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SC Court of Appeals

support of our opposition with attached case law, if you'd like.

MR. FOSTER: Would you like to receive that at this time?

THE COURT: Sure. We'll just go ahead and hand up the whole thing. Obviously, they're not going to be read during this hearing.

OPENING STATEMENT BY MR. FOSTER CONTINUES:

MR. FOSTER: The first issue we discussed in our brief, ma'am, is whether this issue is res judicata. We maintained this is a situation where the issue was raised - well, let me go back a step. Assuming that the will we have given you timely is what it seems to be, the question still arises whether we have any right to make a claim given the fact that Ms. Mattox would be an omitted spouse. That is to say Mr. Jonathan Mattox married her after the execution of the will. The will makes no reference to her and it makes no provision directly as to what would to happen were he to marry later. So, the first question would be whether this matter is res judicata as to that issue. We maintain to the Court that this issue was raised in the original order and indeed arguably in the original action, but was not ruled upon. We based that upon the language of the Court, which states in the order of September 2017, that I referenced, and I'm hoping I can find it right here. Um, even if the Court

were to rule on the omitted spouse issue, there was no credible evidence presented to the Court, etcetera, etcetera. While I appreciate the fact that a Court, or may I be allowed, an attorney writing for the Court if that was the case, may use subjunctive mode. That is not a ruling. That is a statement about were I to do X, then Y would be the case. We've cited the language from the Supreme Court of Ohio, as well as early cases from South Carolina and the United States Supreme Court about the effect of what is or is not res judicata. The Ohio Supreme Court facing a similar situation has held, "When judgment of a court is not dispositive issues which a party later seeks to litigate res judicata is not applicable. This is true even if the prior court decision has discussed the issues that is a subject of the current litigation", which of course in this case it would be. So, assuming, ma'am, that we are not de- we are not precluded by res judicata, what then must we prove to go forward or to go to trial? There is no question that §62-2-301 requires us to prove either A, that the omission from the will of the later married spouse was intentional, which we don't maintain, or that that testator provided for the spouse by transfer outside the will and the intent of the testator is shown by his statements or from the amount of a transfer or other evidence. That is precisely what we contend. We have set forth in our brief what we understand to be the

case. We have attached a deed, executed in June 9 - June 29th, 2015 by which Mr. Jonathan Mattox's aunt transferred to himself and the Respondent, a resident - her residence as joint tenants of right of survivorship. To the extent I'm allowed to say so to the Court as an officer, we have not provided an affidavit, but I was ensured by the trustee for the grantor, Nancy Mildred Hayes, that this was done at the request of the deceased. So, her name was put down as joint tenant with right of survivorship. We've attached that deed. Um, on his death, the house passed to her. Now, at this point, I must confess to a mistake, which I hope the Court can forgive. I made a big thing - or I made a notice of the fact that Ms. Mattox - Mrs. Mattox did not list this in her inventory and appraisement. Under the modern terms of inventory and appraisement, as I read it, she is not required to list it. I was relying upon the older language, at least as I remembered it. It was, however, unlisted. We've attached documentation showing that the residence was valued by the County of York at $395,000. I believe the Court may take judicial notice, and I do assert to it, that tax values in this county, as in most counties, is low and therefore we believe that we can suitably state that this residence, which passed to Ms. Mattox without our knowledge any consideration on her part, other than her spouse - spousal situation, um, was therefore gratuitous. We believe that with discovery,

other property may be discovered and that is what we ask to do in this case. Now, as I understand it, my opponents spent a good bit of time discussing Rule 60 and I wish to go into that. Rule 60, in my opinion, specifically allows for this by allowing us to come forward where there has been a mistake or where there has been newly discovered evidence. I would suggest to the Court that this is a classic example of newly discovered evidence, if it ever existed. I'm not going to argue those points, but I ask the Court if it would have the patience to let me respond. We require also to be able to show that we have a meritorious defense or claim. That's what I've attempted to set forward in going through the property that was transferred, that we know that was transferred to Ms. Mattox gratuitously. We believe there to be other property. We're not required to prove that we will prevail on that issue, but merely that we have set out a good case, which if established at trial, will constitute a valid claim of defense. We've cited the federal law to that effect under the federal rules.

THE COURT: Are you saying other property than what's listed on the inventory?

MR. FOSTER: I'm sorry, ma'am. I have to ask ----

THE COURT: Are you saying other property than what's listed on the inventory?

MR. FOSTER: We - it may be listed on the inventory, ma'am. We do not know the tittle to that property, and therefore that, among other property is what we seek to discover.

THE COURT: Okay.

MR. FOSTER: The federal precedent also states that we have to state it with sufficient particularity for the Court to determine that there is legal merit. We believe that we have done so in setting out the in - the facts as to this residence. We also state the fact that under federal precedence, we have the right to a generous interpretation of our attempted case. We cannot go forward with that issue without discovery. Discovery is what we seek. We believe that what we have in this case is a prima facie case to reopen the estate, to pursue discovery, and to see if, after that discovery is made, whether grounds exist under the statute in question to allow Mr. Matt- David Mattox to claim a portion of the estate. That would be again §62-2-301(a)2. Ma'am, that is where we're at, basically. I will be happy to answer any question and I defer to opposing counsel.

THE COURT: Thank you, Mr. Foster. Mr. Pierce and Mr. Gettys?

OPENING STATEMENT BY MR. PIERCE:

