?
A. Correct. But the amounts that came out of his, Mr. Mensch's, Sterling Mensch's account, would also be in addition to that. Those are just the expenses that came out of her account.
Q. I've gotcha. So –-
A. So I'm not saying it's a big –-
Q. He paid some of these out of her account and then he paid some out of his account?
A. Yes, Your Honor, it muddies it.

Q. Okay. So but we know at least that we've got about $27,000 that she's got in income to defray her yearly expenses.
A. Say the last part again.
Q. She has around $27,000 in Social Security and pension payments per year to defray her living expenses and medical expenses such that if her expenses are 62,000 -- let's say they're 70,000. Let's say Mr. Mensch paid another 8,000 out of his checking account. Let's say 70,000.
A. Uh-huh.
Q. Okay. So 70,000 and she's got 27 in Social Security and pension, so that leaves 70, 50 --
A. 43,000.
Q. -- $43,000.
A. Uh-huh.
Q. So then we have $43,000 left so the RMD would be 33 that she can take without a tax penalty; correct?
A. She can take the RMD and have to pay the taxes on it.
Q. Right.
A. This level income let's just figure 25 percent for this discussion.
Q. Okay. All right.
A. So 10,000 and we have 33 times so we were 10,000 off before. We just added 8,250 in taxes so we're at

18,000.
Q. Okay. All right. So the -- so what difference would that be that she's short?
A. It's about 18 to 20,000.
Q. About 18 or 20,000.
A. Yes, ma'am.
Q. So that's what would have to be -- that's what Mr. Mensch as her POA would have to find in order to provide for her total care and the mortgage payments were what, 1,300 or so a month?
A. Yes, Your Honor, during this -- we're talking about the current time frame; right, 2013 on?
Q. Right.
A. Yeah, 13 -- I'll tell you. 1,351.45.
Q. Okay. What's that times 12?
A. $16,217.40.
Q. Plus you wouldn't have to pay property taxes or homeowner's insurance or all of that sort of thing which who knows what that would add. But that would if the house were sold her expenses would be reduced because she'd have no more mortgage payment, no more expenses for the house's upkeep, any of that sort of thing.
A. Yeah, that could be.
Q. Okay. All right.

THE COURT:

That's all I've got.

MR. MCLEOD:

Your Honor, may I follow-up just with one?

THE COURT:

Let's let –- let's let this side goes first since it's their witness.

MR. MCLEOD:

I'm sorry for jumping in.

MS. THOMASON:

I don't think I have any, Your Honor.

THE COURT:

Okay. Thank you. Yes, sir.

EXAMINATION BY MR. MCLEOD:

Q.   When you reviewed Ms. Mensch's statements, her Bank of America statements, did you see any large amounts come in for sale of property?

A.   No, I don't know.

Q.   How about around June of 2012?

MS. THOMASON:

Objection, Your Honor. Again, that's beyond.

THE COURT:

Yeah. Yeah. That's beyond what I asked.

MR. MCLEOD:

Well, then I can call a reply witness, Your Honor.

THE COURT:

All right. I'm going to -- I forgot to ask you one thing, Mr. Chastain. Since we're all out of -- we can't stay in our lane here.

EXAMINATION BY THE COURT:

Q. Mr. Chastain, I'm looking at this State Street Investor's Statement of 2021 and this is the place that received the mutual funds out of GE called Elfun Funds, because the stock went to UBS to hold and the mutual fund went to State Street. I'm looking at the title ownership of these funds and it says Florence Mensch TOD/POA. So does that mean that at her death TOD, transfer on death to her agent under her POA? Do you know if that's what that means?

A. Yes, that's what --

Q. So he would get all of this when she died?

A. That's what my understanding was.

Q. Excuse me.

A. Yes, that's my understanding of that kind of titling.

Q. And that would be -- that title would be determined by whatever agreement there is between her agent and State Street? If you don't know. I'm asking things that I'm sure you don't work for State Street, but.

A. No.

Q. I'm very -- I'm curious.

MS. THOMASON:
Your Honor, I think that was probably where GE made that decision. It came just like it was from theirs and then when --
THE COURT:
And so for GE he had it the same way then?
MS. THOMASON:
Yes, ma'am.
THE COURT:
Okay. So he had it set up so that when she died it all came to him --
MS. THOMASON:
Well, he didn't -- he didn't set that up. She did before when she managed her affairs until 2013 it is generally. But -- but that was there even prior.
THE COURT:
Right.
MS. THOMASON:
In other words, Mr. Mensch made no designation of how that would be.
THE COURT:
But Mr. Mensch did make his own personal account --
MS. THOMASON:
Yes.
THE COURT:

-- a payable on death account to his daughter --

MS. THOMASON:

Yes.

THE COURT:

-- his personal account in which he deposited a lot of Ms. Mensch's money.

MS. THOMASON:

Yes, that's right.

THE COURT:

So his daughter would have taken that should, thankfully nothing happened, but that would all go to his daughter.

MS. THOMASON:

Yeah, I just wanted to clarify that the GE was handled by --

THE COURT:

Okay. Okay.

MS. THOMASON:

-- before.

THE COURT:

What you're going to ask him, Mr. McLeod? I think I --

MR. MCLEOD:

Your Honor, I'm good, but in light of this I think I do need to call a reply witness. It will be a very quick reply witness, but I do want to get one more thing out.

I think it's important.

THE COURT:

Okay.

MR. MCLEOD:

Based on what we've just been arguing.

THE COURT:

What witness is it, Mr. McLeod?

MR. MCLEOD:

It would Shauna Waddell.

THE COURT:

Okay.

MS. THOMASON:

If it's –- I mean I'm fine, but if it's with regard to the sale of Ms. Mensch's own residence you even asked Ms. Waddell about it and it was sold and she purchased an apartment by her own testimony, so.

THE COURT:

Right. Right. What point are you trying to make?

MR. MCLEOD:

We raised the issue –- we raised the issue of that it matters now what other money was in Ms. Mensch's account to care for her. So if there is a –- you know, honestly, without saying it there was a lot more money in that account and, you know, this is their argument. They're making it against the RMD so I don't see why I can't say that there was more money in that account that could have covered her expenses rather taking out of her retirement account.

THE COURT:

Okay. And none of that information is in the record at this point. I don't have any statements or there's nothing been entered to document that.

MR. MCLEOD:

It is in the Bank of America statements that we've already agreed are admissible.

THE COURT:

Okay. So that's in evidence already.

MS. THOMASON:

Yes, Your Honor. Along with what she spent out of it before --

THE COURT:

You can pull from that when you do your summation. I'm not trying to hamstring you, but, you know, I don't want to take up additional time when -- for things that we already have in the record or things that have already been addressed.

MR. MCLEOD:

There's one thing that's probably -- it's probably not in there because of the way it was done it didn't actually go into her bank account and that would be personal knowledge of Shauna Waddell.

MS. THOMASON:

Your Honor, we don't have that evidence. We're at the end of trial. Personal knowledge that it didn't go into the bank account Ms. Waddell already testified to everything that she knew and she said she didn't know anything about the house and she believed the house was sold and an apartment was bought.

MR. MCLEOD:

We're talking about Sterling Mensch's house. We're not talking about her houses that was sold.

MS. THOMASON:

She testified that she thought he owned it.

MR. MCLEOD:

We weren't talking about the same thing then. I mean we're talking about what money was in her account and what money she had available to her. What money was going to pay for her care?

THE COURT:

Okay. Over what period of time is this testimony going to be from?

MR. MCLEOD:

From June of 2012. The two things I'm referring to where June of 2012 and August of 2014.

THE COURT:

Okay. But we're finished with Mr. Chastain; correct?

MR. MCLEOD:

Yes, Your Honor.

THE COURT:

Mr. Chastain, thank you. Thank you for your patience and unless there's an objection you can be excused. All right. You have the right to call a reply witness and it has to be –– I'm not going to let you go on and on and on and on.

MR. MCLEOD:

I know.

THE COURT:

We've got to wrap this up.

MR. MCLEOD:

I will stay within those parameters.

THE COURT:

Because I want to get to your summations.

MR. MCLEOD:

I know.

THE COURT:

Okay. I don't want this with her to go beyond 12:30. Okay.

MR. MCLEOD:

Okay.

THE COURT:

It's ten after almost. All right.

MR. MCLEOD:

Okay.

THE COURT:

Because she's been called already and I'm looking for new information from her. Okay.

MR. MCLEOD:

Okay.

MS. THOMASON:

Your Honor, I would just ask if this is some kind of character evidence or it's something going on in his life or something she thinks --

THE COURT:

Okay.

MS. THOMASON:

-- I mean we've got two experts that have already gone through everything and that was our testimony as to damages.

THE COURT:

Okay. I'm going to take a break for ten minutes and I want you to discuss with opposing counsel what it is you want to bring out so that they can, you know, offer an informed objection. All right. Okay. We'll be on recess for ten minutes.

(Off the Record 12:10 p.m. -- 12:26 p.m.)

THE COURT:

Please be seated. All right, Ms. McLeod. Do you intend to call a reply witness?

MR. MCLEOD:

I am not going to call a reply witness. The one thing we discussed is we will stipulate that all of Ms. Mensch's Bank of America statements, savings accounts are in evidence. We will bring them back when we come back from lunch and we will put an exhibit on them and you can determine from there and I won't call a reply.

THE COURT:

Okay. Do we want to have lunch before we do our summations? We do?

MR. MCLEOD:

I need to gather my thoughts.

THE COURT:

All right. Why don't we come back at 2:00. Does that sound good?

MR. MCLEOD:

That sounds good.

MS. THOMASON:

Thank you, Your Honor.

THE COURT:

All right. Good then. Thank you.

(Off the Record 12:26 p.m. –- 2:07 p.m.)

THE COURT:

All right. We'll go back on the record. All right. Mr. McLeod, since you are the Petitioning Party I'm going to you let you proceed with your Closing Argument.

MR. MCLEOD:

All right.

SUMMATION/CLOSING ARGUMENT BY MR. MCLEOD:

Your Honor, may it please The Court. From 2013 until Florence's death in April of 2018 Sterling Mensch engaged in over 239 transfers from Florence Mensch's account to his Bank of America account ending in 3259. We have stipulated that the total amount transferred from Florence's account to Sterling's account is 820,382. Sterling Mensch was Power of Attorney on Florence Mensch's Bank of America account ending in 3259 (sic) and later added as a joint owner on that account in late 2013. He did not need to transfer the money to his account to pay for things for Florence's benefit. He did not contribute his own funds to Florence's Bank of America account. That was clearly stated in the Summary Judgment Hearing and we stated it in this case in this trial. Under the Vaughan Case if you transfer funds out of a joint account during the contributing party's life you owe their estate upon death. And I have the Vaughan Case, but I think you probably know it so well.

THE COURT:

I've got it.

MR. MCLEOD:

Yeah. So in Petitioner's Petition line 106 it states pursuant to SC Code Section 62-6-201 in the common law of South Carolina any funds in a joint account of Sterling Mensch and Florence Mensch belong to Florence Mensch because Florence Mensch contributed to the funds to the joint account. In the Motion for Summary Judgment Petitioner's counsel clearly stated that Sterling Mensch had not contributed funds to Florence's Bank of America account ending in 7059. The actual transfers from Florence's account to Sterling's account can be scrutinized under the Vaughan Case or under the Power of Attorney Statute. He was listed as a joint owner on the account at the time the majority of the transfers were made. We went through types of things Sterling Mensch spent money on which included extravagant dinners, jewelry, match-making services, among countless other things that are difficult or impossible to determine exactly what these amounts were for. By February of 2019 his Bank of America account ending in 3259 how roughly $15,000 in it. We also went through Florence Mensch's account and learned that her monthly memory care and assisted living bills were mostly covered by her Social Security and her GE Pension. The amounts for the assisted living facility were paid from her Bank of America account, not from Sterling Mensch's account as he states in his affidavit. After Ms. Mensch death Sterling continued to take money from Florence's account including transferring her monthly GE Pension amounts to his 3259 account. He did not notify GE Pension that she had died and transferred some of those funds to his own account. The Estate must now repay the GE Pension that Sterling took after Ms. Mensch's death. Sterling Mensch liquidated Florence Mensch's retirement funds in an amount of over 1.1 million dollars, which then caused Florence to incur taxes on top of the money he was taking from it. He took the money out of the retirement account instead of investing it, so the appreciation that could have occurred if invested properly in the biggest bull market in modern history was lost as well. John Markel's affidavit calculates the amount of taxes, penalties and interest incurred on money which was taken out in excess of the minimum required distributions, which are sum-certain amounts. There are further damages due to the money that had to be used to pay the tax on those amounts instead of being invested properly. Sterling failed to diversify Ms. Mensch's retirement portfolio since he became her Power of Attorney in 2010. At one point in time she had 98 percent of her account in GE stock. Ninety-eight percent of an 86-year-old's retirement account was in one stock and he did not sell this stock to diversify her assets before it collapsed. The more diversified Elfun Trust Fund was sold which caused her to become even less diversified. There is no legitimate financial expert that would testify that this constitutes diversification or prudent investing. John Markel testified that Ms. Mensch's account was not diversified. John Markel provided a method for quantifying that loss which is based on learned treatises. As he stated the Yardstick Method has been used for decades with regard to diversification. Mark Chastain confirmed this in his testimony today. He said that the Yardstick Method is an acceptable method for determining the damages as to diversification. Respondent's counsel prefer that we argue the drop in value which would actually result in a higher amount than John Markel's calculation. John Markel's calculation was based on if the money were put in government bonds instead of kept in GE stock. That's a very conservative approach and if the money were put in an S&P 500 Index for the same time period the amount would likely be much higher than 400,000. The value of the account actually declined in half to its previous value. If he would have just sold the GE stock and kept it in cash that would have been a better investment decision for an 86-year-old woman suffering from dementia. That's ignoring the fact that the money would have appreciated over the years if it was managed properly. I believe 400,000 is a very conservative number. The argument that Sterling Mensch could not sell the stock at any time during the time period that he served as Power of Attorney is absurd. He had a Durable Power of Attorney. It was not a Springing Power of Attorney. The GE Mutual Funds are listed as TOD/POA. If you look at the statements this added in 2014. That makes sense given the fact the Respondent's Interrogatory Responses say that Ms. Mensch was competent in managing her own affairs until late 2013. Shauna Waddell testified that she suggested that Sterling should sell the GE stock if he had not and she said he told her that he was told that he would need a doctor's note saying that Florence Mensch was not capable of managing her affairs. Sterling had a Durable Power of Attorney and was listed on the GE account as the POA. He did not need a doctor's note to use it or to sell. I believe John Markel called it a "lame excuse" and I believe that's exactly what it is. It's just another excuse for Sterling Mensch's failure to meet the minimal requirements of his duties as Power of Attorney for Florence Mensch. John Markel's affidavit and testimony along with the account statements show that some GE stock was in fact sold, so it was certainly possible to sell the stock. In addition, three days before Florence died on April 23rd, 2018, Sterling transferred 259,000 out of the 409,652.44 that was in that account from Florence Mensch's UBS Retirement Account which was to go to the Estate of Florence Mensch. Now, just prior to that on March 20th of 2018, 28,472 shares of GE stock were sold for a total of $406,255.80. When Sterling wanted to liquidate the retirement accounts he found a way to sell the GE stock. He should have done it years earlier and diversified the money to preserve it for Florence and her successors and interest. John Markel's affidavit calculates the amount of taxes, penalties and interest. This case has largely been about what transfers from Florence Mensch's account to Sterling's account were for the benefit of Florence Mensch. We had three Rule to Show Cause hearings and three other hearings related to production of documents in this case. Sterling was ordered by The Court to provide receipts in the September 30th, 2020 Order. The Court stated that he had to subpoena records to obtain receipts. No subpoenas were issued to try to obtain those receipts. None. If the Respondent could not obtain receipts then he was ordered to inform Petitioners that no receipts nor documentation of any kind could be obtained. Sterling's attorney, Devon Puriefoy, sent me an email saying --

MR. PURIEFOY:

Your Honor.

MR. MCLEOD:

-- there were no receipts --

MR. PURIEFOY:

I'm sorry. I'm sorry. I have to object because we're getting so far beyond the scope of what this trial is about. We're now talking about an Order that was issued by a previous judge and then arguments that I submitted as if they were testimony at a hearing that cannot -- that cannot be considered by This Court for purposes of determining damages in this case.

THE COURT:

I'm okay with you talking about the previous Court Orders from this case as a part of your summation, but

I don't want to hear about emails between counsel.

MR. MCLEOD:

Okay.

THE COURT:

Thank you.

MR. MCLEOD:

That's kind of how we -- but I didn't know how else to put the Order in. I mean it was like -- I didn't want to say --

THE COURT:

Well, if we do that then they're constantly going to want to stand up and put that email in context on what you-all were talking about. So this is about the facts as we have it in our record and the law and based on that what you believe your client, the Estate, is entitled to from this Respondent.

