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THE COURT - And that -- that is enough to say,
well, he should've checked the safe?

MR. PIERCE - Well, and as well, Your Honor, I
mean the affidavit states that the mother knew that a Will
existed, and I think in the exercise of due diligence, you
would ask people close to the decedent, especially, a
mother who is named as the PR in the Will if she had any
knowledge of the documents and where they might be kept.

THE COURT - All right.

MR. PIERCE - So that was -- that was the
evidence that was offered at the October 5th, 2018
hearing, and based on the argument at that hearing, Judge
Rogers agreed that due diligence was not exercised and,
therefore, relief under Rule 60 was not appropriate, so we
do believe there absolutely was evidentiary support for
Judge Roger's
finding, and that's based on the arguments we've made
here as well as the transcript of the hearing.

The next issue that's raised on appeal by the
appellant, Your Honor, is whether the appellant is
precluded from litigation on the grounds of res judicata.
We contend that the appellant is precluded from litigation
on the grounds of res judicata, but it's very important
for us to understand how res judicata, actually, fits into
this case, because we're not here on a motion to dismiss

1 on the grounds of res judicata. Okay? We're here on an
2 appeal from denial of a Rule 60 motion.

3 THE COURT - Right.

4 MR. PIERCE - Rule 60(B)(1) requires a -- case
5 law in South Carolina requires the Court to consider four
6 things on a 60(B)(1) motion. The first is the promptness
7 with which relief is sought, promptness within which
8 relief is sought based on newly discovered evidence, the
9 reasons for any failure to act promptly, the existence of
10 a meritorious defense and the prejudice to the non-moving
11 party. And res judicata fits in solely to the existence
12 of a meritorious defense here, Your Honor. Here we
13 contend the omitted spouse statute would serve as a
14 meritorious defense to the appellant's theoretical new
15 claim, because regardless of whether a new Will is
16 probated, the respondent would be considered a omitted
17 spouse, and, therefore, the outcome of the case would be
18 the same. The Supreme Court has held in Miles v. Miles,
19 which is cited at 312 SC 408, that absent specific
20 language in the Will or sufficient extrinsic evidence that
21 a bequest is made in contemplation of marriage, a spouse
22 has not been provided for under the omitted spouse
23 statute, and, therefore, the omitted spouse statute would
24 apply, and she would be entitled to her intestate share of
25 the decedent's estate. In this case, Your Honor, the

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1 decedent executed his Will prior to ever meeting the
2 respondent and then under Miles we believe that that would
3 be a textbook case of the omitted spouse statute.

4 THE COURT - Okay, but I'm -- maybe I'm being a
5 little slow this morning, but I -- how's that a res
6 judicata -- I mean I understand what you're saying, but
7 even if -- one -- one of the issues whether you should
8 grant the Rule 60(B) motion is whether they might prevail
9 if the new evidence is discovered, but -- it doesn't seem
10 to be res judicata to me, it's just -- it's just an
11 argument that they would lose anyway.

12 MR. PIERCE - Well, Your Honor, I think -- I
13 think the argument from the appellant is that they -- they
14 -- excuse me -- our argument is they could not raise their
15 defense to the omitted spouse claim, because it's already
16 been adjudicated.

17 THE COURT - But -- so you're saying, by not
18 appealing that issue, it's not just an argument, it's --
19 it's settled law in the case.

20 MR. PIERCE - Correct, Your Honor.

21 THE COURT - Okay. It is sort of a contingent
22 language, though, doesn't it? I mean that -- that Court
23 -- the probate court order that sort of says, if I hadn't
24 ruled this, then this, you know, ---

25 MR. PIERCE - It -- there is ---

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1 THE COURT - Mr. Foster says it's dicta.

2 MR. PIERCE - Well, I don't believe it's dicta,
3 Your Honor. I mean it is in the -- the conclusions of law
4 section of a order signed by a Judge of competent
5 jurisdiction. While there is some contingent language,
6 there is no contingent language as to the Court's -- the
7 Court's analysis of the information that was presented,
8 and that it was insufficient to prove that there was a
9 bequest outside of the Will, and, therefore, the omitted
10 spouse statute would apply.