MR. PIERCE: Yes, Your Honor. We are going

to have a two-part argument. I'm going to argue the 60B argument, as well as the statutory provisions raised by the Petitioner and Mr. Gettys is going to address our Motion to Cancel the lis pendens, which was included in our response. Your Honor, I believe the Court does have a sufficient statement of the facts, so I'm not going to go through those. The Petitioner has made a Motion for Relief under the judgment of Rule 60, specifically reciting 60(b)2 and 60(b) - excuse me, 60(b)1, 60(b)2 and 60(b)5, which we'll address those more specifically herein. Um, as a threshold issue, um, there are two threshold issues. Um, the trial court does have absolute discretion under Rule 60(b) to grant relief under a judgement and the moving party does bear the burden of proving the facts entitling (inaudible) relief. Starting, um, with the statutory provisions cited, Your Honor, I believe the only one cited in the - the actual motion was actually §62-3-412(1), um, and it provides that if there is a will that the parties are unaware of that could provide grounds - that could provide grounds for reopening the estate. In the affidavit, um, attached to the motion, which I believe is provided with the Court, Paragraph 2 says, and this is, uh, Peggy - this is Peggy Mattox, um, mother of the decedent, what I understand. Paragraph 2 says, "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." I believe this is directly in opposite to the requirements of the statute that the parties were unaware that the will existed. Um, moving to Rule 60(b)1, Your Honor, um, it does allow the Court to set aside a judgement for a mistake, inadvertent surprise or excusable neglect under (inaudible) 388S.C.301, which I included in my packet. In determining whether relief under 60(b)1 would be granted, the Court must consider the promptness was in which the (inaudible) reasons for the failure to act promptly, existence of a meritorious defense, and prejudice to a non-moving party. As far as promptness goes, Your Honor, Peggy Mattox's affidavit states that she discovered the will in October of 2017 and turned around and gave it to the Petitioner shortly, thereafter, meaning the Petitioner has been in possession of this purported original will for nine months before filing anything with the Court. We would say that that is an obvious lack of promptness. Um, there has - there has been nothing alleged to explain the failure to act promptly. The entire crux of this case, Your Honor, was the lack of an original will. It was found one month after the final order was issued and it wasn't raised for nine months. There's no reasonable explanation as to why that would be the case, if it was in hand and it was dispositive for them the underlying case. Mr. Foster mentioned the meritorious defense requirement. I believe it

means it's a meritorious defense on the part of the non-moving party or the party against whom the case is being sought to be reopened. In this case, Your Honor, under the Conclusion of Law in the Final Order, it is mentioned that there was no credible evidence presented that the Respondent was provided for outside of the will. We believe that remains the case today and that the respond would prevail under the omitted spouse statute, which is S.C. §62-2-301. And finally, Your Honor, as far as prejudice goes, in the nine months since the final order was issued to the time - the entire time while the Petitioner had the will and was sitting on it, the Respondent was entering into personal sale agreements for particular pieces of property, as well as a listing agreement for property outside of the will, which she got by a right of survivorship. So, by reopening this case, she's being placed in jeopardy of being forced to breach one or more contracts and that's obvious prejudice to the Petitioner [sic]. 60(b)2, Your Honor, to receive a new trial based on newly discovered evidence, the moving party must establish the newly discovered evidence will probably change the result, has been discovered since the trial, could not have been discovered before the trial, is immaterial to the issue and is not merely cumulative or impeaching. That's Southeastern (inaudible) Foundation vs. Smith (inaudible) South Carolina 621, which is also included with our - the

packet we handed to the Court initially under Breen v. Inegrity, which is a 2018 South Carolina Court of Appeals case cited as 2018 West Law WL1937099. Um, belief under 60(b)2 depends on a presentation of the evidence that could not have been found before trial with due diligence. Your Honor, Peggy Mattox's affidavit states that they knew a will existed, they knew that - excuse me. The Petitioner, Peggy Mattox and the decedent all knew of the location and combination of the safe in which the will was found. Um, a safe is a natural and obvious place that people would keep important documents, like a will. We - we believe that all of that, Your Honor, shows that the - the original - the purported original will could have been discovered prior to trial with due diligence. And additionally, um, based on the discussion of the omitted spouse statute earlier, we believe the outcome of the trial would be the same if the estate were to be reopened. Finally, Your Honor, under 60(b)5, South Carolina Court of Appeals in Malarky v. Malarky has held belief under 60(b)5 is available only in cases of fraud upon the Court or in rare special exceptional or unusual circumstances that may warrant equitable relief including accident or mistake. I don't believe there's been any fraud alleged and I don't believe a lack of due diligence in finding an original will constitutes a rare, special, exceptional or unusual circumstance. All that being said,

Your Honor, I do not believe the Petitioners are entitled to relief either the (inaudible) Code or the Rules of Civil Procedure. And I do hand it over to Mr. Gettys now to address our Motion to Cancel unless you have any questions.

THE COURT: Thank you. I don't think I do. Um, Mr. Foster, do you want to respond to that argument first?

MR. FOSTER: Does the Court wish me to, or shall I wait for Mr. Gettys?

THE COURT: It's up to you.

MR. FOSTER: Okay. Well, I will do so briefly. First of all, with respect to Mr. Pierce who - a good lawyer with whom I've locked horns many times. Apparently, I have confused him by my affidavit. Let me go through this. The lady says she was not aware that the will was there. She sold her car in October '17 and then after that went to her safe. She did not say, and her affidavit does not say, "I found the thing in October." That is conscious because she could not say when she found the thing. She knew it was after the event. She could not say; therefore, I did not seek to say it in the affidavit. Secondly, we go to the question, I may be anticipating Mr. Gettys, of the breach of the lis pendens. The lis pendens is perfectly proper if this Court allows us to go forward and to seek discovery on the full case. If, for whatever reason, it

decides we're not so entitled, it of course, is challengeable. However, with respect to Counsel, this is a situation solvable by either placing the money in the lawyer's trust or by putting up a bond. In either event, there is no harm recognized to Ms. Mattox and consequently, my view is there is no issue there. The matter comes down to whether this Court believes we are entitled to relief. That would be my brief response.

THE COURT: Mr. Gettys?

OPENING STATEMENT BY MR. GETTYS:

MR. GETTYS: Thank you, Your Honor. Your Honor, just because I'm a big picture guy I think more than anything else. This is an omitted spouse claim. I mean, that what this all revolves around is an omitted spouse claim and if the will that's purported original will were to be found to be a truly an original will, the Court would then entertain why that will would take away from the spouse's intestate rights of a hundred percent of the assets because there are no children of the decedent. And so, we tried the case, based upon the issues related to a copy of the will being handed up by the brother of the decedent and had much testimony at the time relative to the omitted spouse claim, as well, and are prepared to do that again, if need be. But the fact of the matter is that at some point after that trial, this purported proper original will was located and it