MR. MCLEOD:

All right. Thank you. So Sterling had a duty to maintain receipts as Power of Attorney and he did not maintain any receipts whatsoever. The burden is on Sterling Mensch to show the amounts he transferred were for the benefit of Florence Mensch. The burden is on him to show that the transfers were used for Florence Mensch's benefit. He could have testified as to these transfers, but he chose not to. All he's done is sign an affidavit which in general terms states he paid for certain items for Florence's benefit. An affidavit which was shown to contain obvious false statements. The actual transactions in Sterling's account that were for the benefit –- that were for her benefit were not listed in the affidavit. He has still failed to quantify these amounts or provide actual proof of the amounts. Respondent's expert testified the mortgage payments and property taxes Sterling made should be credited to him against the damages despite never pleading this in his Answer or state any facts that allege he used the amount he transferred for his mother's benefit. The affidavit of Mark Chastain clearly states that Ms. Mensch never lived in the New Tarleton house and that the home was only titled in Ms. Mensch's name because of Sterling Mensch's divorce. Mr. Chastain's affidavit then takes the position throughout his affidavit that the mortgage payments and taxes on 512 New Tarleton Way should offset the damages in this case. Then Mark Chastain's affidavit seeks to charge Ms. Mensch's Estate with mortgage payments not based on what the actual mortgage payments were, but rather on a general amortization schedule. Therefore, the mortgage payments he calculates are not related to the funds Sterling Mensch transferred from Florence

Mensch's accounts, because they aren't even in the exact amounts as the mortgage payments. Mark Chastain testified that he could not match any transfer from Florence Mensch's account to any mortgage payment. The affidavit of Mark Chastain attempts to offset transactions with amounts that Sterling Mensch could not possibly recover against the Estate and certain amounts that he cannot prove were actually even paid by him. In Exhibit 5 of Mark Chastain's affidavit he lists several items, their amounts, and he's made up what he refers to as construction related costs. As to the down payment on 512 New Tarleton of 39,700 listed in Exhibit 5 of Mark Chastain's affidavit Mark Chastain testified that this amount should be removed as it is not correct. As to the pool and home theater he testified that those two items occurred in 2007 or 2008, roughly around that time, and therefore could not have possibly been made from the transfers Sterling made between 2013 and 2019. For the remaining items of fencing, counter tops, cabinets, landscaping and blinds he said that the amounts for these items could be higher or lower and that he could not say for sure if the amounts for those were correct. He also stated that they certainly occurred when the house was built, which is before Sterling Mensch ever became Power of

Attorney and before the transfers he engaged in between 2013 and 2019. So Sterling does not even have bank statements showing he paid these amounts. He can't prove who actually paid these. There are no bank records beyond June of 2012. There's no way that these funds from the transfers between 2013 and 2019 could have been used for any of those items listed as construction related costs in Exhibit 5 of Mark Chastain's affidavit. Mark Chastain testified that as to certain gifts made and attempted to relate those to taxes incurred on withdrawals from the retirement account. The amounts that he gives were incorrect. They're shown by the bank statements. At the same time Respondent seems to be arguing that Ms. Mensch's needed the money from the retirement accounts because she was low on funds. If she needed the money then that makes it ever more egregious that Mr. Mensch was transferring and spending a large amount of her money. If you review the accounts of Florence Mensch you see that she had additional money beyond the retirement accounts available. She had money to cover her basic living expenses and would have had for many years except for the spending of Sterling Mensch. If she had lived longer she probably would have had a problem with her funds. She probably would have -- I don't know what she would have done. Respondent's expert alleges certain expenses in Exhibit 6 of the affidavit of Florence Mensch were for the benefit of Florence Mensch, which he testified is based on the affidavit of Sterling Mensch. Now, Sterling Mensch's affidavit does not reference the specific transactions listed in Exhibit 6 of Mark Chastain's affidavit. It is impossible without receipts to know what those transactions were actually for. Mark Chastain testified that he did not have the insurance proceeds from State Farm which were received for the hail damage. He deposited –- Sterling deposited the insurance proceeds in his account. He's represented that the property was for Florence Mensch's benefit but he was listed on the insurance proceeds and deposited them in his account. Respondent then asserted that amounts paid from his account should reduce the damages in this matter. From the expert affidavit showing the amounts for hail damage and the insurance checks deposited into Sterling Mensch's accounts it appears that Sterling actually made a profit on the insurance proceeds. Respondent's expert testified that Sterling had other funds in his bank account besides the funds he transferred from Ms. Mensch's account. His Bank of America statements show that he had his own funds in that account. It is impossible to determine what was paid from the money Sterling took from Florence Mensch and what was paid from Sterling's funds. If the expenses of the house were actually for Florence's benefit he could have easily paid them from Florence's account. If you are going to commingle your principal's funds with your own funds and then claim that you used the funds for the principal you should keep records and receipts of such transactions. The Power of Attorney Statute actually says you have a duty to keep records and receipts. Sterling actually had his daughter listed on his Bank of America account ending in 3259. The account where the $820,582 went. Therefore, if something happened to Sterling the money would have went to his daughter instead of the siblings, which is what Ms. Mensch's Will says and what her State Street account says. And that would have passed to his daughter under the Payable on Death Provision. So Sterling Mensch not only had a fiduciary duty to Florence Mensch, but he has a duty to her successors and interest. So when he transferred money from her retirement accounts and then subsequently transferred to his account he breached his fiduciary duty to the successors and interest as well when he transferred the funds to his account. The Power of

Attorney Act actually says you have a duty to maintain the principal's estate plan. At the time Shauna Waddell took over as Personal Representative there was less than $15,000 left in Florence Mensch's Bank of America account ending in 7059. We do not know what the exact amount of the Estate will be after Shauna Waddell finishes dealing with the IRS and pays all taxes and expenses of the Estate. We expect it to be less than 50,000, but we do not know at this time. Sterling Mensch should not receive any credit based on what the amount in the Estate will be until that amount is determined. And to me that's more appropriate at supplemental proceedings. We are here today to determine the amount of damages which Sterling must repay to the Estate and Petitioner's are seeking a judgment for that amount. Petitioner's thought their mom's Estate would be millions of dollars. It easily could have been with proper management by Sterling Mensch and if he had not taken the funds for himself. My clients hope today is the beginning of a reckoning for Sterling Mensch. And, Your Honor, we're also requesting attorney's fees and costs incurred by the Estate of Florence Mensch. I have a very short argument related to my Motion for Attorney's Fees and Costs. We request that attorney's fees and costs in our Petitioner as well, but I will wait and make that argument until The Court instructs me to. But I do want to go over one more thing before I conclude. In the Amended Expert Report of John Markel, and that's Exhibit 1. Can I hand that one to you, Your Honor?

THE COURT:

Yeah. All of them are over there.

MR. MCLEOD:

All right. So on page 20 of John Markel's Report he has an Appendix D, Summary of Losses Under the Primary Computational Approach. This actually includes an amount of rent, which I'm not going to go into because you've ruled on it, but I'm just laying out what the three options are under it. This includes amount of rent and then an offset to that rent because the intent was to give Sterling Mensch credit against that rent for mortgage payments and taxes that he actually paid. The other amounts in Row 1 you have the stipulated amount of losses 820,382. In Row 2 you have avoidable income taxes generated by IRA distributions to Ms. Mensch, which are in excess of the amount mandated for minimum required IRA distributions for a particular year. He's got an amount of $163,420. Avoidable penalties and interests that were assessed as a result of late payments by Sterling Mensch of Ms. Mensch's income tax liabilities for the years 2012 through 2016 he has an amount of 13,820 there. Avoidable income taxes for Ms. Mensch resulting from the prior failure of Sterling Mensch, III, to properly itemize deductions for property tax and mortgage interest in each of the years of 2011 through 2016 he has an amount of $24,559. Avoidable penalties and interest that were assessed as a result of late payments and failure to file by Sterling Mensch for her return for 2018 that has an amount of $40,314. The subtotal is 1,062,495 for Rows 1 through 5. And then he also has in Line 9 losses suffered by the Estate as a result of the failure of Sterling Mensch to diversify Ms. Mensch's assets and I know we've gone over that a lot. That's the amount of 400,000. And I want to take you to Appendix N. That's page 40. This is the same numbers, but it excludes the rent and the offset for mortgage payments. And the total for that, the same numbers except those are excluded, the total is $1,462,495. The same numbers as above. And I won't go into pre-judgment interest. You've ruled on it, so I'm not going into it. But that's all he's doing is listing that to the right. But that 1,462,495 does not include pre-judgment interest. He's separately stated that.

THE COURT:

Is that the amount you're asking in damages?

MR. MCLEOD:

That is the amount we're asking in damages; 1,462,495.

THE COURT:

And you are -- I believe the testimony was as far as the taxes some portion of these taxes is being appealed through the IRS so there's not a finite number as to that quite yet, is that still the case?

MR. MCLEOD:

That's correct, Your Honor.

THE COURT:

And what category would that fit in? What line number?

MR. MCLEOD:

That would be Line 5. The only one that hasn't been settled is 2018.

THE COURT:

Okay.

MR. MCLEOD:

And there is 2017 as well has not been settled, but we didn't even include that. It's kind of a (inaudible) amount.

THE COURT:

Okay.

MR. MCLEOD:

It's not worth John Markel's time.

THE COURT:
Is there some amount of this 40,314 for 2018 that is beyond dispute or is the whole thing being appealed?

MR. MCLEOD:
I think right now the whole thing is being appealed, but it's also been denied so far. So we're at a -- it's been denied on the initial stage. They -- they told us they will not -- they will not change it right now because we've already used our -- as far as Florence Mensch's Estate they say they give you one get out of jail free card and we used that in prior years. So they're not going to give it to us. On appeal it's kind of anybody's guess. I'm not saying it can't be reduced somehow. It seems very unlikely. I think John Markel testified it was unlikely and I have to agree with him. I deal with this stuff a lot. I think it's unlikely, not impossible to get it reduced. So that amount is unclear.

THE COURT:
Any idea when it will be resolved through that process?

MR. MCLEOD:
Shauna Waddell has been dealing with it more than I, but --

THE COURT:
I mean is it imminent or could it be next year or --

MR. MCLEOD:
I think it could be a while.
THE COURT:
Okay.
MR. MCLEOD:
With the way the IRS is going.
THE COURT:
So you're asking for 1,462,495 based on this Exhibit N; is that --
MR. MCLEOD:
That's correct, Your Honor.
THE COURT:
Okay. Let me ask you one question before I turn it over to the Respondent. As to the house and all the expenses related to the house I'm assuming that is captured in your Line 1, 820,382; is that --
MR. MCLEOD:
Well, no, that's not because the house expenses we don't know how those were paid. And that's kind of the --
THE COURT:
But I mean in terms of how -- are the mortgage payments in there or did you exclude those?
MR. MCLEOD:
In the 820,832?

THE COURT:
Uh-huh.
MR. MCLEOD:
That is just the amounts that was transferred from Florence's account to Sterling's account. That's all that is.
THE COURT:
Okay.
MR. MCLEOD:
Yeah.
THE COURT:
Which could be because he paid mortgage payments from his account?
MR. MCLEOD:
Well, that wouldn't –- he could have after those funds were transferred to his account it's possible.
THE COURT:
Right.
MR. MCLEOD:
Yeah.
THE COURT:
I guess my question is when the Estate sold Ms. Mensch's house were they able to recoup all the expenses that the Respondent said he incurred or paid for from the time he lived there? Do we know that?

MR. MCLEOD:

Well, we do know what was received when it was sold.

THE COURT:

Right.

MR. MCLEOD:

We went over that a little bit. It was 163,000; right?

MS. WADDELL:

Yes.

MR. MCLEOD:

Yeah, 163,000. But keep in mind most of that is going back to pay taxes and things we're having to deal with now.

THE COURT:

Right. I was just trying to see if the –- if it was handled the way it should have been and assuming that –- assuming there was some finding that Ms. Mensch needed a house even though she lived in a facility, making that assumption, and if then her agent, the Respondent, made all of her mortgage payments for a house titled in her name from her account rather than his account, as it should have been done, if he'd done all of that correctly and then at her death and he used her account, not his, to pay for hail damage and he would have deposited that check into her account. He would have fixed the heater from her account. He would have done all of this for the house from her account, not his, I was trying to think when the Estate sold it would it be a net loss to her, or would it be break even, or would it be a gain?

MR. MCLEOD:

It would be -- you'd have to look at the total amount she paid and have to know that for sure.

THE COURT:

Right.

MR. MCLEOD:

Which we stated is difficult.

THE COURT:

Right. It's difficult to do.

MR. MCLEOD:

Yeah.

THE COURT:

Okay.

MR. MCLEOD:

And under the facts I think that's not the case. I mean this was Sterling Mensch's house for 13 years.

THE COURT:

I understand.

MR. MCLEOD:

He's saying it's his house. To me you either -- either should have been paying rent or he should have been paying the mortgage and taxes. I mean that is just kind of a given.

THE COURT:

I understand. I was just trying to see if that had -- if that calculation had been done. Okay. Let me see if there's anything else. Okay. Anything else before I turn it over to the Respondents?

MR. MCLEOD:

That's all I have. Do you want me to just reserve the attorney's fee argument?

THE COURT:

I say go ahead and -- if you want to do that now go ahead and do it.

MR. MCLEOD:

Okay.

MS. THOMASON:

Your Honor. Your Honor, if I may.

THE COURT:

Yes.

MS. THOMASON:

May we approach?

THE COURT:

Yes.

(Sidebar discussion 2:40 p.m. -- 2:42 p.m.)

MR. PURIEFOY:

So are we going to separate and allow the Respondents to present their summation and then get into attorney's fees; is that going to be done?

THE COURT:

Well, we could do it that way. I was going to let him go ahead and go into his attorney's fees so his side will be completely finished and then move it to your side and you can address what you believe the damages are and then comment on the fees. All right. Mr. McLeod, I've got your Amended Affidavit of Attorney's Fees and Costs which has been filed yesterday. And it shows a total of $133,952.95.

MR. MCLEOD:

And that also includes costs, Your Honor, too.

THE COURT:

And costs, yes.

MR. MCLEOD:

Yeah. Those are separated on an itemized schedule.

THE COURT:

Right. And you have been paid –- does that include the credit for the previous payments made by Mr. Mensch?

MR. MCLEOD:

Yeah, I think you're see there it gives him the credit for –-

THE COURT:

Yes. Okay.

MR. MCLEOD:

-- the amounts paid.

THE COURT:

And does this amount take us through today? I guess it couldn't today. Yesterday?

MR. MCLEOD:

It does not.

THE COURT:

Okay.

MR. MCLEOD:

Well, what was my last -- do you see my last entry?

THE COURT:

Your last entry says 9/15/2021 preparation for Final Damages Hearing update to Attorney's Fee Affidavit.

MR. MCLEOD:

That's correct, Your Honor. Well, it wouldn't take us through today, no.

THE COURT:

Right.

MR. MCLEOD:

It was as of that date.

THE COURT:

Okay.

MR. MCLEOD:

Yeah.

THE COURT:

Okay. I'll be glad to hear from you.

MR. MCLEOD:

But I'm not going to amend it later on or anything.

THE COURT:

Okay.

MR. MCLEOD:

Your Honor, may it please The Court. We have made a Motion for Attorney's Fees and Costs and we've also requested such in our pleadings. The Court is granted discretion under 62-1-111 to award Attorney's Fees and Costs. I have asserted in my affidavit that the attorney's fees are reasonable and I believe that they are. Also included in the affidavit of Attorney's Fees and Costs is the amount my clients paid for the expert accounting fees, which are set forth in the affidavit. My clients will continue to have to pay attorney's fees after this hearing. As to why The Court should exercise its discretion in awarding Petitioners attorney's fees and costs I doubt anyone has ever ignored The Court Orders the way Sterling has in this case. It's hard to imagine how anyone could show less respect to The Court than Sterling showed in this case. Liability was established in Summary Judgment Hearing.

I do not think I need to detail the egregiousness of Sterling Mensch's conduct any further than I have. I've probably overextended my welcome here at times and I'm sorry about that, but however the manner in which Sterling frivolously transferred money from his mother's account to his accounts and the subsequent spending that took place is shocking. The egregiousness of his actions and attempts to hide those actions are what has caused the Estate to incur the fees and costs that it has incurred. The amount of the transfers involved, the many different accounts, and the number of documents involved made this a very complex and time consuming case. It is impossible to make the Estate whole or put the Estate or the Petitioners in a position that they would have been had Sterling Mensch not engaged in the violations without awarding the Estate attorney's fees and costs incurred in this action. The Petitioners pursued Sterling Mensch and obtained -- well, we believe we will obtain some judgment against him. So we believe there will be a favorable outcome. We ask The Court to award the full amount of attorney's fees and costs in this matter. And, again, I just want to thank The Court for your patience with me and we appreciate everything. That's all I have.

THE COURT:

Thank you, Mr. McLeod. All right. Mr. Puriefoy.

SUMMATION/CLOSING ARGUMENT BY MR. PURIEFOY:

MR. PURIEFOY:

Your Honor, may it please The Court. I will be brief in my Summation as I believe The Court is well-equipped to make a ruling based on all the evidence and testimony that has been presented, but there are a couple of high points I believe need to be discussed before we conclude this matter. As, Your Honor, has already noted numerous time on the record liability in this case has already been established. The references that were made in summation for the Petitioner in this case the lion share of them spoke to the allegedly nefarious acts of the Respondent, namely the failure to keep records and receipts regarding funds that were utilized by his mother, Florence Mensch. The Court at the Summary Judgment phase found liability and has found him to be liable for breaches of those fiduciary duties. That is not the purpose of being in front of This Court for this trial. The question that is now presented, although the Petitioners have established liability, that is but the first step in their case. They must also prove by a preponderance of the evidence that they are entitled to damages associated with that liability finding. The Petitioners indicated on their summation that both Mr. Chastain, expert witness in this case, and Mr. Markel, the Petitioner's expert witness, both agreed that between 2013 and 2019 there were transfers from Ms. Florence Mensch's account to Sterling Mensch's account in the amount of $820,382.13. The primary consideration for The Court today is to determine why Mr. Chastain's Report shows a deduction or reduction from that amount and why Mr. Markel's Report shows an increase over these amount of transfers. And I believe the easiest way to do that, Your Honor, is to discuss what I have broken out into seven categories, which are the seven primary differences between Mr. Chastain's Report and Mr. Markel's Report. Topics 1 and 2 as I will refer to them are the rent and the pre-judgment interest. Your Honor has already ruled that that will not be considered for purposes of trial today as they were not appropriately pled. Your Honor, that in and of itself comprises $600,059 of the alleged damages that are being sought by the Petitioners in this case. The third issue and distinction between Mr. Chastain and Mr. Markel's Report are the increased income taxes that were allegedly suffered by Ms. Mensch's Estate as a result of excessive retirement distributions. Your

