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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000330

Case No. 2019-CP-40-03582

Julia B. Brooker,……………………………………………………………………….Respondent

v.

Beacham O. Brooker, Jr., in his individual capacity as Trustee
and individually as a Beneficiary of the Janet B. Brooker Trust,
and Ellen B. Corontzes individually and as a Beneficiary of the
Janet B. Brooker Trust,…………………………………………………………………….Appellants

FINAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

One point on which both parties agree is that the Settlor/Mother, Janet Brooker ("Janet" or "Settlor"), wanted her three children, Beacham Brooker ("Beach"), Ellen Corontzes ("Ellen"), and Julia Brooker ("Julia"), to be treated as equally as possible. Where the parties part is where Julia takes this conclusion to the extreme. She wants to be equalized for every transfer of money that Janet made to each grandchild or spouse – whether that be a birthday gift or payment for mowing Janet's yard. This is true from the beginning of her siblings' marriages in the late 1980s and the births of her nieces and nephews in the 1990s, even though Janet created the Trust twenty years later.

Under Julia's interpretation, she would require Beach to do what George DuRant did to the tune of $60,000, along with having the force of several subpoenas behind him, requiring various financial institutions to search their basements for 20-year-old documents. Surely, Janet did not want to impose this financial and time-consuming burden on her son Beach when she would have a good idea of how many gifts she gave each spouse and grandchild at the time she created the Trust in 2007. To do so would violate Janet's tenet of treating every child as equally as possible – the one thing about which these siblings agree. Julia's interpretation and resulting requirement of a forensic accounting greatly favor Julia and Ellen to the substantial detriment of Beach, who would have to spend months upon months collecting the necessary data and then either conducting the forensic accounting or hiring someone like George DuRant to do so at $325 per hour, who subsequently spent 190.85 hours (totaling approximately $60,000) deciphering where the money went. This was not Janet's intent, which was expressed in her Trust Agreement and her conversations with her estate planner W. Steven Johnson, Esquire ("Mr. Johnson").

Julia's arguments regarding the meaning of the equalization clause are based upon the Probate Court's decision relying on language (outside the equalization distribution) in the Trust Agreement, stating that the Settlor wanted all her children treated equally with each receiving "equal shares." But this argument ignores the fact that Janet Brooker previously had a will and trust with the same provisions and, under that plan, had attempted to treat her children equally. She had set up and funded trusts for the grandchildren, funded them with minimal contributions, and made tax advantaged payments[1] for the grandchildren's private school tuition. To compensate Julia, she paid for several expensive overseas trips for herself and Julia. Had she believed this was not adequate compensation, she would have paid Julia an equal share contemporaneously. Prior to the 2007 change in estate planning, she had never given federal gift tax annual exclusion gifts to non-blood relatives (the spouses of Beach and Ellen).[2]

What changed, and the reason for the full revision of the estate plan in 2007, was that, due to the increase in market value of the securities held, the total value of the estate exceeded the $2 million exclusion from the Federal combined estate and gift tax of 55% of the estate's value. Thus, Beach Brooker and Janet Brooker requested the assistance of Todd & Johnson regarding strategies to reduce the potential amount of tax owed. Those strategies included a 529 plan for grandchildren college tuition, personal residence trusts on Janet's home and beach condo, a family LLC to which Janet contributed Lockheed Martin stock as part of her capital contribution, and, most importantly for present purposes, an accelerated annual gifting plan where she would gift up to the federal

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[1] The Estate and Gift tax element emphasizes another inequity in the Probate Court's order. The equalization amounts the Court ordered are to be paid in post-tax dollars thus disregarding the fact that Julia benefit from the gifting program's tax savings of 55% of the amount of those gifts while Beach and Ellen do not.