wasn't until our client or my client had gone under contract on two different properties, one a listing agreement, the other an actual contract of sale, um, that this lawsuit was brought - this second lawsuit was filed (inaudible). Your Honor, once served with the lawsuit, um, to reopen the estate, the question became, does the Petitioner have the right to lay claim to a non-probate asset. You'll see that I've just handed up an affidavit from Barry Mack (phonetic). Up until yesterday, there was no statement by Petitioner's Counsel that the property was a non-probate asset. In fact, in arguments prior to the filing of this request for a hearing, the statement was made that because a deed of distribution was recorded by Barry Mack (phonetic) that somehow made the pro- the residence a probate asset, to which we provided law, to which we went through and had an email prepared by Barry Mack and sent to Mr. Foster in that regard. The law is very clear on that, which we put in our motion. A non-probate asset does not become a probate asset, a joint tenant with right of survivorship deed, not shown on the inventory and appraisement, as it's not supposed to be, does not somehow become a probate asset as a result of a scrivener's error or a deed made in mistake as Mr. Mack clearly acknowledges. It's an ineffectual deed as it relates to that piece of property. We can't cure or make that anything other than it is. A lis pendens for an estate

action on a non-probate asset makes no sense. The effect of a lis pendens on a non-probate asset, as you'll see in my client's affidavit handed up, that is under a listing agreement of sale, chills the sale of that property to any third-parties. I'm not sure - until today, I thought that the mother, Peggy Mattox, had found this original will shortly after the - this Court issued its order, I did not know until just now that it was sometime after that, but regardless, that purported original will did not show up until after the contract for sale of the residential property was executed with a realtor and listed for sale. We have requested repeatedly that that lis pendens be removed because it is not a probate asset to which this court would have any jurisdiction, nor to which if the Court allowed for the reopening of the estate, it would somehow become a probate asset. It is not proper to lis pendens that property, period in our opinion. We have provided an affidavit from both my client and Barry Mack as to the statements that we have shared, the law that we shared to our motion to Cancel the lis pendens previously served upon Counsel and we would ask the Court to acknowledge that that lis pendens be picked up. The second property is commercial property that my client has under contract for sale. That contract also was executed prior to the lis pendens in the bringing of this motion to reopen the estate. That contract is a contract that the

owner of the property properly entered into without notice of any subsequent action that may come into, is under due diligence, which is supposed to end by the end of this month. This lis pendens on this property could cause us to fall in violation of our contracted agreement with the purported buyer of this, uh, commercial property, soon to be commercial property. Here again, it was - it was entered - the contract to sell that property was properly done, as my client had completed the probating of the estate as she understood it to be, entered into a contract as the owner of the property as she understood herself to be and still believes herself to be, and entered - and then subsequently, a lis pendens filed on that. We repeatedly sought and Mr. Foster was accommodating in conversation about lifting that lis pendens, but it has not been lifted. There - that property is not a probate asset to which even if they were able to prove that this estate should be reopened and somehow prove that the omitted spouse claims should be limited in some way, they have no right to the property, they have a right to the value of the property, the proceeds of sale of that property, as it was under contract. The lis pendens again is ineffectual in that regard as this - it was properly put - it was properly put under contract as a non-probate asset and seeking to reopen this estate does not change that ownership interest. I do agree that in the event the Court should open up the

estate, our client should not, or at least to her peril - would distributing the proceeds of sale should it close, that would be done at her peril. However, again, just because the Petitioner or the Movant here before us says, "Well, we have a properly prepared will that we believe suffices under South Carolina law" does not - is not a showing, in and of itself, enough, in our opinion, to reopen the estate. In order to survive on an omitted spouse claims, the detriment of the spouse, the Movant has to show that some kind of gift or transfer of wealth was done in anticipating - excuse me, not in anticipation, in lieu of will provision or in lieu of the intestate share or will provisions that would've been proved for the spouse. No allegations has been of that. All that the Court has heard is Counsel's belief that looking back at history is this is what could've been intended, but no writing to show up to do that and no furtherance or anything to make the Court believe in good faith that there is something there other than a fishing expedition. It's as if, just because I say it so, gives us ground to figure out if that be so or not. And we believe, based upon this Court's previous ruling and based upon the hearing that we had before the Court before and based upon my client acting properly based through the administration of the estate and taking title to both, that there has to be a showing much stronger than, "Well, the trustee deeded the property - the

residential property" which again is a non-probate asset to my client and her husband because her husband said, "Please do that" years before he passed away, without drafting a will in any such way that would show his intent or put anything in writing that would show his intent that's been produced to anyone that that asset was in lieu of any kind of testamentary provision or intestate provision. What the Court is being asked, in our opinion, is to leave lis pendens on the property so that my client cannot protect her ownership interest. For example, real world example; should the Plaintiff, Petitioner or any family member show up on my client's probate property and cause a disturbance and have a copy of that lis pendens and my client called the Sheriff and say, "Get him off my property." He could wave the lis pendens and say, 'It's not necessarily her property." Which is absolutely false. It's absolutely false. It's a non-probate piece of property that she owns outright and by filing improperly a lis pendens on that property to intimidate or harass my client is only a way to get someone the ability - or a party to get an ability to get on property he has no right to be on otherwise. So, we would ask the Court to order that those lis pendens be picked up so that the assets can properly be transferred or dealt with as previously contracted either sale or listing for sale. Thank you, Your Honor.

THE COURT: Thank you. Couple of questions. Mr. Foster, do you have - do you argue with the fact that that deed was a - a deed into the husband and wife as joint tenants, rights to survivorship. Do you have any consternation about that deed?

MR. FOSTER: No, ma'am. My concern about that is quite simply this and I hope the Court will allow me to be as blunt as Mr. Gettys. We have no knowledge of any of this property being sold and I got involved with this when this matter was solved. However, it may appear to Respondent. However, within days after, and I believe this is something admissible, within days after your Court's order, the Respondent received proceeds of 2.1 million dollars from the sale of property that was in the estate. That was to my knowledge also listed in the inventory and appraisement. If this Court's decision, if I may continue, ma'am, if this Court's decision is based upon its concern as we acknowledge that the resident was not estate property, it must act accordingly. My concern is this and it goes back to my point about discovery; we don't know what assets are available in this case. We don't know what's been paid; we don't know what's been saved. We simply don't know, and we are asserting a cause of action, which should we be able to produce the evidence to succeed to trial, which would allow my client, if I understand the law correctly, one-half of

those assets. On that basis, I don't think, I at least, the Court must act as it sees fit, I don't see where I, at least, can lift the lis pendens in good faith. We have proposed and we again propose, a trust, an interest-bearing account or a bond, as the Court may determine. I did wish to respond to Mr. Gettys, if this is a good time.

THE COURT: Uh-huh. Go ahead.

MR. FOSTER: Shall I go ahead, ma'am?