Honor, the testimony of Mr. Chastain and Mr. Markel both was that at some point taxes were going to and are going to have to be paid on these amounts, whether they were paid at the time that Mr. Mensch withdrew those funds to pay a number of expenses or if it was paid at the Estate level. The testimony of Mr. Chastain indicated that quite frankly the living expenses that Ms. Mensch was subjected to could have never been covered by the required minimum distribution –- the interest –- excuse me, the required minimum distribution, the Social Security, and her disbursements from her pension. That is indisputable. In fact, Mr. Markel's analysis failed to address that issue at all. There was rather a blanket assumption and allegation in Mr. Markel's Report that anything over the required minimum distribution constituted a harm to the Estate of Ms. Mensch. Mr. Chastain testified that the required minimum distribution in conjunction with the pension payments and the Social Security would not have been enough to provide for Ms. Mensch during her life. There were arguments that were floated as a new theory to the case that the home that Mr. Mensch was residing in at 512 New Tarleton Way could have been sold and the assets from that sale could have been used to provide for mother during her care. There was absolutely no testimony about that fact by either Ms. Waddell or Mr. Markel when they were on the stand and this is an entirely new theory that is being presented to The Court. It's unsubstantiated and there's been no evidence to support an analysis based on that proposed theory. Your Honor, what is also undisputed is between 2014 and 2016 both Mr. Chastain and Mr. Markel, and I will use the figures that were presented to Mr. Markel, for gifts that were written to the Petitioners and their spouses in this case. As these gifts also contributed to what I'm calling issue number 3, which is the increase income tax resulting from excessive distributions. Between 2014 and 2016, Your Honor, the Petitioners received $144,000 worth of gifts from Mr. Mensch. Neither Mr. Markel nor Mr. Chastain noted in their reports that any of those gifts were ever returned back to the Estate. Yet Mr. Markel in his report allocates 100 percent of the associated taxes resulting from those distributions necessary to pay those gifts to Mr. Mensch. Again, Your Honor, that would be a claim by the Petitioners that despite the Petitioners receiving $144,000 in Christmas gifts over three years they would receive those items tax free while Mr. Mensch would bear 100 percent of the taxes associated therewith. We do not believe that a good faith argument could be made that Mr. Mensch should be required to bear the sole costs, the sole costs, of the those taxes if The Court does determine that they were excessive distributions. But it's extremely important to note, Your Honor, that again The Court is bound by the testimony and the evidence that's been presented to it. There was no evidence and no testimony by the expert for the Petitioner that the living expenses that were required to maintain Ms. Mensch in the state that she had been comfortable in and accustomed to living her entire life could have been achieved through the utilization of the required minimum distribution, the Social Security, and the pension. Your Honor, the only testimony and the only evidence that's been submitted to This Court is that these additional distributions were necessary if for no other reason than to provide care for Ms. Mensch. And, of course, in those three years that have been referenced $144,000 of additional gifts were also paid to the Petitioners. Your Honor, item number 4 is going to be the avoidable penalties and interest between 2013 and 2017 due to the late filings of tax returns by Mr. Mensch. Although the contrary has been argued to This Court throughout the entirety of this case, Mr. Mensch is not afraid to stand in the light of his improper conduct and any conduct that reasonably and directly caused harm to the Estate of Ms. Mensch. Of the nearly 2 million dollars under one calculation submitted by the Petitioners this figure counts for $13,000 of additional damages which Mr. Mensch will not shy away from and is agreeable to pay. Your Honor, the 5th item is the allegation in Mr. Markel's Report that the Estate of Ms. Mensch was damaged as a result of Sterling Mensch's failure to do itemized deductions. Once again, Your Honor, there was no supporting documentation that was presented by the Petitioners to their expert that suggested that itemized deductions were necessary. In fact, the only testimony and evidence that was submitted was through the testimony of Mr. Chastain where he very specifically indicated that as part of his report he reviewed the tax returns that were filed by Mr. Mensch with his independent third-party CPA. He reviewed the documents that were submitted in support of that -- those tax returns being filed and what Mr. Chastain noted was the IRS code that permits the individual paying the costs and expenses associated with the home to itemize those deductions on his tax return. There's nothing unlawful in fairness about that type of conduct. In fact, it was approved by and signed off on by Mr. Mensch's third-party CPA. The only evidence and testimony presented to This Court is that Mr. Mensch was permitted to do so. The –- the Rider that was attached to the note that secured the mortgage for this home specifically indicated, and it was acknowledge by Ms. Mensch, that that was not going to be her home. That would not be her primary residence. That is where Mr. Mensch resided between 2013 and 2019 and he paid the expenses associated therewith and as a direct result with the information and documentation submitted to this third-party CPA he –- he carried those deductions on his tax returns. And we therefore do not believe that those –- those damages should be allocated to Mr. Mensch. Your Honor, the 6th item is the –- or are the avoidable penalties for 2018. And I believe, Your Honor, has very astutely indicated and pointed to the fact that these are speculative damages which are not permissible under the laws of South Carolina. Their damages need not be –- need not be reduced to a scientific certainty, but you cannot merely speculate as to what those damages are. Because the Petitioners in this case unilaterally appealed the penalties and interest associated with the 2018 taxes in The Court finding that Mr. Mensch is responsible for those penalties and interest it could be finding that he's responsible for damages that are not actually suffered by the Estate and we do not believe it would be proper for The Court to consider those damages in its final determine until such time that there is a final ruling on how those property and taxes –- penalties and taxes related to the 2018 taxes are going to be assessed. There's also an extremely important note as it relates to this particular item, Your Honor. On cross-examination I asked Mr. Markel if he'd had an opportunity to review the tax notice that had been sent in this case, which includes a $40,000 penalty and interest charge for failure to file taxes, and he indicated that he had. And I specifically pointed to him in that document where Mr. Mensch was relieved of his duties as the Power of Attorney and the Personal Representative on December 4th of 2019 and Ms. Waddell took over December 4th of 2019. At the moment that Ms. Waddell took over as the Power of Attorney or the Personal Representative the onus was then on her to file these taxes. I find it ironic that there have been repeated allegations of Mr. Mensch's failure to act in accordance with the Power of Attorney Act or with the South Carolina Probate Code. However, Ms. Waddell failed to file taxes for 2018 until May of 2021. During that entire period of time there were interest and penalties that continued to accrue. And therefore, Your Honor, we do not believe for those two independent reasons that these penalties and interest should be allocated to Mr. Mensch. The final, Your Honor, which constitutes another $400,000 of damages that the Petitioners are alleging in this case, is the allegation that Mr. Mensch failed to diversify the General Electric Funds. And there are a number of key distinctions that need to be drawn. During the summation of the Petitioners' case they indicated that Mr. Mensch had liquidated certain assets inside of the Global Street Financial Account. The damages associated with the allegation that Mr. Mensch failed to diversify occurred while they were still being managed and operated by the GE Fund, not while they were moved –- or after they were moved into the Global Street Financial. That's an important distinction because the argument that has been presented by the Respondents, and there's been absolutely no rebuttal testimony presented or evidence presented by the Petitioners, is that through the introduction of the Interrogatories by the Petitioner in this case Mr. Mensch responded in that Interrogatory Response that he did not have the requisite authority to manipulate the assets inside of the GE Fund. During cross-examination I asked Mr. Markel whether he had any direct knowledge or if he conducted an independent investigation to determine what authority Mr. Mensch had and he indicated he had not. I had asked Mr. Markel during cross-examination if he conducted an investigation to determine if either Ms. Waddell or Mr. McLeod conducted an independent investigation to determine what authority Mr. Mensch had as it relates to the manipulation of the asset in the GE Fund. During that cross-examination Mr. Markel indicated that nobody had conducted a reasonable investigation. Subpoenas were not sent. A phone call was not made. There was never a determination as to what authority Mr. Mensch actually had to manipulate what was inside of that GE Fund. Your Honor, the Petitioners in this case bear the burden of establishing their damages. Although there has been a finding of liability the Petitioners are still responsible for establishing their damages and we do not believe that under the claim for $400,000 that they have established those damages, Your Honor. The reality of this case, Your Honor, is that Mr. Mensch was named as the Power of Attorney for Ms. Mensch in 2010. Mr. Mensch's biggest mistake and his biggest blunder was his failure to accurately keep records regarding the funds that were spent out of Ms. Mensch's account. Your Honor, Mr. Chastain got on the stand and indicated that as a result of Mr. Mensch's blunder he owes the Estate $513,336.37. That, Your Honor, is what we believe Mr. Mensch owes back to the Estate and we factor that number into the calculation in Mr. Chastain's Report, which I believe was page 4 of his Report. The total damage that we are alleging is owed back to the Estate in order to make the Estate whole without making any wild assumptions or given every inference. In fact, Your Honor, the biggest distinction between Mr. Chastain's Report and Mr. Markel's Report is that Mr. Chastain testified over and over again that all reasonable inferences were given in favor of the Estate. Meaning his calculation was a very conservative approached to what he believed the number of damages was. Unless he was able to definitively prove that a certain expense was for Ms. Mensch's benefit directly he construed that against Mr. Mensch. The opposite approached was taken by Mr. Markel. Every inference was construed against Mr. Mensch and that's how we arrived at a number of nearly two million dollars, which, Your Honor, almost two million dollars in damages is nearly a million dollars more than was ever contained in Ms. Mensch's Estate during the time period that we are discussing. We do not believe that that number was arrived at in good faith. Mr. Markel testified during his cross-examination that he was unable to provide any justification for some of the numbers that he referenced in his report and as I've already alluded to by way of example and not limitation, the failure to be able to inform The Court of the yearly required minimum distribution for each year that he alleged that there were excessive distributions. Mr. Markel's failure to be able to explain to The Court what Ms. Mensch's yearly living expenses were against the backdrop of those required minimum distributions and her ability to live and be taken care of based on the same. Again, Mr. Mensch does not and has never come before This Court with the belief that he does not owe some amount of money back to the Estate. The question I believe that Your Honor has to answer is what weight of the evidence to give to the testimony of Mr. Chastain and to Mr. Markel and their respective reports. We believe that the more reasonable and objective report was that of Mr. Chastain and his report speaks for itself, Your Honor. There's no need for me to rehash each and every document that was relied on by Mr. Chastain, but I believe a fairer account of what actually occurred in this case is most accurately reflected in Mr. Chastain's Report.

THE COURT:
So what is the figure that you're saying you believe is owed to the Estate?
MR. PURIEFOY:
Your Honor, and so I think that this is very important. That's a very important question for The Court to ask, not just because that's the purpose of this hearing, but the methodology that was used by Mr. Chastain to arrive at that number can still be applied even if these numbers are manipulated in some way either up or down by The Court. What we did, Your Honor, Mr. Chastain found that the total amount of money that was used for Mr. Mensch's direct benefit was $513,336.37.
THE COURT:
This is for Mr. Mensch's benefit?
MR. PURIEFOY:
For Mr. Mensch's benefit, Your Honor.
THE COURT:
Okay.
MR. PURIEFOY:
Meaning that of the $820,000, 382 –– $382,000.13 of that $513,336.37 was used for Mr. Mensch's benefit. The remaining amounts were used for Ms. Mensch's benefit.
MR. MCLEOD:

Your Honor, I feel like -- I need to object a little bit because those numbers haven't been mentioned in the testimony, by their expert.

THE COURT:

Okay.

MR. MCLEOD:

I know you're going to make your decision.

THE COURT:

What I want is what do you believe your client owes the Estate?

MR. PURIEFOY:

And that's what I was getting to, Your Honor.

THE COURT:

Okay.

MR. PURIEFOY:

The 513,336.37 was absolutely testified to by Mr. Chastain as he did the math on the stand for Your Honor to arrive at this figure. And I believe that adjustment came as a result of the $39,700 pool expense that he indicated needed to be added back. So before I get to the final number there's been no allegation in this case nor did the Petition indicate that the Will executed by Ms. Mensch disinherited Mr. Mensch. He was entitled to a third of the Estate at the time of her death. What the Petitioners are asking is that Mr.

Mensch make the Estate whole and still participate in that Estate to the extent anything was left over. Our position of course is that nothing is left over and he is not entitled to any money out of the Estate. Your Honor, the total amount that we believe that Mr. Mensch owes back to the Estate is $296,155.64.

THE COURT:

Does that include the $13,000 that you said --

MR. PURIEFOY:

That does not, Your Honor. So that's why I made that note that the methodology used by Mr. Chastain could easily be manipulated as that --

THE COURT:

Sure.

MR. PURIEFOY:

-- as $13,000 would go into line --

THE COURT:

So that would take it to 301,975 I think. Wait a minute.

MR. PURIEFOY:

Yes, Your Honor.

THE COURT:

975.64.

MR. PURIEFOY:

Correct. Yes, Your Honor.

THE COURT:
Okay. I'm going to ask you a few questions about that if you're ready before we go into the attorney's fees.
MR. PURIEFOY:
Yes, Your Honor.
THE COURT:
Okay. Well, let's go back to –- I want to make sure I understand this house situation. This house. I believed Ms. Waddell testified that Ms. Mensch had a house and then an apartment and then she went into an assisted living and she sold a house that she had. And then at some point during this time this house on Tarleton Way was being built and there was a reference to the fact that it was being built for Mr. Mensch, but not in his name because he was going through a divorce. And it was testified to and agreed to I believe that Ms. Florence Mensch never lived in this house; correct?
MR. PURIEFOY:
Yes, Your Honor.
THE COURT:
Okay. And we have in both the experts a schedule of mortgage payments made by Mr. Mensch. I think with Mr. Chastain I believe it was, he just went over –- he just listed them all out as they were required and it came out that sometimes Mr. Mensch would pay more than the

required mortgage. Sometimes, you know, getting a little ahead. And I believe his payments on this came from his personal checking account; is that right?

MR. PURIEFOY:

That is correct, Your Honor.

THE COURT:

Okay. So it came from his personal checking account which included transfers from Ms. Mensch's account?

MR. PURIEFOY:

Yes, Your Honor.

THE COURT:

So he in doing so was using, at least it would be in theory, he would be using his mother's money because he had taken the money by virtue of his authority under the Power of Attorney from his mother's account and transferred those into his account. And in looking at the Power of Attorney would you agree that the payment of this mortgage for a house that provided him a roof to live in. Nobody gets to live in a house for free. Provided him a place to live and if that payment for that shelter is being paid by money from his mother after being transferred to his account he's sort of -- by making that transfer he's converted that money from ownership by Ms. Mensch to now it's under his complete control even should he meet his demise it would go to his daughter. This Power of Attorney requires first and foremost that he have a duty of loyalty to his mother. And nowhere in the Power of Attorney does it provide or allow him to make a gift to himself. So that being the case if he takes money from his mother's account, converts it to his own use and, in fact, so much so that it loses its character because if he dies it's going straight to his daughter. There's no power to make himself a gift. So, okay, there's no power in here for his mother to provide him a free place to stay. How are you addressing that set of facts in your computation?

MR. PURIEFOY:

Well, Your Honor, I believe that the first part of that question speaks to the issue of liability, because I believe the that liable –- the finding of liability in this case stems from the transfer from Ms. Mensch's account to his own personal account.

THE COURT:

Right.

MR. PURIEFOY:

And the failure to keep track of how those monies were used. I believe that is –-

THE COURT:

Right.

MR. PURIEFOY:

-- the liability in this case.

THE COURT:

Right. And he cannot forgive himself a gift. By using his power as agent he has no power to give himself free things from his mother's assets. So how does that factor into the 309,975.64?

MR. PURIEFOY:

Your Honor, I need to look at the Power of Attorney, but I will -- I will answer to the best of my ability right now.

THE COURT:

Okay.

MR. PURIEFOY:

I believe that the argument that's being presented by the Respondent in this case is that although -- we'll assume that there was gift that was made to Mr. Mensch. The calculation by Mr. Chastain he accounts for every penny that went from Ms. Mensch's account to Mr. Mensch's account. And if in that calculation it's determined that there is a portion of that that certainly constituted a direct gift, which was the breach of the fiduciary duty in this case, it's captured in our number because the question is of the funds that were improperly transferred how much of those were actually used to the benefit of Ms. Mensch. That's not to say that the transfer is appropriate but rather does that constitute a damage to Ms. Mensch. The position that's been taken by the Respondent is that all the monies that were then used to pay the mortgage, and we know that the mortgage was paid because it never went into foreclosure, so we certainly know that the mortgage payments were being made.

THE COURT:

And are you arguing that these mortgage payments were beneficial to Ms. Mensch?

MR. PURIEFOY:

Insomuch only that it allowed her to retain the asset that her name was associated with. We didn't give Mr. Mensch credit, if you will, for making those payments. What we did was we said those payments ultimately benefitted the Estate because the home was not sold in foreclosure, but every penny that was not used for those mortgage payments, for example, constituted a benefit to Mr. Mensch which comprises the $513,000 damage award. But, Your Honor, on page 3 of the Power of Attorney paragraph 10 it grants Mr. Mensch the authority to transfer any of my assets to my children and my lineal descendants by gift including to any such person serving as my Attorney-in-Fact.

THE COURT:

Right. And that's what he did when he made the gifts, but --

MR. PURIEFOY:

I guess the question, Your Honor, is whether there is a distinction between writing the Christmas gifts and gifting himself the money from Ms. Mensch's account.

THE COURT:

I guess what I'm looking at on this Power of Attorney is page 5 it says, "Notwithstanding any provision herein to the contrary, my Attorney-in-Fact shall not satisfy the legal obligations of the Attorney-in-Fact out of any property subject to this Power of Attorney except to the extent this Power of Attorney specifically authorizes gifts to my Attorney-in-Fact, my Attorney-in-Fact may not exercise this power in favor of the Attorney-in-Fact, the Attorney-in-Fact's estate, his creditors, or creditors of the Attorney's estate." So this says you can give gifts to my -- as you pointed out to my lineal descendants, but it has a specific paragraph where it says you cannot use my property to satisfy your legal obligations. You cannot use it to give yourself gifts and you may not exercise this power in favor of the agent, or his estate, or his creditors, or the creditors of agent's estate.

MR. PURIEFOY:

Right, Your Honor. And so I think -- I think there's a two part distinction there. The liability finding is the violation of the latter half of that requirement that it not be used for his direct benefit, which is what the Petitioner's allegations throughout this entire case is is that he used it for his own benefit. But as it relates specifically to the mortgage Your Honor pointed out that it indicates that Mr. Mensch's Power of Attorney cannot utilize gifts for satisfying his legal obligations. The Petitioners have argued throughout the entirety of this case that that was not his home. That was Ms. Mensch's home. It was titled in her name and so the utilization of those funds, albeit improperly obtained through these transfers, the funds themselves were being used to satisfy a legal obligation of Ms. Mensch not Mr. Mensch.

THE COURT:

Well, let me take that further. It did provide him with shelter and a place to live that he did not have to expend his own funds for, which makes his own bank account much better because he's not having to pay for a residence and he's got a house with a pool and all this sort of thing. So then you look at the Power of Attorney Act and it talks about the duty of loyalty, the duty of putting the interest of the principal first, the duty to use the Prudent Investor Rule and you have a woman in a facility who can't use this house. And she can't use the pool, and she can't use the theater room, and she can't enjoy this house and the whole purpose of the house was apparently to have him a place to live because he was going through this legal proceeding. How is it –– how is he complying with his fiduciary duty to Ms. Mensch by continuing to live in a house that she's paying for that she doesn't need?

MR. PURIEFOY:

So, Your Honor, so to begin I believe the Rider that was attached to the note itself acknowledges –- it acknowledges Ms. Mensch's understanding that she was not going to be residing there.

THE COURT:

Right.

MR. PURIEFOY:

I think that is an important first step. That shows her subjective intent to not utilize that house as her primary residence.

THE COURT:

Right.