[2] Janet did give the spouses the annual exclusion gift for 2007 days before the Trust was signed. But Janet made the gifts in contemplation of the aggressive gifting program and wanted to ensure she captured the 2007 tax exclusions.

annual gift tax exclusion (which increased over the period from $12,000 to $13,000 to $14,000) to all available family members including the non-blood relative spouses of Beach and Ellen. Because Julia was not married and had no children, a provision was included that an equal amount of the aggregate gifts to each of Beach's and Ellen's families prior to death would be paid out to Julia from the estate post-mortem.[3]

Thus, the sole impetus for the equalization clause for Julia was the accelerated gifting program which did not pre-exist the 2007 estate plan revisions. The pre-2007 estate plan had no such clause. As Mr. Johnson testified when he spoke with Janet, the only gifts to be considered in the calculation of the equalization distribution are the gifts made after the Trust's execution in 2007. (ROA 441-442). Julia's interpretation of the Trust, the Probate Court's ignoring the testimony of Mr. Johnson or calling it into question, and the Probate Court's reliance on a codicil never executed or presented to Janet, *Julia's* interpretation (not Mr. Johnson's) of the notes of paralegals of Todd & Johnson all require this Court to look into the fallacies of the Circuit Court's Order affirming the Probate Court's Order. This Court should reverse the Circuit Court and enter judgment in favor of Beach and Ellen.

FACTUAL BACKGROUND

Prior to the 2007 estate plan amendments, Janet, the Settlor, had established trusts for each of her grandchildren at their birth and funded those trusts annually for a number of years through transfers of common stock. (ROA 414:1-9; 437:25 – 438:1). In addition, Settlor paid private school tuition for the grandchildren for a number of years. (ROA 457:6-9). In an attempt of fairness toward Julia, Settlor paid for a number of international trips for the two of them including China, Africa, Peru and the Galapagos Islands, and Europe. (ROA 511:23 – 512:23).

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[3] Equalization could not be achieved during Mrs. Brooker's lifetime because gifts to Julia would exceed the annual gift tax exclusion and be taxable.

Julia focuses on paltry documentary evidence in an effort to avoid the clear testimony of Mr. Johnson and his law partner, William Reynolds. More specifically, Julia focuses on (1) a draft of codicil by office staff that was never used or shown to Settlor, (2) notes purportedly taken by Mr. Johnson during the September 25, 2007 family meeting,[4] and (3) notes from Mr. Johnson's paralegal that referred to gifts from 1997. As discussed in the brief in chief, Mr. Johnson testified that he was hoping the codicil would be a quick fix to address the equalization issue, but realized the software that generated the codicil would not allow him to accomplish Settlor's intent. (ROA 456:18 – 457:4; 460:25 – 461:10). There is no evidence that Settlor reviewed the codicil, much less executed it. In fact, her ignorance of the codicil and resulting failure to sign it is evidence, in and of itself, that the codicil does not reflect her intent. Second, the only references to equalization or lifetime gifts in Mr. Johnson's notes (ROA 571-572) is "(1) Do codicil – with equalization provision" on the first page and "equalization clause" on the second page. There is nothing regarding lifetime gifts or that Julia should receive gifts from the early 1990s. It is a stretch to say that anything beyond an equalization provision was discussed. Finally, Mr. Johnson's paralegal

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[4] In a footnote, Julia also suggests that because Mr. Johnson did not use "future gifting" or "acceleration of gifting" in a time entry in which he wrote "discuss gifts of assets to children" then Mr. Johnson must mean that he discussed more than "future gifts" which presumably was gifts made in the past. (Br. of Resp't at 8 n.2.) Julia is seeking perfection in a lawyer's description of his time spent. Quite frankly, Mr. Johnson's use of "discuss gifts of assets to children" does not mean that he spoke about any gifts other than the ones Janet was about to aggressively pursue. Julia's reliance on this time entry reflects her desperate attempt to bolster her factual record.