THE COURT: Well, let me ask you a couple of questions, first. So, Mr. Gettys has - is this property under contract or has it actually been sold?

MR. GETTYS: Yes, ma'am. On the affidavit - well, I think, and I probably should say, there are three tracts. There was one tract that was under contract prior to the original hearing before this court and it sold, and those proceeds distributed appropriately.

THE COURT: How is it titled?

MR. GETTYS: That one was an estate asset.

THE COURT: And it was entitled in the decedent's name?

MR. GETTYS: The decedent's name. Yes. (inaudible)

THE COURT: And I do recall that there was a contract pending at that time.

MR. GETTYS: Yes, ma'am. That's right.

THE COURT: No, is that the property that's listed on the inventory as the 26 acres?

MR. GETTYS: At least that or some portion of that. Yeah, a portion of that.

THE COURT: A portion of the 26 acres?

MR. GETTYS: Yes, ma'am. The remaining portion of 26 acres is under contract and that contract is attached to my client's affidavit before you.

THE COURT: Okay.

MR. GETTYS: There is a third parcel and that is my client's residence.

THE COURT: And that's the one that you are maintaining is joint with rights to survivorship.

MR. GETTYS: That is the one that we believe to be joint - and I should say, Your Honor, you know, this idea that there are other assets out there. You know, my client prepared an inventory that's the assets unless there's some showing that we've hidden something purposely from the Court, it's again this esoteric argument that we need discovery to harass and intimidate our client is our position.

THE COURT: And, um, do you agree with Mr. Foster that your client received the 2.1 million in proceeds from those asset ----

MR. GETTYS: Yes, ma'am.

THE COURT: ---- from the sale of that portion of the property?

MR. GETTYS: Absolutely.

THE COURT: And do you know where those funds are right now?

MR. GETTYS: My client has possession or has spent or has done with whatever she would've done with her property. You still have all that (inaudible)

MS. MATTOX: I received $526,000 of my husband's (inaudible) from my proceeds. Peggy Mattox received some, David Mattox received some and Jonathan ----

THE COURT: So that was owned ----

MS. MATTOX: That was joint.

MR. GETTYS: Yes, ma'am.

MS. MATTOX: The 2.1 million was the joint between the three parties.

MR. GETTYS: Yeah, let me clarify that.

THE COURT: IT shows a hundred percent interest on the inventory.

MR. GETTYS: That - that hundred percent interest was a portion of a larger tract owned by others that together was sold for $2.1 million with family members.

THE COURT: Okay.

MR. GETTYS: (inaudible)

THE COURT: So, he did, in fact, have title

to the 26.055 acres?

MR. GETTYS: Of which he still retains ownership of the unsold portion of the bigger tract sold for that $2.1 million. Yes, ma'am.

THE COURT: But I guess my question is, there's still something left of this 26.055 acres?

MR. GETTYS: Under contract before you; yes, ma'am.

THE COURT: Okay. All right. All righty. But again, I go back to you, Mr. Foster, do you have any argument, or do you contend that the residence is not joint with rights of survivorship?

MR. FOSTER: No, ma'am. It is joint tenants with rights of survivorship.

THE COURT: Okay.

MR. FOSTER: And if that is the Court's decision as to its disposition, that is what the Court must do. My position on that is what we attempted to state earlier.

THE COURT: Right. I understand. All right. Go ahead. I believe you had another argument you wanted to make. Mr. Foster, I believe you had another argument you wanted to make?

MR. FOSTER: Briefly, I made my point about the intent of the Petitioner in this matter. I would make

the point that I do not understand the proof that we must give to this Court under the probate court statute in question requires us to prove that the property in question that was distributed away gratuitously was estate property at the end. It's merely enough to say that it was given away. Now, I grant the fact that there is a distinction to be made if at this point, we claim the right to put a hold on it. That is up to the Court. I am concerned about the fact that we are hearing, Your Honor, arguments about what could cause a default or what the Sheriff might do. I defer to Mr. Gettys who certainly has more knowledge of these things possibly than I do, but I question as to what extent this can considered to be evidence as considered by this Court. Our position is what I attempted to state earlier. We have made a prima facie case to open this matter to take evidence and to move forward. If at the end of it or even after the discovery, we discover that there's no basis for this, I can assure this Court that no one will be quicker than me to acknowledge that fact. But in effect, what Mr. Gettys wants to do, with respect, is to cut us off right now before any of that gets done. We don't believe that to be proper and we ask the Court for relief.

THE COURT: Let me ask you this question. Did your client receive any of the $2.1 million proceeds in the sale of this property?

MR. FOSTER: I don't think so. No, ma'am.
THE COURT: I'm just asking the question. I don't ----
MR. FOSTER: I don't know. Mr. Gettys closed the thing. He would be able to say more than I.
THE COURT: All right. Mr. Gettys, do you have ----
MR. GETTYS: Your Honor, my law partner did. I'm not very familiar with it, but I do believe I ----
MS. MATTOX: David received a couple of hundred thousand and his mom received about a million.
THE COURT: Okay. And you're not under oath yet.
MR. GETTYS; Yes, ma'am.
MS. MATTOX: Oh, sorry.
THE COURT: Are you going to be putting up any (inaudible) any testimony?
MR. GETTYS: I had not planned for (inaudible)
THE COURT: Well, we're here on a motion hearing, so. I don't think you need to.
MR. GETTYS: Yes, ma'am. But if the Court - ---
THE COURT: I don't want to hear anything that's not sworn testimony.

MR. GETTYS: Um, he - my understanding is each of the family members, my client's deceased husband being a family member, the Mattox family, owned portions of a larger tract that their great aunt and father had owned and of those portions, there was amalgamation of several parcels to create one, uh, saleable piece and that's - different owners of that saleable piece did get cashed out, which I believe the Petitioner in this case was one of those parties.

THE COURT: Okay. Thank you.

(background)

THE COURT: All right. Mr. Foster, would there be any issue or heartburn on behalf of your client if this sale were to go through and the proceeds were just escrowed until a ----

MR. FOSTER: That's what we proposed.

THE COURT: ---- a result of the, uh ----

MR. FOSTER: That is what we proposed.

THE COURT: Outcome (inaudible)

MR. FOSTER: One of the things we propose.

THE COURT: Okay. What do you have to say about that, Mr. Pierce or Mr. Gettys?