MR. PURIEFOY:

Now, that does not speak to whether she intended for Mr. Mensch live there, but that would be assuming facts that aren't in evidence. So I think the only thing that The Court has to consider is the note itself and then that second Rider that was acknowledged by Ms. Mensch. Mr. Mensch living in the home, Your Honor, I think that speaks to the rent issue. I think that's the exact argument that Mr. McLeod and the Petitioners attempted to make in alleging that because he was using mom's money to pay the mortgage he should have been paying rent to mom which was not a negotiated --

THE COURT:

I'm not talking about the rent. I'm talking about the fact that she in this document requires him to manage her Estate and all of her affairs for my use and my benefit and may act -- and may do or execute any document therein in the doing or executing of all or any of the following acts and deeds. And then it goes through all of this and we've all read these. His job became then when he took this on mom comes first. Mom comes first. And if he's doing this and he sees her assets starting to dwindle maybe he has a duty to reduce her outflow. Maybe he has a duty to say, "Okay, how can we conserve?" And, you know, if you look at -- I mean he took what, 820,000 out of her account. Why wouldn't he pay her expenses out of her own account?

MR. PURIEFOY:

Your Honor --

THE COURT:

Because it's easier for him to use it if he puts in his own account.

MR. PURIEFOY:

Your Honor, I can't disagree.

THE COURT:

He converted it into his own account for his own use as he sees fit. He could go to an ATM and take the money out. Is that what this envisioned?

MR. PURIEFOY:

Well, Your Honor, it did envision that he be permitted to make gifts to lineal --

THE COURT:

I don't dispute that, the gifts he made. And you're right none of the other children said, "Oh, I don't need this gift. Mom needs her money. Here. I'm not going to cash the check." They all cashed the checks. He shouldn't pay the tax on checks they cashed. I'm down with that. But he had no reason to take that money out of her account and put it in his to pay her debts. He should have paid them from her account and if he's going to go that route and start mixing money he better by George have some records.

MR. PURIEFOY:

Your Honor, I believe that that is the --

THE COURT:

And that's the reason we're all here. He failed to keep records.

MR. PURIEFOY:

Correct.

THE COURT:

And that his job.

MR. PURIEFOY:

Correct, Your Honor. And I believe that's why at Summary Judgment it was a very one-sided finding for --

THE COURT:

Yeah.

MR. PURIEFOY:

-- for liability.

THE COURT:

But now we're on damages.

MR. PURIEFOY:

Right, Your Honor.

THE COURT:

And why -- you know, I'm thinking he caused all this. If he had kept records and done what he was supposed to do and not put $829,000 out of his mom's account into his that he could use at will and then leave to his daughter, that was a complete breach of his duty, which again, yes, he's liable, but now we're saying what are the damages that he owes? And so I understand what your argument is but what I don't understand is how you're telling me that I should ignore the fact that he paid mortgage payments out of his own account and give him some sort of a high-five for that when he's living in the house. I'm not saying he should be paying rent. I'm not saying rent. We're talking about an asset that was created for –- for the purpose of –- I don't know what the deal was when the house was built, but all I know is is this woman's money was having to pay the mortgage. She had probably paid the homeowner's insurance. She probably paid the taxes. She probably paid fixing the heater. He gets an insurance payment back. It's 4,000 to the good. Do we see that he deposited that into Florence Mensch's account?

MR. PURIEFOY:

Your Honor, it was noted, yes. Not the check amount was not referenced by Mr. Markel or Mr. Chastain.

THE COURT:

Right.

MR. PURIEFOY:

But that was captured in the 820,000 because it was a transfer from Ms. Mensch to Mr. Mensch.

THE COURT:

But what I'm saying is the 4,000 that it was over and above what it cost to fix the hail --

MR. PURIEFOY:

Likely went to the 513,000 that we're claiming he owes back.

THE COURT:

Yeah, but -- but technically he should have taken that profit and put it in Ms. Mensch's checking account.

MR. PURIEFOY:

Correct, Your Honor. I don't dispute that.

THE COURT:

But we don't think he did that.

MR. PURIEFOY:

No.

THE COURT:

I have yet to see a bunch of deposits from Mr. Mensch's account back over to Ms. Florence Mensch's account.

MR. PURIEFOY:

Nor do I believe that any --

THE COURT:

Yeah.

MR. PURIEFOY:

-- exists.

THE COURT:

It's just a big old ball of confusion, because he used it as he saw fit and now we're trying to sort it all out. So that's –- that was my primary question about this in terms of the damages because he doesn't get to give himself free things. She made a statement here. You give your gifts to my three children, but you don't get to use my money to make yourself more liquid in your own assets. You don't get to do that.

MR. PURIEFOY:

Absolutely, Your Honor. And I believe that in the report that Mr. Chastain produced to Your Honor for this case the $513,336.37 is exactly that. Those were monies that Mr. Mensch used for himself or he did not have the receipts and the records to show that it was for Ms. Mensch. And so all inferences unless there was some definitive document that could be used to support a claim that it was used for or just being reasonable in, you know, reading the information, all of those inferences were construed against Mr. Mensch. And so what we've –- what we've indicated is of the 820,000 that we've stipulated to 500,000 of that is being allocated to Mr. Mensch. I think that that answers The Court's question insomuch that although, yes, funds from Ms. Mensch's account were going to Mr. Mensch's account and the mortgage was paid. The only benefit that Ms. Mensch received from that was the appreciation in the value of that asset that was ultimately realized at the sale. During her life she never realized the benefit of that asset except insomuch that it remained an asset of her Estate. All we could do, the reasonable deduction through what transpired in this case is that the mortgage was paid and if the mortgage was paid all Mr. Chastain did was say, "I'm giving you credit for the bare minimum amount that's required under the note and that's it. If you paid more you don't get credit for that. You only get credit for the exact amount of the note. And for any dollar over that unless you can demonstrate to me that you used that -- that extra dollar for Ms. Mensch's benefit it was construed against you." That is what comprises this $513,000. The very conduct that you're referring to that was in violation of the Power of Attorney Act is why he has damages of $513,000.

THE COURT:

All right. So your amount then that you believe he is indebted to the Estate it wasn't 513,000. Is that what you said?

MR. PURIEFOY:

Right. So, Your Honor, the calculation and methodology used by Mr. Chastain was this. Unless we know for a fact that it went to Ms. Mensch's benefit it was construed against Mr. Mensch. That's $513,336.37. What the Petitioner's are asking is that Mr. Mensch repay to the Estate what he owes back. He owes $513,336.37 back into the Estate. What has never been argued by the Petitioners is that he was somehow disinherited meaning if he had never taken this wrongfully obtained 513,336 --

THE COURT:

Oh, I see what you're saying.

MR. PURIEFOY:

Had he never taken that money the value of the Estate would be $648,542.19. If he were then to inherit his one third as was contemplated by the Will you break out what he would be entitled to which would be $216,150.73 and you deduct what he owes back to the Estate. You deduct that number from what he owes back to the Estate and that's the total number --

THE COURT:

From the 309 --

MR. PURIEFOY:

-- of damages that he actually has to give back to the Estate at which time of course he will be completely disinherited.

THE COURT:
And he gets nothing from the Estate?
MR. PURIEFOY:
Absolutely nothing.
THE COURT:
And that is the total because that includes the 13 --
MR. PURIEFOY:
That does not, Your Honor. So your last number, 301 I believe --
THE COURT:
309.
MR. PURIEFOY:
309 would be the total that would actually be owed back to the Estate.
THE COURT:
So you're saying he owes 309 and Mr. McLeod is saying he owes 1.4 million?
MR. PURIEFOY:
Yes, Your Honor.
THE COURT:
Okay. That's a lot of spread there.
MR. PURIEFOY:
Yeah. And, Your Honor, I think that we can cover a lot of that spread with three specific deductions. The rent was 259,000. Pre-judgment interest was 400,000.

And what we believe to be a very clear finding that there was no failure to diversify is an additional 400,000. So between the 400, the 400, and the 259 we're at a little over a million dollars if those numbers were to be backed out of the total figure. Now, I don't know if the 1.4 for Mr. McLeod, I can't recall, if that included the rents and the ––

THE COURT:

He's saying no.

MR. PURIEFOY:

–– pre-judgment interest. So if that is the case, Your Honor, yes, we are talking about a million dollar difference between the two in an Estate that never had more than 1.2 million dollars in it at any given time during the time period that we're discussing, which means that under Petitioner's argument between 2013 and 2019 the Estate would have grown by an additional $200,000 despite the living expense increase that was taking place as was testified to by Mr. Chastain because every year that RMD was being taken out the amount of funds available to pay for those expenses continued to decrease.

THE COURT:

All right. Ms. Thomason.

MS. THOMASON:

Yes, Your Honor.

SUMMATION/CLOSING ARGUMENT BY MS. THOMASON:

One point of clarification I would ask, Your Honor, to go back and look at while you're determining is the Power of Attorney does allows gifts, notwithstanding what is allowed in paragraph 10, you can't satisfy your own something, but that also it allows such broad discretion. More so than we normally see in a Power of Attorney. In that it allowed him to even form trusts for her beneficiaries and move her assets into trust. The other thing is I'd ask The Court to recall, even though we didn't include in our damages, as a matter of fact Mr. Chastain testified that he originally took the mortgage payments back to 2008, but we directed him to go to 2013. Mr. Mensch paid all the mortgage payments between then and when the Power of Attorney started. So it's not like the rent was free for all those years. And so from '7 to, you know, '13, we're using those numbers.

THE COURT:

What about after –- between the time that she died and the time that he opened an estate?

MS. THOMASON:

He continued to –- the payments were continued to be made.

THE COURT:

From his money or her money?

MS. THOMASON:

That –- because remember from she died Mr. Chastain testified from the time she died until he was removed as PR there was about 170,000 transferred from her funds into Mr. Mensch's account still –-

THE COURT:

And I think there was a time period that he didn't come and open an estate. A certain amount of time went by from the time she died to the time he got appointed.

MS. THOMASON:

And we have calculated all the payments were made, but that –- all the money that moved whether it was –- I mean between the time she died and when he was removed as PR.

THE COURT:

Okay.

MS. THOMASON:

Before he was named PR and after constituted that 170,000 that Mr. Chastain testified to. That's in that 820.

THE COURT:

And I think there was –- wasn't there a transfer that came out in testimony about four days before she died there was what 259 something?

MS. THOMASON:

Yes, ma'am, there was, Your Honor. 259 came out and the testimony was that it was used partially to pay $100,000 tax to IRS and then South Carolina Department of Revenue and living expenses for her. But -- but regardless of the fact that those were paid right after it still had money. I think what was important is that the taxes would have been owed no matter when it was taken out.

THE COURT:

Right.

MS. THOMASON:

And so whether -- and the benefit to the beneficiaries, the Estate now is what matters. What they would have gotten had this not happened versus what they would get now.

THE COURT:

Right.

MS. THOMASON:

And so those taxes, penalties and interest, yes, but the taxes themselves would even be owed at a higher rate on this side as a beneficiary.

THE COURT:

I follow you. Yeah.

MS. THOMASON:
And so I just wanted to point out those couple of things for when you're looking back.
THE COURT:
Okay.
MS. THOMASON:
As to the –- the –-
MR. MCLEOD:
Your Honor, can I note one thing on that? I think you know, but we did rule as to liability on that –- on conversion from the 259 going to the account –-
THE COURT:
We did.
MR. MCLEOD:
–- three days before she died.
THE COURT:
We did.
MR. MCLEOD:
Okay.
THE COURT:
Thank you.
MS. THOMASON:
Your Honor, I've got two things that I don't know how you want me to –- I can argue the response to the attorney's fees, but I wanted to just clarify with The

Court also a ruling on the other pending claims, because Mr. McLeod needs to make an election of remedies and we've still got several claims that we discussed at the beginning of the case and so I'll defer to you to tell if you'd rather --

THE COURT:

Tell me about that now. Are you talking about like estate claims or --

MS. THOMASON:

I'm talking claims in the Petition, the Petitioner's claims. You ruled on three.

THE COURT:

I ruled on three and the others were not ruled on because I felt that I needed to take testimony. But the others were clear from -- you know, there was no scintilla of evidence that made me think that I couldn't give a Summary Judgment on those. It doesn't mean that I got rid of the rest of them. It just means that they weren't so -- I didn't have enough on the record to say, "Okay, I'm going to give Summary Judgment on those."

MS. THOMASON:

And that's what I assumed. I just -- I wanted to make sure because there were so many of those --

THE COURT:

Yeah, it was --

MS. THOMASON:

-- are just assumed inside the breach of fiduciary duty and the violation of POA Act.

THE COURT:

I believe what I did is his Causes of Action were a violation of the Power of Attorney Act, a breach of a fiduciary duty as agent and PR. Fraudulent, negligent misrepresentation, concealment, conversion, negligence, unjust enrichment, constructive trust and I out of that list I granted it on breach of fiduciary duty as Attorney-in-Fact, violation of the Power of Attorney Act, conversion as to the retirement account and the other were just some miscellaneous things.

MS. THOMASON:

Yes, ma'am. Yes, Your Honor, and that was my -- in this case, and I've got case law, Your Honor, if you would like to look at it.

THE COURT:

Okay.

MS. THOMASON:

But I know you're very familiar with that, but --

THE COURT:

It's a lot of overlap.

MS. THOMASON:

And the damages are the same in each one.

THE COURT:

They are. You know they all over –- they overlap.

MS. THOMASON:

So I would just ask that you rule and I think that for purposes of damages that we're here today that those damages are contemplated by the three you've granted and so I'd ask that you dismiss the others as duplicative.

THE COURT:

Well, I'm not going to dismiss them right now.

MS. THOMASON:

Well, that would be great.

THE COURT:

That's not something I'm going to do as a part of your argument, but I appreciate the –- making me aware of that.

MS. THOMASON:

And do you want the case law? I'm sure you have it.

THE COURT:

I'm glad to get case law.

MS. THOMASON:

Okay.

MR. MCLEOD:

And I can just hand you what I was going to give you.

If you want to throw it away.

THE COURT:

Okay.

MS. THOMASON:

We need a few more pieces of paper.

THE COURT:

Okay.

MS. THOMASON:

And then to the extent any of the remaining claims seek relief in equity, and The Court has already found liability in law, we would ask that those be dismissed --

THE COURT:

Okay.

MS. THOMASON:

-- based on the record. Okay.

THE COURT:

So noted.

MS. THOMASON:

All right. Your Honor, all the case law. Your Honor, we would object to the Attorney's Fees Affidavit filed by the Petitioners. The Courts have held that you have to determine the reasonableness but also whether The Court should grant them. And the statute and the law says The Court may in certain instances, but that it requires that the party seeking attorney's fees lay out six –- or satisfy six elements before awarding the attorney's fees. And then once deciding to award attorney's fees determine the reasonableness of the attorney's –- of the fees that are being asked for by The Court. In a Supreme Court case Jackson v. Speed, which is a 1997 case, Your Honor, The Court determined that there were six factors for determining a reasonable attorney's fees. The nature, extent, and difficulty of the case, the time necessarily devoted to the case, professional standing of counsel, contingency of compensation, beneficial results obtained, and customary legal fees for similar services. And it goes further to say that the affidavit that the attorney submits has to address each of these and it can't be just a summarily –- a summary stating these elements. It has to provide the evidence and support inside the affidavit. And it is Respondent's position that the affidavit did not –- it didn't lay out –- well, Mr. McLeod addressed them orally a minute ago, but in the affidavit it didn't do anything more than just say the elements and that we satisfied them without the evidence in support as well. And they submitted no actually evidence other than just the statement of the attorney that these are, and I'm not questioning Mr.

McLeod's honesty, I'm just saying it did not lay out on each of these elements. And as an example when we're looking at reasonableness and we go through and customary legal fees, one of the things we don't have, we don't have the contract for services. We don't know what's stated. The beneficial results obtained, the customary legal fees for similar services we have nothing to compare against. And so nothing was submitted in the affidavit for similar services or how -- you know, the length of the case and the complexity. It was brought up that, you know, discovery and the hours spent in this, but that was captured at the Motion to Compel and we believe that it was duplicative. I know that it's been deducted on a fee affidavit, but in terms of, you know, at this stage going back, and as an example, and you can read the memo, Your Honor. But as an example I would -- I would demonstrate a couple of things that I'd just like to draw The Court's attention to. The Court doesn't have -- and costs is the same way. Your Honor, can determine the costs required, but it has to be laid out why that was necessary. So in the fee affidavit in going through to just pull -- pull out some really -- the ones that caught my attention right off the bat. Partly through the litigation, partly through the case there's 5.7 hours billed for redrafting an engagement agreement. So we don't know what the engagement agreement was or what it is, but 5.7 hours to revise an engagement agreement is -- is substantial. We also have Summary Judgment, the Motion and Memo, and then the Order 130 hours and 20 of that is the Order that then was redrafted by The Court that we both have. Rule to Show Cause 64 hours. The Motion to Withdraw that was Mr. Leaphart's Motion to Withdraw that Mr. McLeod was reviewing and it was 2.4 hours in reviewing that Motion. There is a Motion that took -- that it's billed .7 hours in here and then Strike the Order is two hours on the Order itself and the Motion. There are fees in here for example almost two hours to draft a subpoena and then have someone else review it at $400 an hour. The same subpoena at $250 an hour. And it's duplicated time. There are Motions to Amend. There's time here for the filing of a TRO that wasn't filed. And I just -- and then when I go to the costs. These are just examples. Your Honor, can review them as you see fit. Some of these are not -- are not attributable to conduct of the Respondent, but to how the case is managed by us, the attorneys. And so as to the costs there's -- Mr. Chastain testified today what he had billed on this case doing that same work and Mr. Markel billed $38,000 in expert report fees and to testify and Mr. Chastain had about ten. And counting this he indicated maybe 12 at the max. There are also fees in here for filing and drafting a subpoena that we had the call about and then the call and follow-up. And so I would just ask that, Your Honor, number one consider whether the affidavit submitted, and we contend that it does not comply with The Court, and The Court has said it will only be upheld on appeal if there's supporting evidence in the record to support the affidavit, but then secondarily to determine the reasonableness of the fees once you've made that determination and ask that you deny it.

THE COURT:

You had not -- you don't have like an attorney to come in that does Probate work and testify that these fees are excessive?

MS. THOMASON:

No, but the burden is on the Petitioner to demonstrate that they are reasonable.

THE COURT:

Right.

MS. THOMASON:

He has to have evidence that they are for similar cases.

THE COURT:

And --

MS. THOMASON:

But in working cases like this, Your Honor, that's what I'm basing it on.

THE COURT:

Right. Do you agree that had Mr. Mensch, your client, comported himself as the law would require him to do, we probably wouldn't be here on any of this?

MS. THOMASON:

Your Honor, I do but we're his attorneys.

THE COURT:

Correct. I understand.

MS. THOMASON:

Yeah.