11 THE COURT - So, you're basically arguing that --
12 that in a normal situation the party argues you don't
13 grant relief because they'd lose anyway, and in your
14 situation it's even a stronger argument, because it's res
15 judicata and they have zero percent chance of winning,
16 because they waived that issue. Is that ---

17 MR. PIERCE - Correct, Your Honor.

18 THE COURT - Okay. All right.

19 MR. PIERCE - And, Your Honor, and just a -- if I
20 haven't covered this already, res judicata does apply
21 where there's identity of the parties, identity of the
22 subject matter and adjudication of the issue in the prior
23 suit. Further, Your Honor, in Hilton Head Center of South
24 Carolina, Inc., v. Public Service Commission of South
25 Carolina -- that's cited at 259 SC 9 -- a litigant is

1 barred from raising in a subsequent trial any issues which
2 were adjudicated in the former suit and any issues which
3 might have been raised in the former suit. I think that
4 holding in that case combined with Judge Roger's order
5 would show that the omitted spouse statute was an issue
6 that was directly at issue in the underlying case might
7 have been raised and was raised in some way, shape or form
8 and the Judge issued an analysis of the -- of the evidence
9 that was presented, so we -- we don't believe that ---

10 THE COURT - Okay.

11 MR. PIERCE - --- the issue of the omitted spouse
12 statute contends to be in order.

13 THE COURT - All right.

14 MR. PIERCE - Finally, Your Honor, the final
15 issue on appeal from the appellant is that they've
16 demonstrated a prima facie -- they've demonstrated prima
17 facie evidence for equitable relief sought, and I'm not
18 sure exactly what equitable relief that is. It's not laid
19 out in the -- the statement of issue on appeal. However,
20 they're relying on evidence that was issued at a Rule
21 60(B) motion as evidence that they can proceed with a
22 claim. A Rule 60(B) motion, Your Honor, is confined.
23 There are very limited grounds from which a Rule 60 motion
24 can be granted. Those are clerical mistakes, mistake in
25 advertence, surprise or excusable neglect, newly

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1 discovered evidence, fraud, mis-presentation or
2 misconduct, void judgment or satisfied judgment. Those
3 are the purposes of a Rule 60 -- of Rule 60 motion. A
4 Rule 60 motion is not an opportunity to bring up issues
5 that could have or should have been raised at the
6 underlying trial, so I don't believe that any of the
7 evidence as it's called in the brief is evidence of
8 anything really. They were arguments made at a 60(B)
9 motion. We don't believe they have any legal or
10 substantive effect on this appeal.

11 THE COURT - Okay.

12 MR. PIERCE - And, Your Honor, I am going to
13 circle back a little bit in interest of Your Honor's
14 request in addressing all of our issues. I went through
15 the ones that were, specifically, addressed to the -- to
16 the brief.

17 THE COURT - Mainly the statutory issues Mr.
18 Foster spoke about.

19 MR. PIERCE - Yes, Your Honor. Well, the -- that
20 issue we believe, one, we agree with Your Honor's
21 interpretation of the statute. That's what we would put
22 forth.

23 THE COURT - Yeah, I just -- again, I don't know
24 -- when I ask questions like that, sometimes I'm playing
25 devil's adv -- I just want to understand, but I -- it does

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1 appear to me that that's -- based on what I've seen today,
2 that's what the statutory scheme seems to be.

3 MR. PIERCE - Well, and, Your Honor ---

4 THE COURT - And paragraph one regards --
5 situations where there's an existing Will and paragraph
6 two is where the order that they're seeking relief from
7 was an order of intestacy.