MR. GETTYS: Your Honor, as to the residential property ----

THE COURT: I'm not talking about the residential property, I'm talking about the other.

MR. GETTYS: Yes, ma'am. We need the proceeds of the residential to buy a new house, so we could not agree or consent to that.

THE COURT: Uh-huh.

MR. GETTYS: As to the commercial property, again, we don't believe that the Petitioner has shown a purpose to reopen this estate other than to find new assets, but if that were the case, if this Court ordered those monies be held in some kind of trust account that we - that the Court had control over or one of the lawyer's, we'd be amenable to that.

THE COURT: All right. And you're saying that this is - what were you saying, that there's a due diligence period that's about to expire or a closing?

MR. GETTYS: At the end of this month.

THE COURT: The due diligence period.

MR. GETTYS: The due diligence period expires at the end of this month and has been under contract since, I believe March.

JUDGE'S RULING:

THE COURT: Okay. All right. Thank you. Okay. Mr. Foster, I am going to direct that Mr. Gettys prepare an order lifting the lis pendens from the joint property so that that can go forward. I think he's exactly correct that that property is not converted into a probate

asset just by virtue of these - this controversy. I am going to - I haven't decided what to do about ruling on the- the Rule 60 portion of this and the 3-412 portion of this. I am going to consider that. I do - I don't know if y'all have read the comments for §62-3-412, but it clearly states that these are exceptions to the concept of res judicata. So, in - in my view there's a certain equity involved when an original will is discovered and going forward to probate that original will. That's not to say that other claims cannot be filed, such as an omitted spouse claim, but I - I'm not saying that today, I'm just saying that I'm going to take these briefs and - and read them and make a decision as to whether Mr. Foster's client can go forward.

MR. GETTYS: Yes, ma'am.

THE COURT: And hopefully that will be done before the end of this month.

MR. FOSTER: Thank you, ma'am. We can ask no more.

THE COURT: So, that we can go forward on other issues.

MR. GETTYS: Thank you.

THE COURT: All right?

MR. FOSTER: Thank you, ma'am.

THE COURT: Anything else?

MR. PIERCE: No, Your Honor.

MR. GETTYS: That'll do it.

THE COURT: Thank you. That'll conclude our hearing.

MR. GETTYS: Thank you, Judge.

[END OF HEARING IN THIS MATTER]

[END OF TRANSCRIPT]

THE COURT - All right, now, let's move on to the case of Mattox vs. Mattox. Who is the appellant in this case?

MR. FOSTER - We are, sir.

THE COURT - Okay, Mr. Foster, give me one second. I have all the case files on my IPad, if you'll give me one second to pull it up.

(WHEREUPON, BRIEF PAUSE)

THE COURT - Yes, sir. All set.

MR. FOSTER - Okay, thank you, sir.

This is an appeal from a probate court order. I was going to briefly recite the background.

THE COURT - Okay.

MR. FOSTER - I am not going to recite the dates except the order, but if the Court ---

THE COURT - Yes, sir.

MR. FOSTER - --- wishes, we can.

Mr. Jonathan Mattox signed a deed in 2005. After that, he married Ms. Lisa Mattox in 2011. There was a deed caused to be given into her on his behalf and hers where they were designated as joint tenants with the right of survivorship on a property valued currently by tax value -- this is the record on appeal -- at three hundred and ninety-five thousand dollars. Mr. Jonathan Mattox -- or I should go back and say -- in his original Will left a

sole heir, his brother, David, no provision and no mention of a wife. He died in 2016. No original Will had been found at that point. Ms. Lisa Mattox began probate. Mr. David Mattox by counsel filed a petition to be substituted. All at that -- at that time all he could come up with was a copy of the Will. The order of the probate court at that time quite properly denied that request saying that effectively under the law, you show us a copy of a Will there's a presumption that the original has been destroyed. In that order, the Court went on, and I am quoting by memory, but I think I am being accurate here, to state, if I were to rule on the question -- and we can go on into it -- but of course what that refers to is the language of 62-2-301, which refers to the circumstances under which a spouse omitted from a Will can still be held as bound by the terms of that Will, specifically, if there's been sufficient provision made outside the Will. That's 301(A). After that order, Mr. David and Jonathan Mattox's mother, Peggy, found the original Will in her safe. A petition was file under Rule 60 and under South Carolina 63-2-412 in July of 2018. We had a hearing. The Court denied us the relief of modification or reopening. We are appealing that order. I am going to try to deal with the grounds that the Court used to deny us that relief. First of all, the Court

states in the order, which again is in the record on appeal, that in 2017 at the original hearing, Mr. David Mattox lived with his mother. Well, that's interesting, but it was never brought up at the hearing in our case or our part of it. It is not a part of the record anywhere except in the Court's second order denying us relief. That means, I suggest to this Court, that the only thing it can be is a judicial notice. Now, obviously, any Judge is allowed to take judicial notice of a fact, however, I call attention of the Court to the language of Rule 201 of our Rules of Evidence, which states under (E), Section (E), a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. The first time we heard of this basis, the first time it appears in -- or in the record, is in the order of the probate court denying us the relief of reopening the case. There's no evidence otherwise that this is the case. I would hand up to the Court, if I may, among other things, the case of Gibbs vs. Rose Hill Plantation from the Federal District Court, basically, confirming Rule 201(E), and I am including another case, if I may approach, sir.

THE COURT - Yes, sir.

MR. FOSTER - Thank you.

(WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

MR. FOSTER - Extra copy for ---

Now, in addition to that, the Judge -- I believe -- I -- I'm summarizing but I -- summarizing accurately, basically, said, well, his mother should've been -- he or his mother should've found the thing earlier. Well, ---

THE COURT - Can I just make sure I'm understanding all the facts correctly?

MR. FOSTER - Yes, sir.

THE COURT - My -- my understanding is -- the order that you're appealing is an order on the reconsideration of the probate court's order based on the -- there was a -- I suppose an original Will was found in a safe in the house on Pawley's Island.

MR. FOSTER - Yes, sir. Yes, sir.

THE COURT - And the probate court, basically, said your client didn't exercise the due diligence that it was an obvious place to look for a Will, and they can't come back later and say, well, now, we've got the original.

MR. FOSTER - That wouldn't be quite the way they said it, but that's, basically, the fact.

THE COURT - Okay, I just -- it just says ---

MR. FOSTER - I understand.