THE COURT:

And the things that you've pointed out to me would be things that I'll go back and look at.

MS. THOMASON:

Thank you.

THE COURT:

I'm a very common-sense, down to earth, practical kind of person and that can either be good or bad, but that's how I look at things. And if I see a subpoena that was drafted and they want to charge, you know,

$5,000 for a subpoena I'm not going to approve that.

MS. THOMASON:

Thank you, Your Honor.

THE COURT:

But I've got to look through it and go down line by line. But that being said I don't think you're trying to say that the Estate shouldn't get some attorney's fees as a result of what Mr. Sterling has wrought upon this Estate?

MS. THOMASON:

And Mr. Sterling has already paid 29,000 in attorney's fees.

THE COURT:

After some Rules to Show Cause.

MS. THOMASON:

Your Honor, if you would look at -- I know what time it took our firm during that process.

THE COURT:

Yeah. I don't think you-all were there from the beginning, were you?

MS. THOMASON:

No, we were there for I think the second and third.

THE COURT:

Okay.

MS. THOMASON:

But I would say that in all of his billing, reviewing documents is 24 hours, and discovery is generally large, and I think some of those documents were required to be produced two and three times because there was not awareness that they already had them.

THE COURT:

Okay.

MS. THOMASON:

And then receipts we had to appear over and over to say we don't have receipts. We don't. And it goes back too far to get them. But I still would ask that you look at it.

THE COURT:

I will. I will.

MS. THOMASON:

And rule. Thank you, Your Honor.

THE COURT:

I'm glad to do that.

MR. MCLEOD:

Your Honor, could I just have a quick response?

THE COURT:

Yes.

MR. MCLEOD:

When you are looking at it I would just ask you to notice that most of this case was me. There's a difference, you know, David Massey and Knox Haynsworth are obviously our elder attorneys.

THE COURT:

I'm going to call them and tell them you said that.

MR. MCLEOD:

I'm not --

THE COURT:

Elderly.

MR. MCLEOD:

I'm not going to say that. Okay. I take that back.

THE COURT:

It's on the record now.

MR. MCLEOD:

Don't tell them. Don't tell them. I should have said something different. They are experienced attorneys. I'm sorry about that. But either way most of the time was me. They helped me when they needed to. You'll notice on 8/23/2019 David Massey zero dollars reviewed Order for 1.5 hours. You know 8/20/2019 David Massey zero dollars 1.7. He's not charging for his time.

THE COURT:

Right.

MR. MCLEOD:

And that's a --

THE COURT:

But if -- and I can't remember what Ms. Thomason said, but if you have like five hours down to draft a subpoena I'm not going to give you five hours for that.

MR. MCLEOD:

That's fine. That's in your discretion, but I don't have some of the time for the last subpoena argument we got in. That's not even in there. Knox has like .9 for it.

THE COURT:

I'm just going to go through and look at what you did and the time and --

MR. MCLEOD:

That's fine.

THE COURT:

-- if I think it's excessive I'm going to mark it out.

MR. MCLEOD:

Yeah, that's fine.

THE COURT:

Anything else?

MS. THOMASON:

Yeah, Your Honor, I have just a -- I calculated and kind of summed up some, because it's not just on each individual entry, and I know you'll look at it from our standpoint, I just wanted to point that we --

THE COURT:

Oh, yeah.

MS. THOMASON:

-- and so you look at everything spent on mostly Summary Judgment.

THE COURT:

If you want to hand something up.

MS. THOMASON:

Yeah, this is just an example.

THE COURT:

If you'll give a copy to Mr. McLeod. I'm still going to go through it line by line because that's just how I do things.

MS. THOMASON:

Please, yeah.

THE COURT:

I am the queen of over thinking things and looking at things. Okay. All right. And these are things that you think are excessive; correct?

MS. THOMASON:

I think when you put them together.

THE COURT:

Okay. All right. Okay. Here is where you-all can help me. I'm going to go through this and what I'm going to try to do is come up with my ruling on the damages without having you guys submit proposed Orders to save time and money for your clients. My question is this: should we go ahead and –- once I come up with that then should we go ahead and issue an Order at that point or I will let you know what my damages figure is and as best I can how I arrived at it and then we reconvene to see how that's going to get paid and then we do one Order that will capture the whole thing?

MS. THOMASON:

I think –- I'm sorry, Tyler.

MR. MCLEOD:

I just –- I just was going to say I mean I prefer that we come to a damages figure first before we get into supplemental proceedings.

THE COURT:

Okay.

MS. THOMASON:

That's fine.

THE COURT:

Because you will know if –- if we have to determine if that damages figure –- if that damages order is really kind of a I guess an interim order. I'm thinking about appealing. If you guys want to decide, either one after you to talk to your clients, you want to appeal whatever I rule on. The final order really wouldn't be until we do the damages portion. You know it will be a final order in a sense when I make the damages part and I can call it that, but we still have to figure out how the payment of the damages is going to be. So we have to figure out what makes sense.

MS. THOMASON:

I think from -- I think we can't even have supplemental proceedings until there's a judgment entered.

THE COURT:

Right. And the judgment is going to be, and it can be an interim order, that I find the damage to the Estate is "X" and then find that we will reconvene the hearing and we will have a hearing on -- and this is if -- unless you guys can work a miracle and settle it, we won't even have to do that. Then we come back and take testimony. Okay. Here are the damages. One of you or both of you will say we don't agree with any of that, but here is how he can pay and then there will be an Order then that could just -- that will comprise the whole thing saying here are the damages. Here's how The Court has computed it. The Court orders that the Estate be reimbursed from the Respondent by, you know -- typically what I do is I will say, "You've got 60 days to pay it," you know. But what I'm doing here is I'm allowing you guys to hopefully settle it and work it out. That's what I'm hoping, but if not come up with a way that it's going to be paid hopefully while the Estate is still open.

MS. THOMASON:

Well, and I anticipate, Your Honor, because ability to pay is not to be considered as a part of coming up with the damage number.

THE COURT:

No, it's not.

MS. THOMASON:

But so, you know, Your Honor comes up with a damage number and what I anticipate is there's not any money to pay that amount then we would have supplemental.

THE COURT:

Right.

MS. THOMASON:

I'm thinking he would want to go look and make sure.

THE COURT:

Okay. All right. So what I'm hearing then is we're going to do a full order determining what the damages are and I will tag one of you with that. And then once that is signed it will say in the order that "Unless this amount is paid by "X" date, The Court will convene a hearing on how this amount will be paid." Okay. And if there's anything that turns up and, you know, miracles do happen. If it resolves let me know. That would make us -- make us all very happy, but.

MR. MCLEOD:

We'll try.

THE COURT:

But I will -- I'm going to proceed on the notion that it's not going to settle and I'm going to take this enormous record and try to make sense out of it and -- and get you something and get one of you to submit me a proposed order. Obviously, it will probably Mr. McLeod because there is going to be some damages, but it's just the amount that's the issue.

MS. THOMASON:

Yes, Your Honor.

MR. MCLEOD:

And some the Estate issues are kind of complicated how you move forward with the Estate. We're kind of in limbo. We're obviously not going to pay him anything from the Estate, but --

THE COURT:

Of course.

MR. MCLEOD:

Yeah.

THE COURT:

You can't do anything until this is resolved.

MR. MCLEOD:

Yeah, that's where we're kind of stuck.

THE COURT:

Yeah, because you don't know what you've got.

MR. MCLEOD:

We also want a judgment for the future honestly because we're –- there's not money to give right now, but if there is in the future we want a judgment. So that's where I'm kind of in limbo.

MS. THOMASON:

Well, that's what you've got. If you get an order to say this is a judgment.

THE COURT:

Yeah. That's what I'm doing.

MR. MCLEOD:

Okay.

THE COURT:

I'm going to come up with a figure. He's on notice now that he's going to owe something. He's even agreed that he owes at least whatever the number was that Ms. Thomason or Mr. –- I'm sorry, Mr. Puriefoy said that he agreed that he would owe after –- I think it was 309 something.

MS. THOMASON:

Well, actually it's 513, but he took off what he would have inherited.

THE COURT:

Right. So after you take away his one-third that he would inherit he is saying out-of-pocket he owes the Estate 309 without receiving any inheritance. So he already knows he owes that so he ought to be getting that together. Right?

MR. MCLEOD:

Yes.

THE COURT:

So that's what I would expect. Son once we get back together then we'll find out where that –– where he is on that and maybe we won't have to have another hearing. Okay. Thank you. We will be adjourned. You-all did a great job with all these numbers and figures. We will be adjourned.

(Introduction the pertinent document Notebook Bank of America Account Statements of Ms. Mensch as Petitioner's Exhibit Number 31.)

HEARING ADJOURNED AT 4:50 P.M.

CERTIFICATE OF REPORTER

I, RACHEL H. WOOD, a Notary Public in and for the State of South Carolina, do hereby certify that the foregoing hearing was taken before me on the date and at the time and location stated on page 1 of this transcript.

That the witnesses was duly sworn to testify to the truth, the whole truth, and nothing but the truth.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Rachel H. Wood, Reporter
Notary Public for South Carolina
Commission Expires: 02/13/2029

STATE OF SOUTH CAROLINA) IN THE COURT OF
) COMMON PLEAS
) OF THE THIRTEENTH
COUNTY OF GREENVILLE) JUDICIAL CIRCUIT

IN THE MATTER OF:
Estate of Florence Petrak Mensch

John R. Mensch and
Shauna M. Waddell,
Individually and as Personal) TRANSCRIPT OF RECORD
Representative of the Estate of) 2022-CP-23-01064
Florence Petrak Mensch and
John R. Mensch,
Respondents,

v.

Sterling Raymond Mensch, III,
Individually As Personal
Representative of the Estate of
Florence Petrak Mensch and in the
former Capacity as Agent under a
Power of Attorney for Florence
Petrak Mensch,

Appellant.

April 27, 2022
Greenville, South Carolina

B E F O R E:

HONORABLE ALEX KINLAW, JR., Judge.

Julie A. Cendroski
Circuit Court Reporter III
Seventh Judicial Circuit

A P P E A R A N C E S

TYLER EARL MCLEOD, ESQUIRE
For Respondents

KNOX L. HAYNSWORTH, ESQUIRE
For Respondents

JOHN-PAUL BAUM, ESQUIRE
For Appellant

I N D E X

EXHIBITS

MARKED ENTERED

NO EXHIBITS PROFFERED

JOHN MENSCH AND SHAUNA WADDELL VS. STERLING MENSCH, III

THE COURT: All right. The first case on the docket this morning is in the interest of Sterling Raymond Mensch versus Shauna Waddell, the defendant of the named defendants. This is Case Number 2022-CP-23-01064. This is -- I have Mr. Puriefoy. Who's he on? Behalf of who?

MR. BAUM: Your Honor, my name is John-Paul Baum. I'm an associate on behalf of Mr. Puriefoy.

THE COURT: B-a-u-m?

MR. BAUM: Yes, Your Honor.

THE COURT: All right. Who else do we got?

MR. MCLEOD: Your Honor, Tyler McLeod. I'm behalf of the petitioners in the original action and the respondents to the appeal. My clients are Shauna Waddell, individually and as personal representative of the estate of Florence Mensch, and then John Mensch, and they are present today.

And you'll also see Knox Haynsworth is present today. He is there -- he's here in case my voice goes out. I've had COVID for the past week. I'm camped out at Greenwood right now, just quarantined and getting a lot better, but at times, like right now, my voice will kind of crackle in and out. So if it gets really bad, I'm gonna switch over to Knox and let him argue, but I'm gonna do my best.

THE COURT: All right. So you've got Mr. Mensch and Ms. Waddell, both of them are present; is that correct?

MR. MCLEOD: That's correct, Your Honor.

THE COURT: Okay. All right. I think we've got all the parties named. And this is a Motion to Dismiss, Mrs. Waddell's Motion to Dismiss. And so you got to move forward, give me a little history and then get directly into the motion.

MR. MCLEOD: All right, Your Honor. We're here today on it's a Motion to Dismiss the Appeal. As I stated, I represent Shauna Waddell, individually and as a personal representative of the estate of Florence Petrak Mensch and John Mensch, who is a beneficiary of the estate.

And Judge Faulkner issued a January 26th order. It was a final order awarding damages in favor of petitioners. We had a four-day trial on damages and then Judge Faulkner issued the order after the damages hearing and awarded damages in the amount of roughly 984,000.

Prior to that, Judge Faulkner had granted summary judgment in our favor, and so the four-day trial was just on damages to determine the, the amount of the damages. And you'll see that attached as Exhibit 2 to our memo.

THE COURT: Right.

MR. MCLEOD: That's the January 26th order. And then you've got the February 2nd order -- well, I guess February 2nd was the appellant's motion to alter or amend Judge Faulkner's final damages order. And then Judge Faulkner issued a February order dismissing the Motion to Alter or Amend, because the appellate failed to state grounds for the motion or state the relief requested.

The substance of appellant's motion, as you'll see in Exhibit 1 to our memo, you know, said: Respondent moved pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the order granting petitioner damages. Wherefore, respondent respectfully requests this Court to alter or amend its January 26th, 2022 order.

There is no way to tell from the motion what the grounds of the motion are. When I first read it, the first thing I thought was what are they asking the judge to alter or amend. It is impossible to tell from the motion.

Judge Faulkner issued the February order, which is attached as Exhibit 3 to our memorandum, denying the

Motion to Alter or Amend for failure to state any grounds or the relief requested.

Your Honor, do you want any more background or do you want me to kind of go into my argument?

THE COURT: You can go ahead. That's good. I read the pleadings. Go ahead.

MR. MCLEOD: All right. So in Camp versus Camp, the Court of Appeals stated, You Know, timely post-trial motion, including a Motion to Alter or Amend the Judgment pursuant to Rule 59 stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.

Rule 7(b)(1) requires that the motion shall state with particularity the grounds therefore, and shall set forth the relief or the order sought. By requiring notice to the Court and the opposing party, the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudiced to either party and assuring that the Court can comprehend the basis of the motion and deal with it fairly.

Camp versus Camp further stated, you know, the purposes of insufficient and successive post-trial motions appear to be the same. Both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency and we cannot facilitate their use.

The Court of Appeals dismissed the appeal in that case due to the Motion to Alter or Amend failing to state the grounds, which resulted in a time for filing a Notice of Appeal not being stayed; and, therefore, the appeal was not timely.

The holding in Camp vs. Camp was overruled by the Supreme Court, but for reasons that do not exist in our case. The Supreme Court held that we do not believe applying the particularity requirement in an overly technical fashion in this case would serve the purpose behind the rule. However, the Supreme Court stated that it was not necessary to apply the particularity requirement in that case because neither party was prejudiced and the Court was able to both comprehend the motion and deal with it fairly.

In the case of Camp versus Camp, a motion hearing was held and ruled upon based on the arguments of counsel after the filing of a bare motion that stated no grounds or relief sought. Therefore, the Supreme Court found in that particular case that the lower court was able to deal with the Motion for Reconsideration fairly.

However, unlike that case in which the Court and the parties were able to comprehend the basis of the motion and deal with it fairly, in this case Judge

Faulkner specifically found in her February 23, 2022 order, the bare request to the Court to amend the order under Rule 59 fails to give notice to the court and opposing counsel as a relief being requested of the court.

Judge Faulkner went on to state that after careful review of the final order in its entirety, she found no basis to give respondent relief under Rule 59.

THE COURT: All right.

MR. MCLEOD: After review of appellant's memorandum in opposition, it appears that the appellant is now arguing that their appeal should be dismissed as untimely because they allege that the January damages order was not a final order. Judge Faulkner emphasized in her February order that the January order was a final order. The January 26th order is one of the most detailed orders on damages I think that you'll read and there's no order more final than a judgment for damages.

The order discusses filing supplemental proceedings and deals with every cause of action in the case. There's nothing in the order which says the order needs to be amended or that the probate court will amend the order in the future.

Appellant may get a credit if penalties and interests are reduced in the IRS appeal, and that credit may be determined in supplemental proceedings, but it's similar to a confession of judgment that gives a credit for payments made. The amount due on the judgment may change in the future under those limited circumstances, but you don't amend the judgment or remand it to, to the court for a further hearing. It just, if the IRS determines that some of the penalties and interest are, are forgiven or are reduced, then the judgment is automatically reduced.

And that's why Judge Faulkner addressed the 2018 tax issue so there would be no further need to amend the judgment in the future. The judgment will be automatically reduced, depending on whether the IRS forgives the penalties and interest. And the total amount of taxes, penalties, and interest is $40,314 out of the $984,763 total judgment. So it's a very small amount.

And if that's the only reason that Sterling Mensch has not paid the damages, which Judge Faulkner ordered he pay immediately, then he should just pay the remaining $944,449. He will not do that, because all he really wants to do is delay supplemental proceedings for as long as possible. He would rather waste money that he could use to pay the judgment on attorneys' fees and appeals.

Appellant did not allege that this was not a final order in the Motion to Alter or Amend. I think that's an important point. This is clear, as they did not state any grounds whatsoever for the Motion to Alter or Amend and they did not request any specific relief. You know, and as we all know, an issue cannot be raised for the first time on appeal. And, therefore, their argument that this is not a final order cannot be raised at this point.

Appellant is attempting to say that the order for damages is not a final order and that their appeal is, therefore, not timely. This is a good example of a ground that could have been stated in the Motion to Alter or Amend. If that were stated as a ground, then Judge Faulkner could have dealt with that at the time, but rather appellant is just now stating this ground for the very first time on appeal. It was impossible for Judge Faulkner and myself to know what the grounds of the Motion to Alter or Amend were.

And, Your Honor, I think it's important to note that Sterling Mensch has shown zero respect for the court system and that continues through these frivolous appeals and attempts to delay supplemental proceedings. If you'll, as you'll see in the procedural history of Judge Faulkner's January order, which is Exhibit 2 to our memorandum, there is a summary of how much of the probate court's time Sterling Mensch has wasted, and the complete disregard he has shown for the court system over the past three years.

In appellant's Memorandum in Opposition, they actually apologize to the court for the use of judicial resources for this appeal. But where is the apology for causing my clients to incur more fees and costs to defend these frivolous appeals?

In Judge Faulkner's January order for damages, which respondent is appealing, Judge Faulkner stated that respondent engaged in civil theft for eight years, depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles.

Respondent is now using the appeal system to avoid paying for that theft. He is doing so without regard to the rules on appeals; namely, where you have to state your grounds in a Motion to Alter or Amend, and that you have to file your notice of appeal timely.