In fact, Julia's own brief suggests that Mr. Johnson was not talking about prior gifts. In her brief, Julia places emphasis on the fact that Mr. Johnson had no explicit knowledge of the alleged approximately $900,000 worth of gifts. But this emphasis is without merit. His alleged lack of knowledge of the amount of "gifts" given by Settlor is of no moment. What is of moment is his explicit knowledge of her intent with respect to her estate plan and the equalization distribution. Julia is looking for meaning when none exists, other than the fact that Mr. Johnson discussed "gifts of assets to children."

was "simply mistaken" when she referenced another year for the collection of gifts, rather than 2007. (ROA 468:14 – 469:2).

None of this evidence is sufficient to establish that "lifetime gifts" meant to Settlor all of the gifts she ever gave to her grandchildren or her children's spouses. Yet, the Probate Court (and the Circuit Court) erroneously concluded this evidence trumped the very language in the Trust Agreement and the unambiguous testimony of Mr. Johnson that Settlor intended for the trust to be prospective only, not retrospective. There is no evidence, much less a preponderance of the evidence, to support Julia's version of her mother's intent. The only competent evidence is (1) Mr. Johnson's testimony, who drafted the estate documents and was well-aware of Settlor's intent, (2) Mr. Reynolds' testimony, who reviewed the equalization provision at issue and agreed with Mr. Johnson's drafting to capture Settlor's intent, and (3) the trust agreement, itself, which as testified to by both Mr. Johnson and Mr. Reynolds reveals Settlor's intent to capture gifts after October 2007, in conjunction with the aggressive gift-gifting plan. The remaining evidence of a codicil that was never signed supports Appellants' position that the equalization distribution was to be prospective, not retrospective. And the other evidence of the paralegals' notes are mere references made mistakenly as testified to by Mr. Johnson.

Julia takes issue with Beach and Ellen's treatment of George DuRant, Julia's expert, in their brief in chief. Specifically, she argues that Beach and Ellen cannot complain about Mr. DuRant when they agreed to his numbers during the trial. Additionally, they cannot complain about the nature of the alleged "gift" – whether it was a true gift or simply a transfer of funds – when they agreed to Mr. DuRant's calculations. First, the Probate Court informed the parties that it was going to rule in favor of Beach and Ellen with respect to the issue of lifetime gifts consisting of those only from 2007 forward, i.e. the gifts from the aggressive gifting plan. Consequently, there was no need to challenge Mr. DuRant's calculations or characterization of gifts pre-2007,

which were much more varied and not consistent across the board like they were post-2007. The calculations to which Appellants agreed were those presented by both parties at the trial where the judge asked for the amount of post-2007 gifts with interest running to the date of the Trustee's tender to Julia. (ROA 516:6 – 517:5). Mr. DuRant presented $732,235.86 (ROA 631) and the Trustee $744,644 (ROA 659-661).

Second, Beach and Ellen's complaint against Mr. DuRant's work product is that he simply listed all transfers to the spouses and grandchildren without investigating whether it was a gift or if an equal offsetting gift was made to Julia. An example would be the entry of $9,883 debt forgiveness to Dino Corontzes on December 31, 1995. This involved a financing scheme to acquire a building in Five Points where the Corontzeses decided for their own estate planning purposes to take title in Dino's name rather than Ellen's. The debt forgiveness by Settlor benefitted Julia's one-third share just as it did Beach's. No child was treated differently.

In sum, the testimony of Mr. Johnson, supported by Mr. Reynolds and the Trust Agreement, clearly provides that lifetime gifts were only prospective and consisted of those gifts from October 2007 forward. Their testimony and the Trust Agreement were the only competent testimony in front of the Probate Court regarding Settlor's intent. No competent evidence was before the Probate Court that supports Julia's position. This Court should reverse the Circuit Court that affirmed the Probate Court.