THE COURT - I just want to make -- you know, want to make sure I'm understanding, so that's -- okay.

MR. FOSTER - And I want to be sure I state it correctly, too. The petition was stated as under the statute and under the cited stat -- statute I cited, as a petition to modify or open.

THE COURT - Okay.

MR. FOSTER - We would first of all point out as I say, there's no evidence of what the Court took notice of. On the -- on -- the second thing we'd point out is -- we've handed up the case of Lanier vs. Lanier. This is a South Carolina Family Court case heard before the Court of Appeals, but it's a discussion of when and where you can come in with newly discovered evidence and what that is. The Court of Appeals in Lanier confirmed the view of older Courts that you are bound to look for things timely, that that includes people like attorneys, CPAs and so forth. It is not state (sic), and I wish to emphasize this, that it includes elderly female family members. It does not state, includes your mother. Ms. Peggy Mattox, the mother who discovered this, stated in her affidavit, which is part of the record on appeal, that she had no idea that the matter was there. She stated that she found it -- this is by inference, but it's in there -- after October 2017 when she had to go into her case, to her -- to her

safe. She stated that her sons, both Jonathan who died and David who is the appellant, knew where to find her combination. That is not to say they knew the combination or had access to the safe. Our argument is under Lanier and under the rules as stated therein, Mr. David Mattox cannot be held responsible for the fact that he did not immediately think of his mother and her safe as a place where this was. That is the basis for our claim.

THE COURT - Mr. Foster, talk me through a timeline. So when did Mr. Mattox die?

MR. FOSTER - Ms. Mattox -- well, Mr. Mattox died October 1st, 2016.

THE COURT - Okay, and --

MR. FOSTER - The first order which denied relief based on a copy and which represented, um, I believe also held that Ms. Lisa Mattox, the wife, was the sole heir -- there were no children -- was issued September 26th, 2017.

THE COURT - All right, and when was the original Will found in the safe?

MR. FOSTER - All that Ms. Peggy Mattox was able to say in her affidavit, which is in our record on appeal -- that is on -- record on appeal page 27 -- was that she sold a car in October, 2017 and some time after it undesignated she found the thing in her safe, because she had to go there.

THE COURT - Okay, when was it first presented as a motion or brought to the Court's attention?

MR. FOSTER - When we filed -- we filed in July 13th, 2018 within one year of the Court's decision and certainly within one year of the Will being discovered.

THE COURT - Okay. All right, thank you, sir.

MR. FOSTER - Thank you, sir.

Going forward, basically, argument here as I understand it in part is, well, it should've been discovered earlier. Well, Ms. Mattox, Ms. Peggy Mattox, said she hadn't been asked for it and had no reason to be asked for it. She is not, in my understanding of Lanier and the cases cited there under, one of the people that is required by David to go look. She is not an agent; she is not an attorney; she is not a CPA. She's not bound by Mr. David Mattox or his employer, his employee, I should say. Therefore, she's outside that area. The other rule under Lanier is -- and the reason I believe in part they decided the case it was -- because in that case the newly discovered evidence was never entered as an issue in the earlier case. In this case it was the issue. In this case, as I say, that was where we were going from. In Lanier, they state that the document has to be found, quote, in the possession of the party for the Lanier rule about how quickly one has to act and how expeditiously one

has to act to apply. The document here was not in the possession of Mr. David Mattox or his agents. Now, in that regard, I call the Court's attention to the language of 62-3-412. This is the other statute, the other basis we used to go forward on our petition. That petition states that they're going to allow a petition for modification or vacation and probate of another Will, quote, if it is shown that the proponents of the later offered Will were unaware of its existence at the time of the earlier proceeding, unquote. Existence is a nice general thing. That can be read as saying, we didn't know there was one, but it can also be read to say, we didn't know where the original was, which is exactly what we say is the case. I argue further that 62-3-412, being broader than what we have in the rule 60 procedure, allows more clearly the relief we're looking for. In this regard I would cite to the Judge, the language in Lanier, which we've handed up, that, basically, recites a long list of cases, which as I'm reading here from page 461 -- it's marked -- most of the cases -- they're referring to in this -- they were asking for a re-trial -- most of the cases sound inequity and were decided before the advent of Rule 60(B). Well, if I may pause at this point, we're maintaining that the earlier rule is maintained in 62-3-412. It goes on, additionally all the cases cited

existence of the lost document was alleged at trial, as here. When the documents were found, the Court's held the original documents themselves were material and were not merely cumulative of other evidence as to their contents, thus, retrials were allowed, pardon, merited. That argument there has to do with retrials. We believe they're directly relevant to the question here of amendment and reopening. Basically, that's where we're at with regard to the question of Lanier and the older things. The other question, the one we spent some time on, is the language of the Court ---

THE COURT - Mr. Foster, can -- if I can have just one second. I'm -- I'm looking at the statute, 62-3-412, and it looks to me that the paragraph one is limited to the cases where there's already a Will ---

MR. FOSTER - Yes, sir.

THE COURT - --- and it -- because it refers to another Will. It says the Court shall entertain a petition for modification or vacation of its order if it is shown the components of the later offered Will and ---

MR. FOSTER - Your Honor is referring ---

THE COURT - --- and then the paragraph two seems to be the only time the Court will reconsider an intestacy holding. Isn't that -- I mean the -- we're looking at the probate court was that he died intestate. Right?

MR. FOSTER - I hope I understand the Court's question. My understanding is that paragraph one would refer to the existence of a Will whether it was unlocatable or whether it existed or whether it was unknown to the clients. The only term used is existence. Um, ---

THE COURT - But it says another Will -- I mean it says a later offered Will, and then that -- so I mean paragraph one refer -- I mean seems to be clearly talking about situations where there was a Will, and paragraph two is about intestacy; there's no Will.

MR. FOSTER - Sir, perhaps I'm reading the wrong thing, but you're referring to a -- the reference of another Will in the first paragraph?

THE COURT - (Indicating yes) The Court shall entertain a petition for modification or vacation of its order and probate of another Will.

MR. FOSTER - Sir, I'm quoting, and I'm possibly incorrect, from 62-3-412.