8 MR. PIERCE - Yes, Your Honor. Um ---

9 THE COURT - I'm sorry. I apologize for
10 interrupting you.

11 MR. PIERCE - No, that's okay. I'm -- I'm
12 pulling up the rule now, Your Honor. And also, Your
13 Honor, regardless I guess of whether or not the Court's
14 interpretation or Mr. Foster's interpretation of that rule
15 stands, you know, it does require that there was no --
16 there was no knowledge of the existence of the Will. One
17 way or the other I believe that's clear. And in Peggy Ann
18 Mattox's affidavit, at paragraph two it says, I knew my
19 son, Jonathan Ray Mattox, had executed a Will, I saw it in
20 his truck the day it was executed, I did not see it again
21 until the events described below. So I believe there was
22 knowledge that it existed, and regardless of whether it
23 has to be a second Will or a newly discovered Will at a
24 later time, I believe that there was knowledge that this

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1 Will existed and 60 -- 62-3-412 wouldn't apply in either
2 case based on that knowledge.

3 THE COURT - Mr. Foster has a different
4 interpretation of existence. He argues that if they think
5 it's destroyed, then the statute's satisfied.

6 MR. PIERCE - I think, Your Honor, existence is
7 whether or not it existed or did exist and that affidavit
8 very clearly says that she knew it existed at one point.

9 THE COURT - Anything else, Mr. Pierce?

10 MR. PIERCE - Yes, Your Honor, and, again, just
11 in the effort of getting all these out here, you know, the
12 underlying case trial, hearing on this, 60(B)(1), 60(B)(2)
13 and 60(B)(5) were all alleged as grounds for relief.
14 60(B)(1) is the only one that's been raised here today and
15 the only one that was implicated -- or excuse me -- 60(B)
16 (2) is the only one that's argued here today and raised
17 ---

18 THE COURT - Well, let me stop you. Let me ask
19 Mr. Foster that directly. Mr. Foster, what is -- I know
20 you're -- you said the basis -- your basis for asking for
21 relief today are the statute, 62-3-412 and what provisions
22 of Rule 60 are you relying? Is it 60(B)(2)?

23 MR. FOSTER - 60(B)(2) AND 60(B)(5) as I
24 understand it, sir.

25 THE COURT - Thank you, sir.

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1 MR. PIERCE - So, Your Honor, we've argued the
2 60(B)(2) issue as far as due diligence and newly
3 discovered evidence. 60(B)(5), Your Honor, -- 60(B)(5)
4 provides that a Court may relieve party from judgment -- from
5 final judgment or order of proceeding if the judgment has
6 been satisfied, released, discharged or a prior judgment
7 upon which it is based has been reversed or otherwise
8 vacated or it is no longer equitable that the judgment
9 should have prospective application. I don't believe that
10 there is any other judgment or order that has been
11 satisfied, released, discharged. I believe Mr. Foster
12 would be relying on the equity of allowing the -- excuse
13 me -- the order to stay in effect. According to *Malarkey*
14 v. *Malarkey* -- that's 397 SC 182 -- relief under Rule
15 60(B)(5) is available only in cases of fraud upon the
16 Court or rare special, exceptional or unusual
17 circumstances that may warrant equitable relief including
18 accident or mistake. There's no allegation of fraud in
19 this case. There are no rare, special, exceptional or
20 unusual issues present. There's no accident or mistake,
21 and we don't believe 60(B)(5) would have any application
22 in this case.

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THE COURT - Thank you, Mr. Pierce.

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MR. PIERCE - May I confer with co-counsel?

25

THE COURT - You certainly may.