The baseless Motion to Alter or Amend filed by appellant was designed to delay supplemental proceedings. Judge Faulkner's order denying the Motion to Alter or Amend is consistent with the spirit and letter of Rule 7(b)(1). No overly technical application of the rule is being applied nor asked for. It is appellant's responsibility to comply with the requirements of Rule 7(b)(1) in order to trigger the stay provided by Rule 59.

The legal effect of appellant's failure to state, to specify the grounds of this motion is that the filing of the motion did not state a time for appeal pursuant to Rule 59. Therefore, appellant's notice of appeal is untimely. As such, appellant has failed to comply with the provisions of SC Code Section 62-1-308(a) by timely filing the probate court's -- by timely appealing the probate court's order for damages.

And as the court in Camp versus Camp stated, you know, the purposes of insufficient and successive post-trial motions appear to be the same to attempt to buy time without asserting a meritorious claim. And these tactics further neither justice nor efficiency and a court should not facilitate their use.

And as I'm sure you'll hear in just a moment from appellant, you know, they are now attempting to delay supplemental proceedings until the IRS appeals process is finalized, which could be years. Sterling Mensch caused the penalties and interest to be incurred. He depleted the estate of Florence Mensch, as outlined throughout Judge Faulkner's order, yet he is now trying to use the fact that Shauna Waddell appealed the penalties and interest to delay supplemental proceedings further.

He has made no effort to pay any amount of the judgment, yet he wants the court to let him use the fact that Shauna Waddell is appealing the taxes with the IRS to delay supplemental proceedings indefinitely. These delayed tactics further neither justice nor efficiency and the court should not facilitate their use. Luckily, due to appellant's carelessness in not stating any grounds for his motion, the Court can dismiss the appeal and supplemental proceedings can then proceed.

We request the Court dismiss the appeal of the underlying orders from the probate court, as there exists no appellant jurisdiction in this court. That's all I have, Your Honor, and thank you for your consideration.

THE COURT: All right. Mr. Baum?

MR. BAUM: Thank you so much, Your Honor. So the probate court, just really quickly, because I just want to make sure I hit on this. The probate court is a little bit different than the court of common pleas or family court, so you have ten days to file an appeal from the date of the final order, okay? So I don't want to waste this Court's time, and I'm just gonna get to the point.

So under 62-1-308, it provides that only full and final orders are appealable, meaning if there is something left, something left to do then it's an interlocutory appeal, right? And the probate court doesn't allow for interlocutory appeals, so we have to wait for the final order.

So, when we filed the appeal, we started going through the order and that's when we realized, and I bring the Court's attention to page 13 of the order, which Mr. McLeod hit on over and over and over again, is there's $40,000 due for taxes and penalties, okay? But then there's a footnote associated with that, and it says: This amount is on appeal with the IRS.

And my client is allowed to reduce the total judgment should this amount change as a result of the appeal with the IRS. So it's not a full and final appeal. And I, and I sit here and I stand and I go, we filed it too early. We have to wait. We've got to remand it back to the probate court. We have to wait until the issue is done, and that's pretty much it.

And then, Your Honor, really quick, Charlotte v. SC Health, it says: A full and final order leaves nothing to be done except execute the order. Okay? In this case, we have to wait on the IRS. And I can, I can address the timeliness of that argument, if you'd like, but I don't want to waste your time anymore.

I just kind of need an order of this Motion to Dismiss stating that, you know, this appeal was premature and, and we can just -- we have to wait for this to happen.

THE COURT: Well, let me ask you this, counsel. Dealing with the IRS, wouldn't that delay things a long period of time? Do you have -- I mean, currently it's very difficult to deal with the IRS as far as for what you're doing.

MR. BAUM: Uh-huh.

THE COURT: I mean, the timeframe for them to get back to you could be a year or two years. I mean, they are real slow.

MR. BAUM: Uh-huh.

THE COURT: It seems to me. So, I mean, how does this impact this litigation?

MR. BAUM: Yeah. So, Your Honor, that's a good question. So essentially, you know, that's a good question, but what the case law says is under Charlotte v. SC Health, is that a full and final order, it has to be full final. There can be no further act.

And if there is a further act that we're waiting on, then it's not a full and final order. So that's essentially not appealable under the appellate rules.

I'm not here to tell you what I think or I believe, as Mr. McLeod said, I'm just here to tell you what the law says in this case, Your Honor.

THE COURT: Counsel, let me ask you this. When I sat on the family court for a number of years, we had litigants who appeared in court and they had some IRS issues.

MR. BAUM: Uh-huh.

THE COURT: And we issued a final order in a number of cases on the domestic side, divorce cases, which the parties were instructed to either one party, there was some dispute about some IRS debt and the parties were ordered to cooperate with the IRS in terms of payment of the debt. And we left that -- the Court left that up to them to deal with the IRS. That was their -- they were to deal with that, but that was still a final order.

So, if they came -- they couldn't come back and say, well, you know, if the IRS made a different determination or something with the IRS or whatever, it was considered a final order unless there was some contemptuous conduct there of some sort.

But I read the order that Judge Faulkner issued, I'm just, you know, I'm just wondering whether or not she, when she issued the order, that in her mind, for lack of a better term, she considered that a final order. Isn't that right? She considered it a final order; isn't that right?

MR. BAUM: Yeah. So, Your Honor, I was just bringing that up because I didn't want to waste this Court's time, but if you guys agree that it's a final order, we can move on to the appeal and I could hit what he's saying in the Camp v. Camp case, what his argument is of why our appeal is not timely. But I'm ready to move forward.

THE COURT: No. I, you know, I view Judge Faulkner's order as a final order.

MR. BAUM: But, again, that's fine. So to hit his -- that our appeal wasn't timely, Your Honor, it's form book law that a Motion to Alter or Amend tolls the time to appeal, okay? And the reason is, is because the Court has already ruled on this as Camp v. Camp.

Now, when I read the -- I'm gonna read this into the record, because Mr. McLeod's analysis of this is incorrect. And this is the conclusion, and I'm gonna read this into the record.

It says: Applying an over-technical reading of the rules does not serve the purpose of Rule 7(b)(1) of the South Carolina Rules of Civil Procedure. For this reason, we reverse the Court of Appeals decision and hold the father's Motion for Reconsideration tolled the time for filing a notice of appeal.

So I'm trying -- and when I'm going through his memo, I'm trying to understand where is he getting this argument? Your Honor, you know how it is, we all post these skeleton motions all the time, and I'm trying to understand where this argument's coming from.

And just for the record, again, I printed out this case to understand where he's getting this from. Justice Waller descended in this opinion. And he said: I respectfully dissent. In my opinion, the Court of Appeals properly found father's motion defective under 7(b)(1) and, therefore, the motion failed to toll the time of the notice of appeals, so formally, I would affirm the South Carolina Court of Appeals.

And that's what he's quoting. He's quoting dissent. And then he goes further and he goes: I agree with the Court of Appeals analysis to allow such a patently defective motion to stay the time period for filing appeal would whittle away the rules and ultimately render them meaningless.

So what he's trying to do, is he's trying to get this Court to rule as the Court of Appeals did when they reversed it.

And then lastly, Your Honor, to see how far off base that argument is, Section 9 of Article 5 of the constitution, it states that the decision of the Supreme Court shall bind the Court of Appeals as precedent. He is trying to reverse the Supreme Court's ruling. Therefore, we filed the Motion to Alter or Amend. It timed that toll for us to appeal, and the facts are undisputed that we filed the appeal within the time after that order was issued for the Motion to Alter or Amend. And, therefore, it tolled our time to appeal this matter, Your Honor.

THE COURT: Mr. McLeod, anything you want to say?

MR. MCLEOD: I would just respond again, it's a stay, and that the Supreme Court held that they did not believe applying the particularity requirement in an overly technical fashion in that case would serve the purpose behind a rule. It's specific to the facts of each case. And that the Supreme Court found that it was not necessary to apply the particularity requirement in that case because neither party was prejudiced, and the court was able to both comprehend the motion and deal with it fairly.

They had a hearing. The court was able to hear the arguments of counsel and to deal with the motion fairly. Here, Judge Faulkner on her own found that she could not deal with the Motion to Alter or Amend fairly. She said that their request to the court to amend the order under Rule 59 fails to give notice to the court and opposing counsel of the relief requested of the court.

Judge Faulkner specifically found that I cannot deal with this motion. It doesn't state any grounds. It doesn't tell me what they want me to alter or amend, and I can't deal with it fairly. And she dismissed it on her own. I didn't file a response or anything. It was clear that the motion was just a bare motion. It did not state any grounds. There's no way the court could deal with that fairly.

THE COURT: Did y'all have a hearing on the motion?

MR. MCLEOD: We did not, no. The judge issued the order based on the motion failing to state the grounds. She couldn't deal with it. We wouldn't have known what the hearing was on. There was no way to, to know what the grounds were or to argue against it.

THE COURT: Okay.

MR. BAUM: Your Honor, can I respond to that really briefly?

THE COURT: Yeah.

MR. BAUM: Your Honor, so the case it says the prejudice that happens to the party, she denied the motion without hearing any argument. So Mr. McLeod is making the argument for me that the only party that was prejudiced in that case was us, okay? Because she didn't even hear our arguments. So, therefore, his argument is null.

MR. MCLEOD: And, Your Honor, I think the appellant's own argument regarding their issue on appeal as to the final order illustrates the prejudice to us in this matter. They didn't state it as a ground in their motion, and Judge Faulkner was unable to deal with that issue. That would have been a fairly easy issue to deal with. She would have told him it was a final order. Clear as day it's a final order. I intended it to be a final order. All you got to do is state your grounds, as the rule requires, and I'm sure Judge Faulkner would have dealt with the issue. If you don't state your grounds, it's a trial by ambush. It's just, we could have never responded to the motion because they didn't state any grounds in the motion.

And I would think for an alter or amend motion, it's probably the most important one to state your grounds. You've got to state what you're asking the judge to alter or amend.

THE COURT: Well, you know, I think, and I don't want to, you know, I definitely don't want to put myself in the shoes of Judge Faulkner, but I think that probably an in-person hearing would have been helpful on the Motion to Alter or Amend. That would have given both sides to assert to the court their respective positions, but apparently that was not done.

But I take the position, this Court takes the position that Judge Faulkner's order was a final order, and I don't know where that puts the case at this juncture. So, if we say it's a final order, where are we?

MR. BAUM: So, Your Honor, our brief would then be due on Wednesday.

THE COURT: Okay. All right.

Mr. Haynsworth, are you trying to say something?

MR. HAYNSWORTH: Well, I am. I made a grunting noise. I was just trying to understand procedurally where that put us. So the position of appellate now is it's a final order and we have timely appealed it, right?

THE COURT: I'm assuming that's the position, yes.

MR. BAUM: Yes, Your Honor.

MR. HAYNSWORTH: So now the argument is back to is the appeal timely because it got stayed by the Motion to Alter or Amend, and if it didn't it's not timely. It seems like that's where we now are.

THE COURT: Yeah.

MR. HAYNSWORTH: And while I'm babbling, Judge, if you don't mind, you know, it seems like if I came to you in circuit court on a Motion for Summary Judgment, SC BOT and final summary judgment period. You have a hearing, I show up, Judge, we're entitled to summary judgment. I don't really state any grounds. So there are no grounds for the other side of the court to deal with. And motion granted or motion denied, as the case may be. And the other side wants to ask you to reconsider granting me that summary judgment.

Well, it's incumbent upon the person asking the court to do something, to tell the court what it wants them to do. And if you don't tell the court I want you to reverse the summary judgment you gave Knox, you know, for these various reasons, the nobody knows what their position is about. And maybe you have a hearing and maybe you find out there, but that's not how the system's set up. The rule requires the specificity. It's like a motion to dismiss a pleading.

THE COURT: Yeah.

MR. HAYNSWORTH: You didn't do the elements that are required for a cause of action, you're gonna throw it out because it's wrong. You don't come to the hearing and argue, well, Judge, what I meant is he had a general act that was breached. No, no, no, no, no. The rules require specificity.

To Tyler's point, there's not a rule that's more important to say what your grounds are then, Judge, you got it wrong or you left something out, you need to do X, Y, Z. What's the point of the rule, you know, if it's there and it doesn't matter and you don't have to follow it, then it not ought to be there because some people file it and some people don't and there doesn't seem to be any detriment to not following the rule, you know?

THE COURT: And Judge Faulkner dismissed the Motion to Alter or Amend because she really didn't understand what was being asked; is that right?

MR. HAYNSWORTH: They didn't, they didn't state ground or -- yeah. They could have said it's not a final order.

MR. BAUM: Your Honor, Your Honor, that's incorrect. We stated that we wanted to Alter or Amend damages. And Mr. Haynsworth's argument is solely back to the dissent where it says that it would whittle away a fact of the rules. Your Honor, this court, Supreme Court case, Camp v. Camp, this was appealed from the family court, okay? And what they said was is the -- I'm gonna read this for you, what the motion was. It said: The motion in its entirety. Please be advised that the defendant, through his undersigned attorney will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his order dated July 26th, 2006, in awarding plaintiff, William James Camp's college expenses and costs. The motion hearing is set for this day. That's it.

And in this case, what we sent is we put a motion forward, Motion to Alter or Amend, and we said we want you to amend damages in this matter. And then without even having a hearing, without even letting us speak, without even letting us submit a brief or anything, she just sua sponte denied the motion off 7(b)(1). And that's exactly what this case, Camp v. Camp -- I can highlight and deliver to your office this exact wording in this case. We would be overruling the Supreme Court case if we follow their analysis.

MR. MCLEOD: Judge, that's wrong because in that case the court was able to comprehend the motion and deal with it. Judge Faulkner specifically found I cannot deal with this motion. I cannot comprehend it because the whole order is on damages. You've got to state with specificity. You can't just say I want to amend damages. That's not specificity. The entire order is about damages. What in the order are you amending? If we had shown up at that hearing --

THE COURT: He's asking for an amendment ---

MR. MCLEOD: If she had had the hearing ---

THE COURT: But I was just saying on the damages issue, were you asking for a recalculation of the damages?

MR. BAUM: Well, Your Honor, yeah, they were allowed to orally argue that as to damages in that case. And they were allowed to argue and put forth. And that's what we were gonna argue is that the damages in this case, they were not calculated right. And in that case, they were afforded that opportunity and, therefore, they said no one was prejudiced. We were actually the one prejudiced because we weren't even allowed to have the argument.

MR. MCLEOD: Your Honor, can we ask on what damages they were going to change, what do they think is wrong with the order?

THE COURT: Well, let me ask you this, did anybody tell Judge Faulkner that the issue was recalculation of damages? Did anybody tell her, say, listen, we filed this Motion to Reconsider, this is what it's about? Anybody tell her that?

MR. BAUM: That was stated in the, in the motion, Your Honor, as to the damages.

THE COURT: Well, I understand what you said, but there was no conversation at all with Judge Faulkner when -- between either side?

MR. BAUM: Yeah, because we couldn't have -- she just denied it, because the Supreme Court rules with the Corona virus that she can just rule upon the face of the motion. So we weren't even afforded an opportunity to submit a brief or submit anything or have oral arguments.

MR. HAYNSWORTH: That's why the rule state you're supposed to state the grounds in the motion.

MR. MCLEOD: Your Honor, how would we have gone to that hearing and argued against it if they don't state the grounds? That's what I'm confused about. They wouldn't have had to submit a memorandum until the day of, the hour before, which they've done to me before, and how would we have argued against it?

THE COURT: Well, Mr. Baum probably should have been more specific in his motion, but I'm assuming that between the two attorneys you would have exchanged memorandums before the actual hearing. I would assume that would take place.

MR. MCLEOD: That hasn't taken place before.

THE COURT: Okay.

MR. MCLEOD: An hour before maybe.

THE COURT: All right. Well...

MR. BAUM: Your Honor, just for the record, I submitted my memo in opposition of the memo to dismiss on Monday. So, what he just said was just a -- I'm trying to be respectful, I'm sorry. That's all I have to say. Thank you, Your Honor.

THE COURT: All right. What I'm inclined to do is to let both sides send me, send me a proposed order and let me look at.

MR. BAUM: Thank you so much, Your Honor.

THE COURT: Can we do that? And I need that probably within -- do you need more than 30 days, Mr. McLeod?

MR. MCLEOD: Well, we don't want to delay this anymore. Our goal is to get the supplemental proceedings, Your Honor. Their memo is due on the third, I guess we've got to have it to you very quickly, because I don't want to delay -- I'm not -- anything in this case that delays it by another day, that goes against my goal in the case.

THE COURT: Well, does a 10-day window work for you? Is that satisfactory?

MR. MCLEOD: Is the memo ---

MR. HAYNSWORTH: How about proposed orders by both sides within ten days?

THE COURT: Yes. That's what I'm saying, Mr. Haynsworth.

MR. HAYNSWORTH: Does that suit, Todd?

THE COURT: All right.

MR. MCLEOD: It suits, but does it delay their time for -- I mean, I guess they've got to have their memo in by the third of May.

THE COURT: Well, it might be a little delay because the third of May is next week.

MR. MCLEOD: Yeah. By Friday, let's get this proposed order.

THE COURT: The sooner you get it to me, the better off it will be.

MR. MCLEOD: All right.

THE COURT: And just send it to my email address, AKinlawj@sccourts.org. Send both proposed orders to that email address, okay?

MR. BAUM: Thank you, Your Honor.

MR. MCLEOD: Thank you, Your Honor.

THE COURT: All right. Thank you, sir. Appreciate it.

(Hearing concluded at 10:05 a.m.)

--- THIS ENDS REQUESTED TRANSCRIPT ---

COURT REPORTER CERTIFICATE

I, the undersigned Julie A. Cendroski, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 22nd day of April, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A Cendroski
Julie A. Cendroski
Circuit Court Reporter III
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**

COUNTY OF GREENVILLE CASE NO.:2022-CP-23-01064

***** TRANSCRIPTION OF DIGITAL/WEBEX HEARING *****

October 16, 2025

BEFORE: The Honorable Perry H. Gravely

STERLING RAYMOND MENSCH,

Plaintiff,

vs.

SHAUNA M. WADDELL, et al.,

Defendants.

APPEARANCES:

Devon Marc Puriefoy, Esq.
Appearing for the Plaintiff.

Jenna Hendricks McLeod, Esq.
Appearing for the Defendants.

Recorded by: Digital Courtroom

Transcriber: Natalie Dahl, RPR
SC Official Court Reporter

INDEX

EXHIBITS

(NONE)

Transcript Legend

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
Phonetic (ph)	Indicates a phonetic word
(Inaudible)	Indicates word(s) are not discernable due to audio recording quality
(sic)	Word(s) said but may be incorrect

P R O C E E D I N G S

THE COURT: All right. So this is Sterling Mensch -- is that pronounced right?