THE COURT - I'm looking at it, too. Maybe ---

MR. FOSTER - For modification of its order and probate of another Will, it would've shown the probates of the later offered Will. Well, I would only say that I don't believe that precludes the possibility of a

situation of this kind where, basically, you have a Will ---

THE COURT - Let me stop you. I just want to make -- it seems to me that the statute has one of two stipulations. Paragraph one is where there was a Will, and that's the order you want to be reconsidered, and paragraph two is if there wasn't a Will. Isn't that the scheme that statute sets up?

MR. FOSTER - Reading it that way would essentially mean that a Will can never be found after the event even under the best case scenario even under good faith.

THE COURT - Under this statute.

MR. FOSTER - Yeah, if that's -- if that's our reading.

THE COURT - But I mean it seems to me that it's -- that their -- paragraph one is there was a Will but you're challenging it, and number two is that the probate court found there was intestacy and their provisions for what, you know, ---

MR. FOSTER - I would not -- I can only say I don't think that's the intent of saying, quote, another Will. In this case, of course, there was another one the sense that we had a copy in round (sic) of the original. The copy was thrown out; now we have the original, but I

would only say this, sir, reading the statute in that fashion means that one can never bring forth the question of a lost Will, that one -- this statute has no effect upon that whatsoever, and I don't believe that was the intent of the Uniform Probate Code.

If I may continue, briefly?

THE COURT - Yes, sir, yeah, absolutely.

MR. FOSTER - The other argument, as I say, that has to do with this matter is the language of the Court in its order where it essentially said, were I to rule -- I want to be sure I'm reading this correctly ---

THE COURT - The probate court order? Is that what you're ---

MR. FOSTER - Beg your pardon, sir?

THE COURT - The probate court order?

MR. FOSTER - Probate court order.

THE COURT - Yes, sir. Okay, I'm there.

MR. FOSTER - And this is going back to the first order, and I want to read exactly. In the first order, the Court in its paragraph (H) -- this is September, 2017 -- even if the Court were to rule on the amended spouse issue, there was no credible evidence presented to the Court the decedent provided for his spouse outside the Will or in lieu of a testamentary disposition, which, of course, is what we're presuming now. Our argument comes

to this, sir. First of all, is that a ruling; is it a judgment. To go to the basic thing, we've cited among our brief language of the restatement on -- second -- on judgment, section 27, which says that when your judgment is not dependent on a particular issue, that determination is akin to dicta, and its re-litigation is not precluded. Beyond that, we've cited a great many cases to the effect of what is the effect, if any, of a Court saying, here is a ruling or a supposed ruling or a comment in the subjective sense, we maintain, simply speaking, is not binding. It is a dicta; it is the Court saying, this is what I think, but it has nothing to do with anything can bind at the Court. It has nothing to do with binding the client. It is simply words. Beyond this there's some language, as I understand it, at least in -- I'm sorry, sir. Okay. I thought I was interrupting.

THE COURT - No, no, sir. I'm just -- I've got the order here.

MR. FOSTER - There is some language in the defendant -- respondent's brief to the effect of generally refusing the matter on the basis of general, equitable principles. Here is the situation as we understand it. Ms. Lisa Mattox was left unquestionably outside the Will a piece of property worth -- by tax value -- three hundred and ninety-five thousand dollars. It may be that if this

Court allows us to go forward with the case, she will still be determined to be the heir, that the language of the statute in which an heir provided for before the -- before the marriage will have no effect. It is possible, however, that that will not be the case. This comes down to where the equities lie. I refer back to the language in Lanier, which I quoted to the Court.

THE COURT - Yes, sir.

MR. FOSTER - We have here a situation where there's no hint of bad faith, I understand it. The most that we're able -- that defendants -- pardon -- respondents are able to say is, well, she should've acted sooner. Well, sooner is interesting, because there's no indication or affidavit of when she found this. That is specific, because, if I may allow to say so, I helped write that affidavit, and we omitted any statement because she could not say when she found it, except that it was after October of 2017. Relying upon what we understand to be both 62-3-412 and Rule 60(B), we believe we've shown a reasonable, equitable case to be allowed to proceed on this case to full discovery and decision by the probate court.

That's, basically, where we're at, Your Honor. Barring any questions, that's what I had.

THE COURT - Mr. Foster, one question on Lanier. I'm looking at page five, and the Court says, when evidence is misplaced, a party must make a, specifically, targeted search to find missing evidence.

MR. FOSTER - No question. The question is who has to do it.

THE COURT - Well, I mean I would assume that the party in this case -- right? -- I mean Mr. Mattox, David Mattox.

MR. FOSTER - That's Mr. -- David, and he could not find it. That's in the first order. The first order ---

THE COURT - Right, but where ---

MR. FOSTER - --- says he made every effort to find it.

(WHEREUPON, BRIEF PAUSE)

MR. FOSTER - If I'm not interrupting the Court, just to go on and ---

THE COURT - No, I'm just -- I'm looking at the order. You said -- so the order makes a factual finding that you did everything possible to find ---

MR. FOSTER - That's my recollection of the reading of it, sir, that, basically, said yes, they made all this attempt and, uh -- and his attorney made all this

attempt, and they couldn't find it. That's the first order.

THE COURT - Okay, I'm looking -- I'm looking at. I'm just ---

MR. FOSTER - This is on record on appeal page 19.

THE COURT - I'm looking at 89.

MR. FOSTER - Well, this is 19, and it speaks to paragraphs 10 through 11.

(WHEREUPON, BRIEF PAUSE)

THE COURT - I don't see anything about the petitioner saying -- it says the petitioner testified he had no knowledge of where the decedent kept the Will and had not seen or discussed it.

MR. FOSTER - Yes, sir.

THE COURT - Where does it state that he searched everywhere?

MR. FOSTER - Well, I presume I need to go back to number nine where it says the petitioner's attorney has made all this effort, but, of course, that's attributable to the petitioner.

THE COURT - Okay. I -- well, I think I understand your argument. Let me hear from the other side.

MR. PIERCE - Thank you, Your Honor, and before I start, I mean I -- I understand this procedure to be in the nature of an appellate oral argument, and I've withheld some objections in that vein, and I'm going to raise those now, um, and I -- the understanding, or hopefully the understanding that these are not waived because we -- this is an oral argument setting.

THE COURT - Okay.

MR. PIERCE - Okay. First, Your Honor, the issue of judicial notice, the issue of 62-3-412 and the issue of proceeding on equitable grounds I do not believe were raised in the defendant's appellate brief. I believe those issues have been waived for the purpose of our argument today. Those were raised at the underlying hearing, and they were available as arguments to be brought before the Court today, but they were not pled and they were not recited in the respondent -- or the appellant's brief. I do not believe they're appropriate grounds to be considered today.