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1 (WHEREUPON, DISCUSSION IS HELD BETWEEN MR.
2 PIERCE AND MR. GETTYS WHICH IS NOT REPORTED AND OUT OF THE
3 HEARING OF EVERYONE)

4 MR. PIERCE - That's it, Your Honor.

5 THE COURT - Thank you, sir.

6 All right, Mr. Foster, you're the appellant; I'm
7 going to give you the last word.

8 MR. FOSTER - I'll try to be brief.

9 THE COURT - Yes, sir.

10 MR. FOSTER - Let me go through what I believe
11 counsel said was not in our brief.

12 THE COURT - Okay.

13 MR. FOSTER - We refer to 62-3-412 on page five
14 and throughout in our discussion of equity. In terms of
15 the question of the allowability of the Court's taking
16 judicial notice, I call the Court's attention to our
17 language on page six, which states, no evidence as to his
18 present residence or nor of his control of his mother's
19 premises was presented. The Honorable Probate Court was
20 without sufficient evidence to make this conclusion. I
21 believe that statement is broad enough to allow us to
22 raise the issue of the judicial notice and its propriety.
23 On the question of general equity, we spend, I believe
24 most of pages six, eight and nine on that point. (Pause)
25 I'm sorry. I don't wish to keep the Court waiting.

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1 THE COURT - Okay.

2 MR. FOSTER - Co-counsel points out the fact that
3 60(B)(1) speaks to mistake, inadvertence, surprise or
4 excusable neglect. I'm not sure that we need to look at
5 that in light of newly discovered evidence under (2), but
6 if we pled it before, I don't wish to exclude it now. I'm
7 sure as usual as lawyers, Your Honor, I'll think of two
8 arguments as soon as I sit down, but I -- that's where
9 we're at. Thank you, sir.

10 THE COURT - All right, well, counsel, if you
11 think of anymore arguments, I'm going to take this matter
12 under advisements, and I'll be leaving for Hilton Head in
13 a day, so if you have any authority or anything you want
14 to submit, I'll be happy to hear from you. I won't make a
15 decision until next week. Thank you, counsel.

16 MR. PIERCE - Thank you. Your Honor, before we
17 go, if I missed -- if I missed that statute, I was
18 certainly not attempting to misrepresent to the Court if
19 it was raised in the ---

20 THE COURT - Oh, ---

21 MR. PIERCE - --- because I was thumbing through,
22 I didn't see it as I was sitting here this morning, Your
23 Honor.

24 THE COURT - Thank you, Mr. Pierce.

1 THE COURT - Mr. Foster, whenever you're ready,
2 sir.

3 MR. FOSTER - Thank you, sir.

4 Your Honor, we have laid out various grounds in
5 Rule 59. I don't wish to hit any of them unless the Court
6 wishes to go through them, but I don't wish to abandon
7 them by failing to get at them. I did want to emphasize a
8 few points. Um, during argument we raised the question of
9 the Court's -- the probate court's taking judicial notice
10 of what it said was an earlier -- an earlier part of this
11 case in which Mr. Mattox was living with his mother. We
12 objected to that on the grounds that as a judicial notice
13 we were given no chance to respond to it. It was not in
14 the record. It occurred for the first time in her order.
15 I believe there was an objection on the part of counsel
16 that we were, quote, raising a new issue. I would make
17 two comments to the Court. First of all, I believe that
18 our grounds as stated in the appeal are certainly wide
19 enough to cover that ground. I would make the more
20 specific point that it is my understanding of appellate
21 procedure that having raised the question of the propriety
22 of the probate court's finding we are allow upon hearing
23 to add an additional ground to sustain our claim. Now,
24 specifically, sir, if I may go to specifics, in the order

1 of this Court affirming the probate court -- this is on
2 page four of six, the second full paragraph ---

3 THE COURT - Hold on. Let me bring up our order.
4 Okay, I'm here. Yeah, page four? Okay.

5 MR. FOSTER - Okay, second full paragraph above
6 (ii) ---

7 THE COURT - Okay.

8 MR. FOSTER - --- there is the statement in the
9 middle of the paragraph, the fact that the Will was
10 discovered in a -- in decedent's mother's safe, comma, is,
11 comma, in fact, comma, evidence of a lack of due
12 diligence. I am obliged to point out to the Court that
13 there is no evidence in this case the safe in question
14 belonged to my client. The safe in question according to
15 the affidavit given by Mr. Mattox's mother -- well, the
16 mother of the decedent and Mr. Mattox, my client -- is
17 that the safe belonged to his mother and she stated he had
18 access to the ---

19 THE COURT - Mr. Foster, I -- I apolo -- I mean
20 that was my drafting, and I apologize if I was un -- that
21 was the intent. What I was trying to say is, the person
22 who owned the safe was the mother of your client, the
23 appellant and the decedent.

