THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

PETITION FOR REHEARING

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BACKGROUND

By its Unpublished Opinion herein dated June 1st, 2022, the Court holds, in relevant part:

> 1. The circuit court did not err in affirming the probate court's denial of David's Rule 60(b) motion. On appeal, David failed to properly challenge the probate court's finding that Lisa [Mattox] established her entitlement to an omitted spouse share pursuant to section 62-2-301 of the South Carolina Code (2022), making this finding the law of the case.

This holding is a misapprehension of the issues in this appeal. At no stage of this matter - neither in the Probate, Circuit or this Court - has the Appellant denied Lisa Mattox' right to an omitted spouse share. This issue is not, and has never been, in contention.

This appeal concerns the Appellant's late discovery of his brother's original Will, its recognition by the Probate Court and the effect thereof.

The Appellant contends that the Opinion's holdings as to the necessity of a Rule 59 hearing before the Probate Court are misplaced in their application of the law, but accepts the same in discussing the points set out herein. He preserves his position as to those matters.

RULE 60(b) RELIEF

Acknowledging the facts found by the Probate Court in the Order appealed as the law of the case, and on which it based its ruling, the Appellant, David Mattox, lived with his mother Peggy Mattox at the time she discovered the will in her home. That Order also recites that he lived in that house in 2017. [RECORD ON APPEAL, Order of Nov. 21, 2018, Finding 12. p.8.].

In *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 446 (Ct.App. 2005) this Court was faced with a claim of a lost or undisclosed document in a Family Court case. This Court held:

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence:

1) will probably change the result if a new trial is granted;
2) has been discovered since the trial;
3) could not have been discovered before the trial;
4) is material to the issue; and
5) is not merely cumulative or impeaching.

[Id., 364 S.C. ___, 612 S.E.2d 459; paragraphing added.]

Here, as to the above elements, there is no question that:

1) acceptance of the discovered will would change the result of the first Probate Order of September 27, 2017;
2) that the original will was discovered since the first Probate trial;
3) that the original will is material to the issue of Probate and the Decedent's heirs; and
4) that the original will is not merely cumulative or impeaching.

This listing of requirements leaves us with only element number (3): could the will (with due diligence) been discovered before trial? To quote again from *Lanier:*

> We find the instant case analogous to *Lans* [*v. Gateway 2000, Inc., 110* F.Supp.2d 1 (D.D.C. 2000)]. Wife was well aware the agreement existed; yet, she did not plead its contents or otherwise inform the court of the document's potential application.
> [*Id.,* 364 S.C.___, 612 S.E.2d 460]

Here, the Appellant had plead the contents in the earlier Probate action and produced a copy of the will. [RECORD ON APPEAL, p.29 – 47; Transcript of Hearing, p.197 - 227.]. The *Lanier* court clarified its holding as follows:

> [T]his court has previously held that evidence "in the possession of the party before the judgment was rendered . . . is not newly discovered evidence that affords relief." *American Cetacean* Soc'y v. *Smart,* 673 F.Supp. 1102, 1106 (D.D.C.1987) (Richey, J.). *See Coastal Transfer Co. v.* Toyota *Motor Sales, U.S.A.,* 833 F.2d 208, 211-12 (9th Cir.1987) (evidence that is somehow in possession of a party at time of trial may not be "discovered"); *see also Longden v. Sunderman,* 979 F.2d 1095, 1103 (5th Cir.1992)

(misplaced evidence is not newly discovered evidence); *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir.1987) (party may not "discover" after trial evidence that was within knowledge of employees at time of trial).

[*Id.*, 364 S.C._____, 612 S.E.2d 460]

In this case, the original will was not in possession of the Appellant or his agents. In expanding on this point, the *Lanier* Court referenced earlier cases on discovery of documents:

However, most of these cases sounded in equity and were decided before the advent of Rule 60(b). Additionally, in all of the cases cited, existence of the lost document was alleged at trial.

When the documents were found, the courts held that the original documents themselves were material and not merely cumulative of other evidence as to their contents. Thus, retrials were merited.

[Id., 364 S.C. ___, 612 S.E.2d 461]

Likewise, in the case of *Stoney v. Stoney*, 425 S.C. 47, 819 S.E.2d 201 (Ct.App. 2018), this Court, following *Lanier*, held that documents in the hands of a partner's wife were allowed as newly-discovered evidence.

As to the requirement of due diligence, the earlier Order of the Probate court found, in relevant part, as follows:

9. The Petitioner's [David Mattox'] attorney has spent much time and research attempting to locate the original Will but has been unsuccessful.

10. The Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, but he understood the Decedent kept it in a safe place.

[RECORD ON APPEAL, Order of Probate Court, September 26, 2017, p.3.]

The Appellant contends that the Probate Court's findings above settle the question of the Appellant's due diligence. The Probate Court’s findings as to the Appellant quoted above

establish both that he had no reasonable ability to locate the original will and his due diligence is searching for that document. Those findings, as noted by this Court, were the law of the case.

In *Lanier, supra,* this Court based its ruling under Rule 60(b) upon the Appellant's failure to exercise due diligence to find a document in her possession. In the case at hand, there is no evidence that the Appellant knew the whereabouts of the original will, that he had control or possession of the same, or that he failed to exercise due diligence in learning its whereabouts. Counsel would note that the Appellant's mother was herself unaware that the deceased had placed the will in her safe. [RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.] To recite, the Decedent's mother swore as follows, in relevant part:

> 2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.
>
> 3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.
>
> 4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.
>
> 5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.
>
> 6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.
>
> 7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.
>
> 8. No one had told me the will had been placed in the safe.
>
> 9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.
>
> [RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

The Probate Court, as affirmed, effectively ascribes to the Appellant knowledge or possession of a document he did not have, and finds (in contradiction of its earlier findings) a lack of due diligence in obtaining that knowledge. There is no evidentiary basis for that finding.

The Appellant has demonstrated all elements required for Relief under Rule 60(b), S.C.R.C.P. No evidence exists to contradict his fulfillment of those elements. He is entitled to Rule 60(b) relief and to file the newly-discovered Will.

CONCLUSION

All evidence in this matter evidences the Appellant's lack of possession and lack of knowledge as to the whereabouts of the original will of the Decedent. There is no basis to find a lack of due diligence on his part in discovering the will, and such a conclusion is settled by the Probate Court's previous Order. He is entitled to relief under both Rule 60(b), S.C.R.C.P. He is entitled to enter his brother's will into Probate and proceed with the Estate.

June 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing and this Certificate of Service dated June 16, 2022, on the following counsel or persons of record:

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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out above, pursuant to Rule 262, S.C.A.C.R. and

by service to the opposing lawyer's primary e-mail address listed in the Attorney Information System (AIS), as authorized by Section a(2) of the Order of the Supreme Court dealing with Electronic Filing and Service issued May 6, 2022.

Respectfully submitted,

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