THE COURT - I mean -- that's not an issue I had -- I really thought about, but I -- is it the same standard as in appellate court? Am I -- is it waived if it's not briefed?

MR. PIERCE - I believe that's the case, Your Honor. I cannot quote you chapter and verse on the

appellate court rules on that, but -- and regardless, Your Honor, I mean -- the standard of review today has not been discussed thus far, and -- and I believe the standard of review will clean some of these ---

THE COURT - Okay.

MR. PIERCE - --- will clean some of these issues up in and of itself, Your Honor.

THE COURT - Okay. Well, why don't we start with that, Mr. Pierce, because I ---

MR. PIERCE - Sure.

THE COURT - I mean I'm not sure what the standard of review is in a ---

MR. PIERCE - Yes, Your Honor, and ---

THE COURT - --- my first probate appeal.

MR. PIERCE - I do -- I do have all of our case law that we've cited in our brief. May I approach with that, Your Honor?

THE COURT - You may.

(WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

THE COURT - Thank you, sir.

MR. PIERCE - Your Honor, the standard of appeal -- an appeal from the probate court is governed by the probate code. That is cited in Golini v. Bolton, cited at 326 SC 333.

THE COURT - Yes, sir.

MR. PIERCE - It says the probate code provides that you can appeal a final order of the probate court to the circuit court. The circuit court must hear and determine the appeal according to the rules of law, and in the Golini case, the South Carolina Supreme Court interpreted the phrase according to the rules of law to mean according to the general rules governing appeals. On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Court of Appeals would apply to hearing the appeal. A decision to grant or deny a motion for relief from judgment, which is what was brought and what's on appeal here today under Rule 60 of the South Carolina Rules of Civil Procedure, the decision to grant or deny a relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion, so the standard of review today, Your Honor, is an abuse of discretion standard. The Golina case goes on to define an abuse of discretion as a situation where the Judge issuing the order -- that would be Judge Rogers in this case -- was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. So that's the standard that we have here today, Your Honor. And before I go into my argument, Your Honor, we -- we have addressed

the issues that were recorded on appeal in the appellant's brief. We did discuss further issues at the underlying hearing, and those have all been fully addressed in our brief as well for the Court's edification, and if the Court has any questions about those grounds, I'll be more than happy to answer them today, but I am restricting my oral argument to the issues that were raised on appeal in the appellant's brief.

THE COURT - Why -- unless -- I mean if you don't want to argue the other one for some other reason, that's okay, but I'd rather you just address everything.

MR. PIERCE - Yes, Your Honor.

THE COURT - Okay. I just feel like -- you only get one chance at oral argument from the Court's prospective. This is my chance to ask questions. I understand your arguments and I prefer if you'd addressed it all.

MR. PIERCE - Yes, Your Honor.

Your Honor, starting with the first issue that was raised on appeal in the appellant's brief, we consent that there is, in fact, evidence establishing a lack of due diligence in discovering and filing the original Last Will and Testament of Jonathan Ray Mattox. That's statement of issue on appeal number one as provided by the appellant. Rule 62(B)(2) of the South Carolina Civil

Procedure allows the Court to relieve a party from final judgment on the basis of newly discovered evidence, and the operative phrase, Your Honor, is which by due diligence could not have been discovered in time to move for a new trial. Your Honor, we have also cited the Lanier case. Lanier case provides that due diligence is defined as not when a litigant actually discovers or finds, but what they could have discovered or found by putting in the time and effort to do so. Appellant, specifically, argues that Judge Roger's finding of Rule 60 does not apply because of a lack of due diligence is without evidentiary support. At the October 5th, 2018 hearing where we argued the motion on the Rule 60 -- argued the Rule 60(B) motion, respondent through Mr. Gettys and I, specifically, addressed the issue of due diligence repeatedly relying largely on the affidavit of Peggy Ann Mattox who's the mother of the appellant and the decedent and we ---

THE COURT - Is that affidavit in the record?

MR. PIERCE - It is in the record, Your honor, and it starts at page 27.

THE COURT - Hold on one moment. Okay, I'm there.

MR. PIERCE - Okay. The pertinent points in that affidavit, Your Honor, are that, one, Peggy -- and we're

going to refer to Peggy Ann Mattox as Peggy -- knew the decedent had executed a Will, and while we do not agree that 62- -- 62-3-412 is necessarily a proper issue on appeal here today, I do believe that flies in the face of the lack of knowledge of a Will requirement from that statute. So Peggy knew the decedent had executed a Will. Peggy was named as the PR of the decedent's estate in that Will. Peggy found the Will in a safe in her home on or after October of 2017, and the decedent, appellant and Peggy all knew the location and combination to the safe. We argued these points as well as the fact that a safe is a natural and obvious place to keep important documents at the October 5th, 2018 hearing. So that was the evidence that we offered against the due diligence put in by the appellant. I hope that was clear, Your Honor, but that was our argument that due diligence had not been -- had not been put in in this case.

THE COURT - Is Mr. Foster right that the person whose due diligence is in question is David Mattox?

MR. PIERCE - I believe it'd be the party, Your Honor, who was seeking -- who was seeking relief from the judgment.

THE COURT - Right, but that would be David -- David Mattox. Right?

MR. PIERCE - Yes, he is the party in this case, and I believe that if you are bringing the Rule 60(B) motion, it is incumbent on you.

THE COURT - So but -- and so it's not the mother, it's the surviving son, it's his -- his due diligence is the issue. Right?

MR. PIERCE - That's correct. She was named as the PR in the original Will, ---

THE COURT - Right.

MR. PIERCE - --- and she has a duty to -- she would have a duty to produce if that Will were to be -- to be brought forward.

THE COURT - Right, but the question -- the question for me is as far as exercising due diligence in a Rule 60 is David Mattox's due diligence, not the mom's. Right?

MR. PIERCE - That's -- that is correct, Your Honor. It's David's due diligence, because it is his motion to be relieved from the judgment issued by the Court.

THE COURT - Okay. Your argument is under the affidavit at the very least it's -- it supports the fact that he knew his mom kept a safe and that he knew that -- I mean he and his brother had the combination to it.

MR. PIERCE - Correct.