ARGUMENT

I. SETTLOR'S INTENT IS NOT FOUND IN JULIA'S INTERPRETATION OF THE TRUST.

Julia contends that she should be made whole from all the gifts given to Settlor's grandchildren and children's spouses from the day they became Settlor's grandchildren or children's spouses to the date of Settlor's death. From a common sense perspective, this

interpretation of Settlor's intent is nonsensical because Settlor could not have intended Julia to receive a "credit" in her column for every $10 birthday gift given to each grandchild or every meal she may have bought for another sibling's family. Of course, Settlor wanted each child, including Beach and Ellen, to be treated equally, but within reason.

Julia looks to (1) the use of "equal shares" in the trust agreement, (2) the preamble to the equalization distribution clause which states that Settlor "previously made gifts" and the use of past tense in the equalization clause to indicate that pre-2007 gifts were to be used; and (3) the evidence at trial, including testimony that Julia was not to be disadvantaged and treated equally, that Mr. Johnson did not know about gifts worth approximately $900,000 before 2007, and that Mr. Johnson's staff created documents with incorrect information as discussed above. But none of these reasons collectively trump the solid and consistent testimony of Mr. Johnson that the Settlor wanted lifetime gifts to be those made only after the creation of the Trust. And both sides agree that the Settlor's intent is of paramount concern. Mr. Johnson clearly and succinctly provided the Probate Court with what the Settlor's intent was – to equalize Julia with gifts from the Trust forward.

Regarding the "equal shares" argument and the preamble/use of past tense argument, Julia argues that case law demands that interpretation of a testamentary trust must be based on "a plain reading of the document as a whole." (Br. of Resp't at 14.) However, this statement of law is only one of the rules of statutory and contract construction. It is not particularly useful in this instance because the issue in this lawsuit involves only the interpretation of a single phrase in a single clause of the Trust, i.e. the language "[f]rom the date of this trust forward" in subparagraph (2)(a) of the equalization clause. With regard to this language, Julia contends that the repetition of the phrase "equal shares" appears twice other than in the equalization provision. Thus, the equalization must cover gifts prior to its creation. Julia overlooks that fact that the phrase "[f]rom the date of this

trust forward" does not appear throughout the document. Rather, significantly, it appears only once in the trust—in the equalization clause—indicating a differing timeline for that clause than other duties imposed by the trust on the Trustee. Moreover, Julia's conclusion that Settlor intended that all her children receive equally under the Trust because she had historically treated them equally confirms Beach and Ellen's argument. Settlor had always been fair in her gifting and included an equalization clause to make up for the accelerated gifting to grandchildren and non-blood relatives under the 2007 Trust. Those gifts and the equalization payment were to be made ***under*** and ***from*** the Trust which did not exist prior to 2007.

Next, Julia repeats an argument she has made throughout this litigation, that, in reference to the Trustee's duties, use of the past tense of the verb "to make" indicates an intent to include all gifts made during Settlor's lifetime. However, the trust language is referring to a duty to be performed ***in the future*** (after death) to compensate for actions done ***in the past*** (from 2007 until death). The past tense is appropriate and says nothing about the date from which gifts were to be calculated. That part of the instruction is contained in the phrase, "[f]rom the date of this trust forward." That phrase must be given meaning. If Julia's argument means it refers only to the beginning of the Trustee's duties, then it causes those words to be redundant and superfluous and violates the rule of construction that, "A construction rendering a provision, term, or part meaningless, superfluous, surplusage, useless, inexplicable, or nugatory should be avoided." 17A CJS, *Contracts*, §§399-400, pp. 289-91, and other authorities cited in Appellants' main brief.

Julia tries to avoid the import of "[f]rom the date of this trust forward" by arguing that the Court should not be constrained by formal rules of construction when there is other evidence of the settlor's intent. However, Julia forgets that the only competent evidence of the Settlor's intent, besides the Trust Agreement itself, is the testimony of Mr. Johnson and Mr. Reynolds, which

undeniably provides that lifetime gifts were to be post-Trust and that Settlor had no desire to include pre-Trust gifts in the equalization distribution calculation.

