THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

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 WRIT OF *CERTIORARI*

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BACKGROUND

JONATHAN RAY MATTOX died October 1, 2016. By its Order in his Estate entered September 26, 2017, the York County Probate Court determined that the Decedent signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing on his Estate held August 9, 2017. That will named his brother DAVID J. MATTOX as his heir.

After execution of the said will, the deceased married the Respondent LISA JO BARE MATTOX. No later will naming her as an heir has been found.

The 2017 Order of the Probate Court concluded that in the absence of evidence that the will had been inadvertently lost or destroyed, the legal presumption was that will had been intentionally revoked. [RECORD ON APPEAL, Order of Sep. 26, 2017, Conclusion of Law E, p. 4.] In light of the legal presumption, the Decedent was found to be intestate and without children, leaving his wife, the Respondent, as his sole heir. [RECORD ON APPEAL, Order of Sep. 26, 2017, Conclusion of Law F., p.4.]

The original will, conforming in all respects to the copy submitted as evidence, was later discovered in the possession of Mrs. Peggy M. Mattox, mother of the Deceased and the Appellant DAVID J. MATTOX, and filed with the Probate Court.

With the will, the Appellant filed his Motion under Rule 60(b)(1), (2) and (5), S.C.R.C.P. and Petition under S.C. Code § 62-3-412, both within one year after the judgment contained in the said Order of September 26, 2017.

Hearing on the Motion and Petition was heard by the Probate Court on October 5, 2018. The Probate Court denied Appellant's Motion and Petition by Order filed November 21, 2018 and received by Appellant November 26, 2018. Appeal to the Circuit Court for York County was filed December 5, 2018.

The Circuit Court, by the Honorable William A. McKinnon, affirmed the Probate Court by Order filed September 3, 2019. The Appellant's Motion to Alter or Amend Judgment was denied, with some modification of the recited facts, by Order filed October 2, 2019. This appeal followed.

By its Unpublished Opinion herein dated June 1st, 2022, the Court of Appeals denied the appeal. It held, 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 the Court of Appeals - has the Appellant denied Lisa Mattox' right to the share of an omitted spouse. 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 Opinion of the Court of Appeals herein states as follows:

> On appeal, David failed to properly challenge the probate court's finding that Lisa 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.

With respect, the reasoning above is not defensible. The right of the widow Lisa Mattox to be treated as an omitted spouse was not in issue; the discovery of the signed Will and its effect on the Appellant's rights is the crux of this appeal.

The Opinion goes on to cite a string of precedent treating the Appellant's failure to file a Rule 59 Motion before the Probate Court and the effect of that lack. The Opinion states, for example:

> 3. David's argument he was entitled to relief pursuant to section 62-3-412 is not preserved for appellate review because the probate court did not rule on this issue, and David failed to make a post-trial motion to the probate court requesting a ruling.

The Appellant would point out that the effect of S.C. § 62-3-412 – the procedure for re-opening a probate case - was raised by him, and was in effect dealt with by the Probate Court's Opinion. The Probate Court's failure to name the statute cited above does not equate to a conclusion that the issue itself was not addressed. The issue – which was the Appellant's right to raise the issue and effect of a later-discovered and executed Will – was raised and addressed. The statute referenced above was only one argument relating to the relief sought.

On a related point, the Opinion of the Court of Appeals states:

> 2. David's argument that the probate court erred in relying on evidence outside the record is not preserved for appellate review because he did not raise this issue to the probate court.

This is a reference to the Probate Court's citation of evidence it asserted to have come from an earlier hearing at which the executed Will had not been discovered. The Appellant objected to the Circuit Court that the fact and manner of raising the alleged evidence deprived the Appellant of the ability to challenge that evidence.

Our Courts have consistently required rulings on all arguments as necessary to preserve an issue for appeal. This doctrine has been stated as: "An issue must be raised to and ruled on by the trial court in order to be preserved for appellate review." *citing BMW of North America, LLC* v. *Complete Auto Recon Services, Inc*., 399 S.C. 444, 454-455, 731 S.E.2d 902, 908 (Ct.App. 2012).

The Rule 59 doctrine cited has no effect on the Appellant's objection to the Probate Court's action. The Probate Court raised the issue of the evidence in question and has, to that extent, ruled on it. It therefore cannot be characterized as an issue that has been raised for the first time on appeal. The use of the cited evidence was improper and should be dealt with by the appellate Court.

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 (in the disputed evidence) 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) the Court of Appeals was faced with a claim of a lost or undisclosed document in a Family Court case. That 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 the original, signed 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 in the original proceeding 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 established by the Probate Court, are the law of the case.

In *Lanier, supra,* the Court of Appeals 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. [APPENDIX, Affidavit of Peggy M. Mattox, p.106-107.] 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.

[APPENDIX, Affidavit of Peggy M. Mattox, p.106-107.].

The Probate Court, as affirmed, effectively ascribes to the Appellant knowledge or possession of a document he did not have, and found (in contradiction of its earlier findings) a lack of due diligence in obtaining that knowledge. There is no sound 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. The Appellant is entitled to Rule 60(b) relief and to proceed to probate of 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. and the

other cited authority. He is entitled to enter his brother's will into Probate and proceed with the Estate on that basis.

October 7, 2022

Respectfully submitted,

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October 6, 2022

Rock Hill, South Carolina

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CERTIFICATION

Pursuant to Rule 242(d)(1), the undersigned counsel certifies that a petition for rehearing herein was made and finally ruled on by the Court of Appeals.

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