24 MR. FOSTER - Sir, I am old enough to when I get
25 to the age when a Judge tries to apologize to me, I feel

1 that I should start getting religion, but I appreciate the
2 point.

3 THE COURT - No, no, it's -- that -- if there's
4 -- that lack of clarity is my drafting there, but I ---

5 MR. FOSTER - I have -- I understand, sir, and my
6 point is simply to pass it off.

7 THE COURT - Yes, sir.

8 MR. FOSTER - Going to the second point down
9 below, it says, however, comma, his mother's own affidavit
10 established that confident (sic) access to his mother's
11 safe and knew the combination of that safe. Again, trying
12 to keep the record straight, the affidavit in question
13 said he had access to the combination to the safe, not
14 that he knew the combination. To go more specifically,
15 sir, my second point on this matter -- and I may come back
16 to this with the Court's permission -- goes to the
17 question of the applicability of the relevant state
18 statute dealing with reopening the -- a matter where a
19 Will has been dealt with, which I recall to make
20 correctly, as 62-3-412.

21 THE COURT - Okay, hold on one moment.

22 MR. FOSTER - The Court -- it's quoted in our
23 brief, and I have correctly cited it ---

24 THE COURT - Okay, let me find it. One moment
25 here.

1 MR. FOSTER - I can hand it up if the Court
2 wishes.

3 THE COURT - If you have a copy, that will be
4 helpful.

5 MR. FOSTER - If I can find it --- (pause) ---
6 I'm afraid that's the only one I've got.

7 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

8 MR. FOSTER - Judge, I've handed -- thank you,
9 ma'am.

10 THE COURT - Thank you, Mr. Foster.

11 MR. FOSTER - Sorry I was so slow.

12 If I may go ahead or should I ---

13 THE COURT - Yes, sir. No, I've got it.

14 MR. FOSTER - Thank you.

15 Your Honor, we've cited this language in the
16 statute, the specific part of this, and I would take the
17 Court's permission to read. It states, subject to appeal
18 and subject to vacation as provided herein and in Section
19 62-3-413, a formal testacy order under Section 62-3-409
20 through 62-3-411 including an order the decedent left no
21 valid Will and determining errors is final, etcetera,
22 except that, and then number one, the one we've been
23 talking about, is the Court should entertain a petition
24 for modification of its order and probate of another Will
25 of the decedent to be shown of the proponents of later

1 offered Will unaware of its existence at the time. The
2 Court, as I understand it, in accordance with counsel's
3 argument, reads the exception as bearing entirely upon the
4 question of, quote, another Will. I would argue, Your
5 Honor, in terms of the underlying section that I read out
6 of the first part of this statute, the obvious intent of
7 the statute, however poorly stated, is to include all
8 instances where there was no valid Will. In this case
9 that was, specifically, what the probate court found.
10 There was an allegation there was a Will; it could not be
11 found; the probate court determined there was no valid
12 Will. I would suggest that to read any other matter into
13 this is effectively to say, to have the statute say, here
14 is the general situation, but we are only going to allow a
15 -- a -- sorry, Your Honor -- we're only going to allow you
16 to repair the situation, if, in fact, there was, quote,
17 another Will. This is perhaps poor drafting, but I
18 believe I am correct in stating that any reasonable
19 reading of the probate code, and we've cited the general
20 language of what it intends, is that it intends to allow a
21 remedy in all such situations. Now, if that is the case,
22 we've argued that the existence of the Will, obviously,
23 was unknown, at least its presence was unknown, as was
24 determined of the original probate court, it could not be
25 found. Therefore, we believe that 62-3-412, as well as

1 the point that opposing counsel makes about independent
2 actions in equity is broad enough to cover a situation of
3 this kind. Might I hand up one piece of authority, Your
4 Honor?