II. Johnson's Testimony Is of Utmost Value.

Julia advances her opinion that Steve Johnson, the estate's attorney was confused about his client's intentions in revising her estate plan. Julia argues in the negative that Settlor never expressed to him a desire that pre-2007 gifts be excluded from the equalization calculation. (Br. of Resp't at 20.) The point is, however, that Settlor never said anything to the effect that, "I feel that I have been treating Julia unfairly and I want a clause causing the Trustee at my death to go back in time and determine the gifts I have given during my life to Beach's and Ellen's spouses and children." Logically, Janet, the Settlor and gift-giver, who long retained accountants and estate attorneys, was in a better position than the newly appointed Trustee to calculate those amounts. She could have simply written a check to Julia or transferred stock to make up the difference instead of placing the burden on the Trustee to do such investigation at an undetermined date in the future.

Additionally, Julia argues that Mr. Johnson testified that Settlor never expressed a desire that lifetime gifts made prior to the Trust be excluded from the calculation of the equalization provision. However, this attempt at a negative inference is clearly contradicted by Mr. Johnson's testimony at trial.

> Q. Now, when you drafted the Trust Agreement and specifically paragraph 2(a) (b) and (c), which is denominated equalizing distribution to the Settlor's daughter Julia B. Brooker, was that intended by Mrs. Brooker and by you to state that this equalization was only to be made going forward as indicated by paragraph (a)'s language, "From the date of the trust forward"?
>
> A. That is correct.

(ROA 442:5-13).

Finally, Julia again argues that certain internal memoranda and draft instruments obtained through discovery from attorney Steve Johnson's office are competent evidence of Janet Brooker's intent that the equalization clause apply to lifetime gifts preceding the 2007 trust. These documents include a draft of a codicil prepared by a non-lawyer paralegal identified as CKO and notes prepared by a second paralegal, Ms. McMahan. This argument must be rejected for at least two reasons: 1) the law firm's non-lawyer employees never met or corresponded with Settlor, the Settlor, and are not qualified to express her intentions in legal instruments; and 2) to the extent that their work product may contradict the plain language of the trust, that evidence is barred by the doctrine of merger.

Regarding the first reason, Mr. Johnson, a member of the bar of this State, is the only individual within his firm who may represent the wishes of his client, Janet. Employees of his office serve under his direction and he may freely accept or reject their advice. In this case, he obviously rejected it.

Second, South Carolina's well recognized merger doctrine precludes consideration of these erroneous drafts and notes. As expressed by this Court:

> The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreement prior to performance. [291 S.C. 311] The execution, delivery, and acceptance of a deed varying the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed [citations omitted].

Shoney's Inc. v. Cooke, 291 S.C. 307, 310, 353 S.E.2d 300, 303 (Ct. App. 1986) (*quoting Charleston & Western Carolina Rwy. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187 (1957). *See also Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (1984); *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1983). Thus, even if the codicil draft Julia obtained had

represented a negotiated instrument with the client, it was superseded by the trust instrument itself and merged into it.

In sum, the Court cannot ignore or discount the testimony of Steve Johnson. He was there, present with Settlor, when she discussed her intentions, and then he put them into writing, which Settlor signed, indicating her agreement with his words. He captured her intent. Considering the Probate Court found the Trust Agreement ambiguous, the only other avenues to determine Settlor's intent is Mr. Johnson, Settlor's estate planner, and his partner Bill Reynolds. Employee erroneous documents and notes do not change the clear testimony of Mr. Johnson and Mr. Reynolds.[5] The weight of their testimony, along with the construction of the Trust Agreement, requires a reversal of the Probate Court.

III. The Broad Scope of the Dead Man's Statute Precludes Julia's Testimony Regarding Any Meetings With Settlor or Her Beliefs About Settlor's Intent.