MR. PURIEFOY: Yes, Your Honor.

THE COURT: -- versus Shauna Waddell, et al., 2021-CP-23-1064. All right. It looks like that there was -- that on July 21, 2025 the supreme court sent it back and said that the notice of appeal was properly filed, and that we're to hear the merits of the case.

I guess the first thing we need -- I guess the housekeeping is I want to make sure what exactly -- due to the fact that I guess there is a little bit of a mix up on filing of your brief, and then designation of issues. I don't think anything was ever filed. Designation of issues or designation of material were never filed by Respondents, correct?

MS. McLEOD: I think that is correct. I think -- so what I understand to have happened, Knox Haynsworth was on this case before I came over with Tyler, and they had a motion to dismiss. So they didn't ever file their designation of the matter as far as what they wanted to be included on the record on appeal, but there were conversations between both sides because there was a full record on appeal that was sent to the court of appeals and the supreme court in this case.

So our position is that it is kind of a moot matter. From our position, everything is in there that we need. So I don't know if Your Honor would like us to file one, we are happy to do so.

THE COURT: I guess as long as the record of appeal -- I think the only issue would be if you didn't have stuff in there, maybe you wouldn't have the ability to cite something within there.

MS. McLEOD: Right.

THE COURT: The other thing is the brief. I know you attempted or at least, you know, you filed something, but it was their brief. So you thought so much of it that you decided to use it for your brief. Does that mean you would concede all of those points?

MS. McLEOD: No. Definitely not. But we did -- we did file the corrected brief after that status conference. So we did file our brief. I've gone down the rabbit hole of trying to determine what rules we're under, whether it is appellate court rules or civil procedure rules, but either way I cannot find a clear deadline for this scenario.

THE COURT: I think it's under the probate case, 62-1-308. The actual times that you must -- you have 30 days after they file their brief to file your brief.

MS. McLEOD: Right. But in this case, after they filed their brief, their appeal was dismissed, and it went to the court of appeals. So they filed their brief back in --

THE COURT: May of 2022.

MS. McLEOD: Right. So it was dismissed on May 17, 2022. So that is when our motion to dismiss was granted, so we never filed our brief because the appeal was dismissed before our brief would have been due.

THE COURT: I think that, at a minimum, though, it would have been 30 days from when the remittitur was filed.

MS. McLEOD: So that was my first understanding, but there is no rule that says that, that I can find. So we did attempt to file our brief 30 days from the remittitur, which the remittitur was July 21, 2025, was the date that we received it, and so haven't calculated 30 days from that. I'm not sure if it was August 20 --

THE COURT: You filed -- you filed their brief on the 30^{th} day.

MS. McLEOD: Right.

THE COURT: Okay.

MS. McLEOD: So we had our brief prepared, so that was just a, you know, inadvertent of filing. You know, the brief -- these issues have already been argued at the court of appeals level. There is no surprises in there. You know, it's our position that, you know, if the South Carolina appellate court rules apply under Rule 208(a)(4), a failure to file -- it states that upon failure of Respondent to timely file a brief, the appellate court can take such action as deemed proper. So we ask the Court to excuse the, you know, what, eight-, ten-day difference.

THE COURT: August of -- it would be --

MS. McLEOD: Oh, August.

THE COURT: Here's my thought. Again, this is -- like I said, it's gone up on appeal and all of that. My thought was to accept the brief, and then hear your argument, but give you additional time to file a response. Because you have ten days after -- is it ten days after?

MR. PURIEFOY: Correct. It would be the

18th.

THE COURT: That was kind of my thought. If you want to file an additional brief after today, we can argue, if you feel you need to. Then, that way, you could respond to anything from their brief that they filed.

MR. PURIEFOY: Certainly, Judge. And for another reason, just to make a record in case this comes back again, I do want to note a couple of things. The statute that you cited to, 62-1-308, does explicitly say, though, that unless the rule -- the appellate court rule is cited within that statutory provision, this court is not allowed to abide by or not required to abide by it. So what the Respondents are arguing is actually under Appellate Court Rule 240, which is not referenced in 308. That is what gives the appellate courts, the court of appeals, and the supreme court the jurisdiction or the discretion to allow for untimely filing of briefs by a respondent.

That rule is not cited in the statutory provision of 308 and, therefore, cannot be considered, I don't think, by this court in terms of allowing an untimely brief. I don't think there is anything submitted in the record that would suggest that their actual respondent's brief was filed within 30 days after the remittitur.

So I think it is untimely. I think their briefing is untimely. Unless there is a rule that they can cite to that says that they're permitted to file a brief outside of the time; for example, in traditional common pleas context, you file a Rule 6 motion to enlarge time. If it's granted, you are allowed to file outside of time. The same thing being true at the court of appeals. If a respondent misses their reply brief deadline, they file a 240 motion to say I'm asking the Court's permission to file outside of time.

Here, they just unilaterally filed without seeking any leave of court to file outside of time. And as you noted, Your Honor, that was not done until October 8, I believe, of this year, and the response was actually due August 20th. And so I do believe they are significantly outside of time.

And to compound the problem, the citations in their brief, because they have no designations of matter in the case, the citations in their brief are to a court of appeals record that is not before this court. They are citing to Page 9,071 of the court of appeals record.

THE COURT: And that's what I guess -- that is what I was talking about is that when I saw the 9,000-page, I was just like, oh, my God, I hope you all don't expect me to read all of that.

MR. PURIEFOY: No, Your Honor. And that is not before this court. We submitted our record on appeal on May 31, 2012, and it was 900 pages. I would venture to guess that 95 percent of that was trial transcript. There is very limited documents as part of our record on appeal as we see the issues pending before this case on the substantive issues and some of the jurisdictional issues. But because it was an untimely filing; and, two, there is no record.

In fact, 62-1-308 made specific reference to appellate court Rule 210, and appellate court Rule 210 says the court cannot consider anything that is not contained within the record.

The only record in this case is the 900 pages submitted by the Appellant, and the Court cannot rely on any of the citations in the Respondent's brief because it cites to the court of appeals' record, which is not before this court. And so because the rule -- and the statute -- explicitly states unless there is an appellate court rule that is referenced in this statute, nothing else is to be considered for purposes of an appeal from probate to common pleas. 210 says there is a directive on this court, you cannot consider anything that is not in the record. There is no record for the Respondents, Your Honor.

THE COURT: All right. So I think what you all are going to have to do then is go back and amend -- okay. All right. And here's -- the fact that they filed your brief, obviously, was some mistake with someone in their office. You know, in my opinion -- but, hey, you can look at it this way: They filed a brief, it was just that the one on October 8th was their amended brief.

MR. PURIEFOY: Maybe so.

THE COURT: You need to be more creative in your thinking.

MR. PURIEFOY: I do just want to note, Your Honor, I pointed this out in the correspondence to the Court on September 5 where I was trying to get us to this hearing, to this point. I said, No designations have been filed, and no brief has been submitted, and that just went ignored until October 8th where I reraised the issue, which, of course, then put me outside of the ten-day window that I would have to file a response brief. But, again, just for the record I --

THE COURT: No, I understand. And here's kind of the rule of the Court is I'm going to -- they filed a brief of -- even though it was your brief, obviously it was a mistake, and I'm going to allow that to be considered their amended. And then I'll ask that they have -- how long -- when can you -- because you really need to reference the record on appeal that is in this -- that has been filed here.

MS. McLEOD: Right.

THE COURT: When would you be able to do that?

MS. McLEOD: A week.

MR. PURIEFOY: Your Honor, to clarify, are they now being granted an opportunity to do their own designation of matter?

THE COURT: No. No. They have to reference what's on -- what's been filed on May the 31st.

MR. PURIEFOY: So their brief can only make reference to those items contained in the 900-page record?

THE COURT: Right. Whatever's on file on May 31st. And then when they file theirs, you'll have ten days to file a response. But I think I can still go forward -- let's do this. Let's go forward. Let me hear the arguments. And after I get the additional information, if it looks like there may be an additional argument or something, we can set that up. Everyone clear on that?

MS. McLEOD: Yes, Your Honor.

MR. PURIEFOY: Your Honor --

THE COURT: Now, we'll go to the merits, and that's you.

MR. PURIEFOY: Yeah, Your Honor. So there are four issues that were raised in our statement of issues on appeal. The first is that the probate court order that was dated --

THE COURT: Before -- I don't -- I want to issue a Form 4 as to my preliminary rulings on these matters here, so it's in the record.

MR. PURIEFOY: And I guess just for further clarification, upon future filing of additional briefing, will we readdress all of these issues again? Because their arguments currently have to cite to their arguments in their initial brief, which are improper. So the arguments that they plan on presenting today in opposition to the issues on appeal will necessarily rest on their briefing that cites to material that is not before this Court.

THE COURT: So all they are going to be allowed to do on their brief is just change the reference numbers?

MS. McLEOD: Citation.

MR. PURIEFOY: Correct, Your Honor. But I guess my position being there's 9,000 pages in the court of appeals' record. There are certainly documents that they have referred to in this briefing that are not part of the record currently. And so what I'm trying to make sure I understand is: Are they being permitted today to argue in their brief -- argue on brief in opposition to these issues on appeal, even if those items aren't presently before this Court as part of my record?

THE COURT: Well, I'm not going to make a final rule until I get the final brief, so that can be part of your reply brief is saying this reference to this was not -- is not on the record of appeal -- I mean, that is probably the best and cleanest way to do it for me to keep up with it. Does that work?

MR. PURIEFOY: That works, Your Honor.

THE COURT: And I'll put some language, too, in the Form 4 that this is not the final order to be adopted in the final order, so for any appellate timing, there won't be any issue on that.

MR. PURIEFOY: Okay. Thank you, Judge.

So the first issue on appeal we've raised is that the January 26, 2022 order from Judge Faulkner was not considered a final order. I think this is the easiest way to dispose of this matter, quite frankly, Your Honor.

In Midstate v. Century, 310 S.C. 330, the court makes clear that there's a very strict approach to determining whether or not a judgment is final or not. Really, what that case says is that if the judgment leaves open a question of fact, even if it makes findings as to the law, if a factual consideration is left open, it's not considered a final order.

What we have in the January 26, 2022 order was a directive or a judgment from Judge Faulkner at the time that says this is your damage calculation, but it's subject to adjustment. Because, at the time of the hearing, there was a dispute over whether or not there was a certain tax liability. That tax liability -- I think it was about $48,000 that was included in the judgment --

was being challenged by the Respondents at the time, so we didn't have the benefit of knowing what the outcome of that challenge before the IRS was going to be. And so the order very explicitly states that this is subject to adjustment depending on the outcome of that IRS appeal.

It's now 2025. That appeal was pending in '21. It's been four years. We have no idea what's going on with that appeal. We don't know if the judgment, as it stands today, needs to be adjusted downward. Again, there is something left to be done. The judgment is not final.

If it is determined that at some point -- and, again, it's been years now -- that the appeal in front of the IRS was successful, then that judgment -- we would have to go back before the probate court to amend that judgment to reflect the accurate judgment amount.

And so because Midstate v. Century makes clear that if there is something left to be done, the judgment cannot be final, we would submit to this Court that the January 26, 2022 order was not a final judgment.

THE COURT: I mean, don't you have that -- in lots of different cases we have a final judgment, and then there may be some adjustment later, and then that's an amendment of the final judgment, though?

MR. PURIEFOY: But the problem there is, Your Honor, we're -- we're so far beyond our Rule 60 ability to challenge that judgment in terms of any sort of a deficiency that may be contained in the judgment. Meaning, if that judgment were just to be adjusted down now at this point without going back to probate to have a newly issued judgment, I have no way to challenge the sufficiency of the appeal, the IRS. I don't know what is taking place in that. We simply have to accept carte blanche we did the best we could, we could not get a reduction in the judgment amount, and so it stands; or, we were able to get a partial reduction with the IRS, and so you just have to trust us and believe that we are only able to get it reduced by 20,000, as opposed to, you know, the full 48,000.

And so our hands are tied in terms of our ability to challenge the judgment itself and say there was a mistake, there was fraud, whatever it may be.

THE COURT: Newly discovered evidence. I mean, wouldn't that be newly discovered evidence?

MR. PURIEFOY: Not if the Court is taking the position that that is all subsumed as part of a final order.

My point being if it is newly discovered evidence, which is a factual consideration under the Midstate case, because there is a new factual consideration, the judgment itself cannot be final.

The second argument, Your Honor, is under the lack of subject matter jurisdiction argument. And this, although a bit nuanced, I have tried to break it down the best I can. So the two code sections that we're looking at, 62-3-302(a) and (b), 302(a) grants exclusive jurisdiction to the probate court to handle an estate administration. There is no question about that. The allegations in this case were both statutory violations and tort violations. And so those claims and the damages resulting therefrom do not fall under 302(a) because it has nothing to do with estate administration.

So we look to 302(b), which is concurrent jurisdiction between the probate court and the court of common pleas, but it is limited. The probate courts have concurrent jurisdiction with common pleas involving actions under the survival statute, and that extends only to approvals of settlements and allocation of settlement proceeds.

Our position is -- and has always been -- the allegations that were argued in front of the probate court had nothing to do with the administration of the estate, and it had nothing to do with the allocation of settlement funds for purposes of concurrent jurisdiction with common pleas.

They argue that all of the damages in this case resulted from predeath conduct by the Appellant -- excuse me -- the Appellant here. Our position is that but for the existence of the survival statute, those claims would have abated at the death of the decedent. But because the survival statute is in place, it says certain types of claims and damages have concurrent jurisdiction between probate and common pleas.

Our position is if this were a wrongful death case, and there was an allocation of the death proceeds, probate court could certainly hear that issue. Here we're saying because it was a predeath conduct -- or it was predeath conduct that led to the issuance of the damage, that's properly before this court as opposed to probate, because it does not fall within 302(a) or (b), which are pretty explicit on what can happen.

I will note that the -- the Appellant will likely cite -- I had it, Your Honor -- it is 62 -- I'll get you the cite in just a moment, but the suggestion that the probate court does take a stab at conferring jurisdiction, and it says when you are challenging the conduct of a power of attorney, but the code section that is referenced -- and I'll get it for you in just a moment -- does not confer jurisdiction. All it says is it gives rise for the potential of liability.

We acknowledge, per the statute, that certain conduct of a power of attorney is actionable, but the language itself confers no jurisdiction. So we, again, I think defer back to what are the claims, what's the nature of the claims, is it dealing with the administration of an estate, or is it dealing with the allocation of or approval of settlement proceeds? We would argue, Your Honor, that it doesn't fall within either one those categories, and so subject matter jurisdiction was improper.

The Respondents argued at the court of appeals, and I suspect it will be their argument today, that we have somehow collaterally estopped from raising subject matter jurisdiction because in our answer we said we admit jurisdiction and venue is proper with the probate court. They've cited to no cases that stand for that proposition. In fact, the only case that everyone agrees to -- or the proposition that everyone agrees with -- is that subject matter jurisdiction can be raised at any point, and it cannot be waived. And so I think that argument suggesting that subject matter jurisdiction is somehow subject to a collateral estoppel challenge is not rooted in any law, that I'm aware of.

The third issue, Your Honor, is the constructive trust. In the July 26, 2022 order, Judge Faulkner said that there will be a constructive trust over all non-exempt property. And while I certainly understand the intended purpose of that language, I think it falls short of what the law requires to actually have a constructive trust put into place.

What the law in this state says is that it's not a cause of action, but an equitable remedy. And what has to be stated before the Court is the specific property or the funds following a disposition of that property that is subject to the constructive trust. Meaning, you have to be able to acknowledge and demonstrate how some allegedly ill-gotten funds have made it into your possession and were exercising control over those funds; or, if those funds were somehow disposed of and used to purchase some other asset giving control over that asset. The order itself has no degree of specificity as to what it actually is touching on.

In fact, the problem in this case that was argued by the Respondents is that the money that was allegedly taken has been spent, it's nowhere to be found, we can't get to it; yet, they are asking for constructive trust over money that they concede is no longer in the Appellant's possession. And so it begs the question: What is the specific asset or the specific -- the specific fund or the asset that comes from the disposition of that that they are seeking constructive trust over? Meaning, would my client's paycheck somehow, in some roundabout way, be subject to this constructive trust, although it says in the order "non-exempt property"? I'm not sure what that could even mean, because there's been no degree of specificity as to what the actual funds are, where they are located, who has them, whose possession they are in, how they have been used, what assets stemmed from the use of those funds. So I don't think that there's the required degree of specificity for purposes of constructive trust.

And, then, finally, Your Honor, this is probably the easiest of the arguments, which is the attorney's fees. About $127,000 of attorney's fees were awarded in this case. The Jackson six factors were not addressed in the affidavit of the Respondent's attorney that was submitted to the Court. And just by way of example, the contingency of compensation, which asks the question: Could the party receiving the services, i.e., the Respondent in this case, afford to pay their lawyer if the Court did not award attorney's fees? That was wholly unaddressed by way of the affidavit before the Court, and it cannot be remedied now. All six of those factors have to be satisfied in order for an attorney's fee award to be proper, and so we also believe that that award was improper.

Those are the issues, Your Honor.

THE COURT: All right. Yes.

MS. McLEOD: Thank you, Your Honor. May it please the Court. Jenna Hendricks McLeod on behalf of Respondents.

As far as the first issue, the court of appeals has already ruled on that issue that the probate's court order was final. The IRS appeal was denied. There is no need to change anything with that final judgment.

The court of appeals clearly ruled that while the order allowed for adjustment of the amount of taxes Sterling owed based on a pending appeal, so the IRS adjudicated and completely fixed the rights of the parties leaving nothing further for the probate court to do. So it fixed the rights of the party, left no doubt as to who prevailed. And, furthermore, if the order wasn't final, Appellant wouldn't have been able to appeal. You have to have a final judgment to appeal from. The court of appeals also already ruled that the --

THE COURT: That was the court of appeals rule, but how did the supreme court's order -- and I haven't looked at it from the standpoint of that, but does the supreme court's order change that finding by the order --

MS. McLEOD: It is our position that the supreme court order doesn't change anything. Any of the findings by the court of appeals, they are only addressing the narrow issue of why their appeal was dismissed, which is whether or not it tolled the time for them to appeal.

MR. PURIEFOY: Your Honor, if I may, because I think this is going to be an issue.

THE COURT: Let me hear her, and then I'll let you respond.

MR. PURIEFOY: Okay. Thank you, Your Honor.

MS. McLEOD: I mean, I think if the supreme court could have easily said there's not subject matter jurisdiction, I think if the supreme court disagreed with the court of appeals, it would have been more judicially economical for everyone involved to go ahead and, you know, get rid of the case that way. So we have no reason to believe they would feel any differently on appeal, so I think it's pretty clear.