5 THE COURT - You may.

6 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

7 MR. FOSTER - This is Ashburn vs. Rogers in the
8 Court of Appeals in 2017. The point that we have -- if
9 I'm not going too fast ---

10 THE COURT - Let me ---

11 MR. FOSTER - --- the point that we have marked
12 on this is dicta and is the footnote, but it is the Court
13 finding in that -- or Court of Appeals finding in that
14 case, that the usage of an independent action -- and I
15 would say that is analogous to 62-3-412 in its intent --
16 is not limited to the grounds used under Rule 60(B).
17 That, essentially, is where we're coming from. The Court,
18 I believe, reads, the case we cited, Lanier, as
19 essentially saying, Mr. Mattox was at fault because he did
20 not go into his mother's safe and find the Will. Well,
21 first of all, we would challenge the question of whether
22 he even lived in the household. There is, in my opinion,
23 no admissible evidence that he did so.

1 THE COURT - Let me, if you don't mind, let me
2 stop you, Mr. Foster. That was certainly not a basis for
3 my order.

4 MR. FOSTER - Okay, sir.

5 THE COURT - I mean I understand that was a fact
6 recited by the probate judge. Was that a basis for her
7 order, that he lived -- they lived in the same house?

8 MR. FOSTER - That was our argument, sir, that
9 she -- she put that in her order denying our motion and
10 action to reopen the case, and we argued at the hearing of
11 your -- before you, Your Honor, that, essentially, that
12 was her taking judicial notice of a point that we were
13 given no ability to respond to. I ---

14 THE COURT - My -- I'm sorry, go ahead.

15 MR. FOSTER - I appreciate the Court's comments.
16 As you know I have the duty to make it clear as to what
17 issues we're talking about, however, the Court may decide.
18 Our view is that under authority such as Ashburn and under
19 authority such as Lanier, the duty to search does not
20 extend to the level, with the greatest respect, that I
21 understand the Court's decision goes to. We're talking
22 about a safe owned by Mr. Mattox's mother to which he did
23 know the combination, or pardon, knowed (sic) where to
24 find the combination, very much like senior citizens will
25 do, if I may say, and because of that, he is precluded

1 from making this claim. Ms. Mattox, the mother, stated
2 clearly in her affidavit she had no idea the thing was in
3 her safe. Consequently, we believe under Lanier, the duty
4 does not extend to that limit. Basically, there was no
5 reason to say that he was not acting reasonably in
6 searching for a thing that he did not know could be
7 present in that location. Lanier also cites cases, which
8 we -- and we've handed up the case to the Court -- I can
9 hand it up again -- in which under general equitable
10 principles, a later discovered Will was allowed in.
11 Beyond that, Your Honor, and hoping I'm not trying the
12 Court's patience, I would emphasize one other thing.
13 We're not here to say we win; we're here to say, there's
14 an issue that needs to be tried. We believe that Ms.
15 Mattox received sufficient property from her dead husband
16 to satisfy the matter of a spouse's
17 share, and that given that fact and given the existence of
18 the Will, the remainder of his estate should be awarded to
19 my client, the loadstar, if I may say, of all probate
20 jurisprudence which is to fulfill the Will in question.