Julia's testimony regarding what she was led to believe by either Settlor or Mr. Johnson as to what her mother's intent was with respect to the equalization distribution is incompetent because she is an interested witness subject to the Dead Man's Statute, S.C. Code Ann, § 19-11-20. Julia attempts to avoid the Dead Man's Statute by claiming that Mr. Johnson told her in a family meeting that her mother intended to "catch her up at the end." (Br. of Resp't at 19.) First, this alleged statement does not mean that "catch[ing] [Julia] up at the end" means that Julia is entitled to be caught up for every gift made to both spouses and four grandchildren. To believe this statement, as interpreted by Julia, is approaching the bounds of absurdity. In other words, under Julia's

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[5] Julia is asking this Court to put more weight behind a (1) codicil that was never presented to or signed by the Settlor and (2) notes of Todd & Johnson's paralegals, who did not appear before the Probate Court, over the testimony of Mr. Johnson, a dean of the South Carolina trust and estates bar. Stated simply, Julia wants this Court to believe that Mr. Johnson was not telling the truth on the witness stand and that the codicil and her own interpretation of the paralegals' notes tell the true story of what the Settlor's intent was. Mr. Johnson told the truth on the stand, and his employees' errors should not call into question his integrity.

interpretation, she would be entitled to be made whole for $15 Settlor paid one of her grandchildren when they were 12 years old to wash her car, even though it was not a gift and of a de minimis value. Under Julia's interpretation, Beach is to credit her account in the amount of $15 for this chore performed by her nephew or niece.

But more importantly, this discussion still falls into the teeth of the Dead Man's Statute. In contravention of South Carolina law, Julia narrowly construes the Dead Man's Statute to argue that discussions with Mr. Johnson and her mother are not a communication or a transaction with her mother, and therefore, not subject to the Dead Man's Statute. However, South Carolina courts broadly interpret the Dead Man's Statute, including the definition of "transaction" for purposes of the Dead Man's Statute. "'Transaction' is a very comprehensive term, meaning the carrying on or through of any matter or affair." *Merck v. Merck*, 89 S.C. 347, __, 71 S.E. 969, 970 (1911). And "[t]he test of the interest of a witness in the event which disqualifies him, under statute, from testifying in his own behalf against the personal representative of a deceased person, is that he will either gain or lose by the direct legal operation and effect of the judgment." *Long v. Conroy*, 246 S.C. 225, 234, 143 S.E.2d 459, 463 (1965). The meeting with Mr. Johnson and Settlor is a transaction for purposes of the Dead Man's Statute. It is the carrying on of Settlor's estate. As stated by Julia, Mr. Johnson billed Settlor for this time to "discuss gifts of assets to children." (Br. of Resp't at 1.) This time entry is an excellent expression of the children, including Julia, carrying on their mother's estate by engaging in a "discuss[ion] of gifts of assets to [them]." Therefore, this is a transaction with the decedent about which none of the children can testify.

Recognizing this problem, Julia then pivots to argue that the conversation or transaction was really with Mr. Johnson, not her mother. But, Mr. Johnson is her mother's agent. Julia cannot hide from the Dead Man's Statute by claiming Mr. Johnson, not her mother, made these statements. Julia also cannot argue that she learned this information from Mr. Johnson after Settlor's death.

(Br. of Resp't at 19.) Curiously, Julia does not cite to any testimony in the record to support this statement, and even if true, Mr. Johnson was still acting as Settlor's agent. He was merely a mouthpiece of the deceased.

But even if Julia could avoid the Dead Man's Statute, her testimony is directly controverted by Mr. Johnson. His unwavering testimony consistently remains that Settlor was only looking prospectively and her definition of lifetime gifts, included only those post-Trust. He, not Julia, was there with Settlor when she was expressing her intent. He, not Julia, drafted the estate planning documents to capture this intent. He, not Julia, is a seasoned estate planning specialist who is well-versed in estate planning language that accounts for equalizing heirs. Because Julia may have misunderstood what her mother or Mr. Johnson told her is no match for Mr. Johnson's testimony, and her confusion cannot be the support for the Probate Court's finding that Settlor intended for the Trustee to capture every transfer of money from the early 1990s to the present. Stated differently, her misunderstanding does not inform the intent of Settlor or the meaning of the equalization distribution.