THE COURT: And I guess when looking at the (inaudible), I don't know, does that mean that kind of vacates the court of appeals, and then they say they hold the appeal was timely, and remand to circuit court for consideration of the merits of the appeal. I don't know. I mean, what is the impact of Weiner (phonetic) versus the court of appeals, I guess is the question.

MS. McCLEOD: I guess we would have to appeal to the court of appeals and keep on this merry-go-round of a case, which is on our way back up.

So I think, you know, the court of appeals -- I cite their ruling in my brief. I think it is pretty clear. They eloquently explain why the order was final.

And as far as the subject matter jurisdiction, same thing there. The court of appeals already ruled that the probate court had subject matter jurisdiction. The court of appeals cites the statutes about power of attorney. So the court of appeals sites to S.C Code 62-8-401, which clearly states: "The probate court has concurrent jurisdiction with the circuit courts of this state over all subject matter related to the creation, exercise, construction, and termination of powers of attorney governed by the provisions of this article." So, basically, the probate court is in charge of the power of attorneys.

THE COURT: 801.

MS. McLEOD: 62-8-401.

So the court of appeals is in -- the probate court is in charge of powers of attorneys to say that they can't, you know, deal with actions that, you know, after death would be kind of nonsensical, right, to say that that is their entire realm of purview, and then to stay, you know, things that happened before death, they don't have control over that. That is nonsensical.

Furthermore, it is our position that this wasn't raised in their appeal, improperly preserved. So we don't think this issue was properly before the Court. And, again, even if the court of appeals had not ruled that the probate court had subject matter jurisdiction, we think judicial estoppel would prevent Appellant's contrary position. They admitted in their complaint that the probate court had subject matter jurisdiction. They proceeded to afford a trial in probate court. I think, you know, regardless of the fact of the matter that you can raise subject matter jurisdiction, at some point it is bad faith to raise it after a four-day trial, right. And I think, you know, you get an adverse ruling, well, then you challenge subject matter jurisdiction. So they are just changing the facts to kind of suit them, and I think that is why judicial estoppel exists, and that is why it should operate in this case.

As far as constructive trust --

THE COURT: Do you have any authority for that?

MS. McLEOD: For the judicial estoppel?

THE COURT: Yes.

MS. McLEOD: Yes, we have --

THE COURT: Is that cited in your brief?

MS. McLEOD: Yes, Your Honor.

THE COURT: Okay.

MS. McLEOD: And then as far as constructive trust, we don't believe that was properly preserved either in their arguments to the probate court or in their written appeal -- or motion for reconsideration, excuse me. And even if it was properly preserved, we believe the imposition of the constructive trust is proper and necessary in this case.

At this point, I think the background is helpful. It was a four-day trial. After two days of trial in July of 2021, counsel for Respondent sent out updated subpoenas. The trial was on damages only. So subject -- excuse me, summary judgment had already been granted for our clients. It was a four-day trial only on damages. After two days of trial, we sent out subpoenas for updated information. Counsel for Respondents objected. Somewhere in the time of them objecting, we got the records that showed Respondent liquidated -- excuse me, Appellant had liquidated $267,105 from his accounts.

So at that point counsel for Appellant informed the Court that the money was in there IOLTA account. So with that knowledge, Judge Faulkner issued an order imposing a constructive trust over all of Appellant's non-exempt property of whatever time, wherever located, and however titled. This remedy is appropriate as a result of his deceitful, devious, willful, wanton, and careless actions set forth above.

So that is the background that she issued that order in knowing that a large chunk of his funds was sitting in their trust accounts. This is exactly the scenario for which constructive trusts were created. Principles of equity do not allow Appellant to take his only liquid funds and spend them on attorney's fees for meritless appeals rather than restoring his mother's estate of the $984,000 he was found to owe after a four-day trial.

A constructive trust is resorted to by equity to vindicate right and justice or frustrate fraud. Judge Faulkner's order correctly states that he engaged in a repeated action of civil effect for eight years depleting his mother's property without any regard to what her future needs might be, without regard to her estate plan, without regard to his siblings, without regard to tax law, probate law, prudent investment principles, and et cetera.

Appellant's -- as far as their next issue, they are misstating the law on constructive trust. They have cited no legal authority that states that money or property must be clearly traceable to particular funds or property in defendant's possession. There is no statute or case law cited to it at all for this degree of specificity that they are arguing about.

I mean, constructive trust -- I mean the whole purpose of a constructive trust is so you can get the funds wherever they are located. To say, oh, well, I spent all my mom's funds. Okay. Well, then you should have to use your funds, right? I don't think you get to say, oh, Mom's funds are gone, you can't trace them because I spent them all.

So that is the whole purpose of constructive trust. I don't think you can just twist it to -- twist it to suit your position now to say I spent it all, and that's my money, so you don't have a constructive trust over it. I don't think there is anything in the law that says the constructive trust has to be tied to this degree of specificity that he's arguing about.

We cite to case law in our brief that says it's an attempt at a technical avoidance which rests upon an asserted public policy or illegality of some kind. The courts have refused to accept this ruse, because to do so would be to compound the defendant's wrong. In those instances, as here, the defendant really -- is really attempting to assert not a public policy, but a private policy to insulate the defendant from his own wrong. Equity doesn't permit a defendant to defeat justice by such a ploy. And that's Chapman v. Citizens and Southern National Bank of South Carolina. I think that's a pretty fitting quote for our facts in this case.

And then, finally, we would argue that the appellate court should defer to the trial court's award. The discretion that must be accorded to the special referee compels us to affirm the award as appropriate (inaudible) for misconduct necessitating the imposition of a constructive trust. And that's from Hale v. Finn.

And then, finally, on attorney's fees.

THE COURT: Hold on. Let me stop you there. So looking at the record I didn't realize that -- so summary judgment was granted on behalf of your client by order of July 29, 2021?

MS. McLEOD: Yes.

THE COURT: All right. Was that order appealed -- in your appeal?

MS. McLEOD: No, Your Honor.

MR. PURIEFOY: The summary judgment?

THE COURT: Yeah.

MR. PURIEFOY: No, because it was partial summary judgment, Your Honor. It wasn't -- it was not liability as to every claim that was before the court. It was a partial summary judgment award.

THE COURT: Oh, I see that. Okay. Yeah, the constructive trust was not -- I see that now under the order. All right. Okay.

MS. McLEOD: And then the last issue of attorney's fees, again, we're arguing that it was not properly preserved. It was not mentioned to the probate court or in the written motion to reconsider, so it's not preserved.

The standard of review for attorney's fees is abuse of discretion, so the decision should not be disturbed on appeal absent an abuse of discretion. Judge Faulkner reduced attorney's fees by $6,380. She went through the affidavit with a fine tooth comb. She specifically states that she reviewed all of the elements under Glasscock v. Glasscock and she found such fees reasonable. Appellant cites no legal authority for his claim or evidence that each of the factors must be specific. So Appellant not citing any legal authority, South Carolina law clearly states that short conclusionary arguments without supporting authority are deemed abandoned on appeal and should not be presented for review.

Appellant tries to make comparisons between our attorney fee affidavit and some other cases. One of them was where there was a conclusionary affidavit of attorney's fees. Ours was seven pages long. It had all billing entries, expense entries, and subtracted out amounts previously awarded by the probate court.

And then another case that he references, there was no findings of fact in the order. And then in Judge Faulkner's order, she made 34 findings of fact in her order. Her findings of fact span five of the 12 pages. So, I mean, I don't think that applies here either.

There was another case that they tried to cite for this contingency of compensation, which is also inapplicable. If you actually read that case, it was about a contingent fee award in the absence of a fee agreement. That is not the scenario we're dealing with here either. And there's -- the case they cite I believe was from 2010, and there was a 2021 court of appeals case that states the contingency compensation factor by stating that neither party had entered into contingency fee arrangements with their respective counsel, which is basically what Judge Faulkner ruled here and what the scenario was here that we're operating under.

I think our brief covers everything in a little more detail, but that was kind of a bird's-eye view, and I'm happy to expand on anything Your Honor would like.

(A brief pause in the proceedings.)

THE COURT: Okay. I was looking to see where the attorney -- the attorney's fees are addressed on Page 12 of the order. Okay. All right.

MS. McLEOD: Thank you.

THE COURT: Yes, Mr. Puriefoy.

MR. PURIEFOY: Your Honor, I guess I'll just start with the issues as they went. As it relates to issue one, which is the January 26, 2022 order not being final, the entirety of the Respondent's argument is that the court of appeals has already ruled on this issue. One, that record is not before this Court. That is extremely problematic for the respondents in this case. But perhaps --

THE COURT: I mean, it was filed in the -- with the clerk of court at some point.

MR. PURIEFOY: That's fine, Your Honor. I guess my point being, though, what has been glossed over in that argument that the court of appeals has already ruled on this issue is our cert petition to the supreme court addressed all issues. The jurisdictional issue as it related to the order not being final, the jurisdictional issue as it related to subject matter jurisdiction, and then of course the timeliness issue under the rule that they ultimately ruled upon. But the Respondents are somehow suggesting -- it seems -- that the only issue before the supreme court was whether or not the appeal was, in fact, timely. That is incorrect. Every jurisdictional issue was in front of the supreme court. They had an opportunity to read all of the briefing. And what they did was they came back and said that they reversed the court of appeals. They didn't say we affirm in part, which they oftentimes do, and we reverse in part. It was an outright reversal of the court of appeals.

And so the Respondent's reliance simply on the court of appeals' ruling is improper. There is nothing to suggest by the order of the supreme court that portions of the court of appeals' order is to be accepted, portions are to be disregarded, although we give you no direction on what is to be considered, what is not to be considered. They are cherrypicking and saying although the order itself specifically says reversed.

MS. McLEOD: I think I can clear this up with one sentence from the court of appeals -- I mean from the supreme court order.

THE COURT: I cut him off when he --

MS. McLEOD: Okay. I can wait, whatever.

MR. PURIEFOY: Your Honor, I reviewed the order, and what cannot be disputed is it says "reversed and remanded." It's the very first page of the document says "reversed and remanded." It is not "reversed in part," "affirmed in part." It is "reversed." I think Your Honor hit the nail on the head that you cannot take away from the order and you cannot add to the order. What the order says is it is reversed. We don't get to cherrypick and say although it was reversed on the untimeliness issue, that inherently means that they agreed with the court of appeals. In fact, it is the exact opposite. What the supreme court said was we don't need to get to the other jurisdictional issues because the appeal was timely, and because the appeal was timely, we don't need to look at whether or not the order was final. We don't need to look at whether or not subject matter jurisdiction rested with the probate court. That is for this court to determine.

THE COURT: How about the court of appeals' order being persuasive authority?

MR. PURIEFOY: It very well may be, Your Honor, but, again, their citation to it is what I believe is beyond the record. And I may be wrong, because I don't know what the record really is at this point because it's just the entire 9,000 pages to the court of appeals.

But, in any event, I think that they are incorrect in simply relying on the court of appeals' analysis, because what we're going to run into is the possibility of -- and it may be the case regardless -- that this Court says we don't disagree with the court of appeals' analysis. We're going to appeal that issue again, and that will likely, very quickly, be disposed of by the court of appeals, but then we will take it up to the supreme court -- excuse me?

THE COURT: (Inaudible).

MR. PURIEFOY: We certainly may, Your Honor. But my point is it is not dispositive of the issue. The order is not dispositive of the issue. I think the Court, in this instance, can review all of the facts and the evidence de novo and make a determination on its own as to whether or not this was, in fact, a final order.

As it relates to subject matter jurisdiction, the same argument: They have relied entirely on the court of appeals. I think that this is a novel issue as it relates to the application of the survival statute to these types of claims for predeath claims that sound not in -- wrongful death, for example, but tort and statutory violations that lead to damages. Those claims on the very face would have abated at death of the decedent if the survival statute was not in place.

So the survival statute, even read against 62-8-401 -- I believe was the citation -- that statutory provision does not do away with the survival statute. And so in reading the survival statute, there is very limited instances in which the probate court has even concurrent jurisdiction with the court of common pleas, which is a constitutional construct, right.

The -- the -- common pleas is a creature of constitutional contracts. What the probate court is is a general assembly creation. This court is granted with general jurisdiction. The Constitution says this court has general jurisdiction unless there is a specific tease out of jurisdiction being sent to another court. The only tease out of jurisdiction that would be present for purposes of this hearing is a carve-out under the probate code related to the power of attorney and concurrent jurisdiction related thereto.

But we come back to: How do your claims

survive the death of the decedent? Well, you have to go to the survival statute, and that statute very clearly says this is only for the allotment of settlement proceeds, in which the court has concurrent jurisdiction. Meaning, I could come before the court -- this court -- and get a liability ruling, and get the probate court to approve a wrongful death settlement. That is what the statute permits and allows to happen. The statute doesn't say that you can try predeath claims or conduct in probate court. That is not what the statute says.

And, then, again, Your Honor, we come back to the attorney's fees. Our position is very simple. The Court found what they found. The Court ruled the way they ruled. Our position is that the affidavit -- a review of the affidavit does not satisfy the six elements or doesn't contain the six elements necessary in order to prove attorney's fees.

THE COURT: All right.

MS. McLEOD: Thank you, Your Honor. I think if you just read the first paragraph from the court of appeals -- excuse me, from the supreme court. He is placing a lot of emphasis on the "reverse and remanded" on the front. It clearly says: "We grant petition for a writ only as to whether the appeal to circuit court was timely. Reverse the court of appeals on that issue."

So they're only reversing on the issue of whether it was timely. For him to argue any otherwise, in my opinion, honestly, is misleading -- and incorrect, but misleading. I think that is the problem we have throughout this case, and I think -- I ask you, especially for the attorney's fees, to read the cases that are cited. They don't always stand for the proposition that they are quoting, and the facts certainly -- you know, they have these inapplicable facts and they're citing them as law, and they just -- in my opinion -- can be misleading. I think Devon is a very smart person and has made some great arguments. I think the supreme court is filled with, you know, very intelligent attorneys, smarter than me certainly, and they can dismiss sua sponte for subject matter jurisdiction. I think if they thought there was a subject matter jurisdiction issue, they certainly wouldn't send us back down here. They could dismiss that sua sponte as far as attorney's fees awards go.

I think based on the standard of review, it should be -- you should defer to the probate court. I'm not even sure any of these issues have been properly preserved. And, again, I think subject matter jurisdiction is clearly proper. If not, they should be judicially estopped from making all of these opposite arguments.

And the court of appeals' record -- I mean the court of appeals, obviously, that order is part of the record. That is the prior record of this case. So I don't think -- it didn't exist yet to be in their record on appeal, so I don't think their record on appeal would not include the prior procedural history of the present case. That is just nonsensical.

THE COURT: I'm interested -- I think it is interesting that this was an unpublished opinion, because it kind of has some meaty issues in it. I'm so surprised that it went under unpublished.

MR. PURIEFOY: And, Your Honor, I think the reason is simple. As you know, the supreme court -- when they have an opportunity to kick something procedurally, if they can, they certainly are inclined to do so. And I don't think that the order as written and as interpreted by the

Respondent actually stands for the proposition that they think it stands for. They are suggesting that because the Court said we're only considering the untimeliness issue, that that means that we agree with the court of appeals on all of the other issues. It is the exact opposite. They're saying we don't have to look at what the court of appeals did because the appeal was timely, i.e., if the appeal is timely, the court of appeals should have never had the issue. This should have been a substantive argument to the court of common pleas to be determined, then subject to appellate review by the court of appeals; as opposed to, Court of Appeals, you were correct in hearing those jurisdictional issues, but even though you are right on those, we're just going to kick it on timeliness. It's the exact opposite.

What the court was saying is, Court of Appeals, you had no business having the jurisdictional arguments because the appeal was timely. Send it back to common pleas, let common pleas make a ruling on the jurisdictional arguments, and then we'll see you back at the court of appeals, if necessary.

MS. McLEOD: I think -- if I may, Your Honor.

I think we all read appellate court decisions that say we can -- you know, that cites the case that says we can -- we stop here because we're not considering anything else. We don't have to go any further. They didn't do that in this court -- in this case. The supreme court didn't do that. I think it is interesting that his argument has changed from a second ago where it said "reversed and remanded," and now he's saying, oh, no, they just stopped there because that is as far as they had to go. I think that is a trend in this case as well. But I think it's clearly that they ruled on one issue, and that's it. So I don't think there is any reason to believe the court of appeals is incorrect. And unpublished opinions are still persuasive authority in the cases -- I believe in the cases that they are referencing.

So we would still argue that even though it's unpublished and we wouldn't be able to cite it in any other case, in this case it is a procedural history of this specific case.

THE COURT: That follows that rule anyway. It is amazing -- you know, the argument -- they all say -- and I don't think it applies here -- but, it's like, Judge, I realize it's unpublished, but here's, you know, and then they'll cite the case.

MS. McLEOD: It is too tempting not to, right?

THE COURT: Especially when you think it is directly on point. And, quite frankly, it does give some guidance to the Court looking at something in the way that someone else has already addressed it.

I used to like to do this probate work. I think you all bring some really interesting issues, and I look forward to delving into it.

So you are going to do a brief within -- by next Wednesday.

MS. McLEOD: Okay.

THE COURT: Citing any -- and I don't want you to change your brief just to reference -- if there's -- if you -- if there's not a reference in the record on appeal, then you just need to say that in parenthesis.

MS. McLEOD: Okay. I'll do that.

THE COURT: Hearing your argument, though, it's not one of these cases that is heavily involved in the record on appeal anyway.

MS. McLEOD: No. There's nothing new.

THE COURT: I mean, it is -- I mean, I think it is all these legal issues. You know, it's not, well, I need to make findings of fact, because that is not -- your argument is not based on that. So I don't -- I'm not sure that the record on appeal is as important as other times of appeal.

Anyway, so then you will have ten days to file your reply brief, if you feel it's needed, which knowing you, I'm sure you will find it's needed. And then I'll look at it. Since he's a little closer to law school, he'll look at it very hard (indicates). And I'll let you know.

And, again, after we get that, if there is some point that I feel like additional argument may be needed, I'll let you know.

MS. McLEOD: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon, the Webex concluded for this case.)

CERTIFICATE OF TRANSCRIBER

Case Name: Sterling Mensch v. Shauna Waddell

Case No.: 2022-CP-23-01064

Date of Hearing: October 16, 2025

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I, Natalie Dahl, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording.

I do further certify that I am neither of kin, counsel, nor have interest to any party hereto.

Natalie Dahl, RPR

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