Finally, Julia argues that (1) Beach testified about what gifts he made to carry out Settlor's wishes and that (2) Julia's testimony mirrors Mr. Johnson's testimony that Settlor did not want Julia to be disadvantaged because she was not married with no children. (Br. of Resp't at 20.) First, Beach's testimony was sought by the Probate Court, and therefore, Julia cannot argue that Beach opened the door to any testimony barred by the Dead Man's Statute. In fact, the colloquy is as follows:

> THE COURT: Do you want to ask [Beach] anymore questions?
>
> MR. SOWELL: No.
>
> THE COURT: Okay. Mr. Griffin?
>
> MR. GRIFFIN: I'm in October 2016 emails, can I look through?

THE COURT: Yes. Here's some things that I am wanting to know. There are three entities that he or his mother banked with: Stephens, Morgan Stanley, and First Community.

MR. SOWELL: Correct.

THE COURT: No other banks? No other –

MR. SOWELL: As I understand it, that's the universe.

THE COURT: Well, that's for him to answer, right?

MR. SOWELL: I can ask him.

(ROA 491:6-22). The discussion referenced by Julia in her brief follows. (Br. of Resp't at 20.) There was no opening of the door to testimony by Beach. Also, there was no objection by Julia's counsel that the testimony violated the Dead Man's Statute. Beach was simply answering a line of questions that the Probate Court wanted clarified. Moreover, Julia claims the door was opened when Beach's lawyer asked for directed verdict by, as the Probate Court put it "leav[ing] it to Mr. Brooker's interpretation only [and] that the rest of the litigation should be ended." (ROA 499:22-24). But, Julia misses the very substantial point that the parties are here because she called Beach's interpretation into question. In her Petition, she lays out Beach's interpretation and says it is incorrect. In the same Petition, she lays out her own interpretation. This is the very dispute that is to be determined. It is no mystery what Beach and Ellen's interpretation is or what Julia's interpretation is. Rather, Julia conflates Beach and Ellen's request to adopt their interpretation as the correct interpretation with an evidentiary rule that renders interested witnesses incompetent.

Additionally, Julia argues that her testimony mirrors Mr. Johnson's about Settlor's desire not to disadvantage Julia, and therefore, should be allowed. Again, this testimony does not open the door. To the contrary, Mr. Johnson, as the estate planner, is an exception to the Dead Man's Statute. *Hanahan v. Simpson*, 326 S.C. 140, 152, 485 S.E.2d 903, 910 (1997), *superseded by*

statute on unrelated grounds (holding the "testimony of the attorney preparing the will is generally held admissible on the ground that the attorney is not an 'interested person.'"). Mr. Johnson is allowed to testify; Julia is not. It matters not that some of her testimony mirrored Mr. Johnson's testimony. She is an interested person as she undeniably "will either gain or lose by the direct legal operation and effect of the judgment." *Long v. Conroy*, 246 S.C. 225, 234, 143 S.E.2d 459, 463 (1965). Julia is the textbook example of a witness rendered incompetent by the Dead Man's Statute.

IV. The Award and Amount of Attorney's and Professional Fees Are In Error.

Appellants rely on their argument in their brief in chief and maintain that Julia did not win the case, *in toto*, which could have led to a judgment worth several more millions of dollars. Justice and equity do not require Julia to receive all of her attorney's fees and expert fees, especially when her conduct adds to the substantial fees accrued by her attorneys and expert.

CONCLUSION

For the above-stated reasons and for those stated in the Brief of Appellants, this Court should reverse the Circuit Court and Probate Court and enter judgment in favor of the Appellants.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Appellants complies with Rule 211(b) SCACR.

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