21 Your Honor, I think we've hit the main points
22 there. If there's anything I can add, I'm happy to do so.

23 THE COURT - Thank you, Mr. Foster. Let me hear
24 from Mr. Pierce.

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1 MR. PIERCE - Your Honor, I'm going to try and be
2 brief. I think it's important to understand what we
3 actually are here to talk about today; it's a motion to
4 alter or amend judgment. This Court's mandate under the
5 case law and the statutes and its appellate capacity at
6 the initial appellate hearing was to review the facts and
7 the law of the case on an abuse of discretion basis,
8 therefore, because the right to grant a Rule 59(E) motion
9 is -- it lies within the sound discretion of the Court
10 that heard the underlying matter. It seems that the issue
11 here is whether or not Your Honor believes that your order
12 is incorrect in finding that Judge Rogers did not commit
13 an abuse of discretion and, therefore, was affirmable.
14 That's what we're here to talk about today. We're not
15 here to talk about whether there's an issue to be tried or
16 whether he wins. The issue was whether or not Your
17 Honor's order is correct based on the prescribed standard
18 of review. That being the case, Your Honor, we believe
19 this Court's order affirming Judge Roger's -- found that
20 Judge Roger's
21 findings in the underlying trial and at the motion for
22 relief from judgment or Rule 60(B) were supported by
23 facts, namely that Rule 60(B)(1) and 60(B)(5) do not apply
24 in this case based on the facts and law cited by Your
25 Honor in your order affirming -- further that under 60(B)

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1 (2), due diligence was not exercised, and the same facts
2 that were presented to Your Honor at the appellate hearing
3 were presented to Judge Rogers at the Rule 60 hearing,
4 Your Honor found those facts to be persuasive that -- and
5 along with the case law in Lanier and Jamison that due
6 diligence was not exercised. Further, Your Honor, based
7 on the Mr. T case, 62-3-412 does not apply in this
8 instance. Your Honor found that correctly. The statute
9 that I believe was cited was 62-3-412(1). If there's
10 another statute that addresses this particular set of
11 facts where there's an intestate share and it supports the
12 appellant's argument, that statute was not cited and is
13 not properly raised today on a Rule 59(E) motion, three
14 steps removed from the underlying trial. And
15 backtracking, Your Honor, just, specifically, noting that
16 due diligence was not exerted in this case, your Court
17 (sic) -- Your Honor finding that there was no,
18 specifically, targeted search as required under Jamison,
19 that the Will was discovered in appellant's mother's safe
20 and that appellant had access to the safe and to the
21 combination, and the fact that he either knew the
22 combination or knew where to find the combination I
23 believe is distinction without difference here. He had
24 access to it and could've opened the safe. Your Honor, I
25 believe that taking into account the standard of review

1 that this Court was required to apply in putting forth its
2 order that Your Honor found correctly, this Court found
3 correctly, and there are no grounds for Your Honor to
4 reverse yourself on this Rule 59(E) motion and would ask
5 that it be denied.

6 THE COURT - Mr. Foster, give me the last word.

7 MR. FOSTER - Briefly, sir, if I may. Whether
8 Your Honor's powers are analogous to a full scale
9 appellate matter before the Court of Appeals or the
10 Supreme Court or whether it is under Rule 59, we take the
11 view that we are well within your authority to raise the
12 points we raised. So that's, basically, all I can say.
13 With respect to co-counsel, who certainly knows what he's
14 doing, I didn't hear any citations, though he did refer
15 generally to the law to say, you are so limited because
16 here is the statute, here is the regulation. Beyond that,
17 I would say again, we believe we have satisfied the
18 requirements of a Rule 60(B). If we have not, we have
19 cited 62-3-412; we have cited the action for an
20 independent action equity. Those actions -- we've handed
21 up Ashburn -- are sufficient to allow this Court to reach
22 the question of whether this Will should be allowed into
23 probate and we should be allowed to move forward on this
24 litigation. I'll be happy to add anything else the Court
25 wishes.

1 THE COURT - Thank you, Mr. Foster.

2 Mr. PIERCE - Your Honor, I did fail to mention I
3 filed a memorandum in opposition yesterday. I'm not sure
4 if you got a copy but I can hand ---

5 THE COURT - Ms. Strait is very efficient, and
6 she prepares our binders several days in advance, so
7 anything that's filed right before the hearing I don't
8 typically get, that's ---

9 MR. PIERCE - Thank you, Your Honor.

10 And if I may respond, Your Honor, briefly,
11 unless you're -- don't want to hear from me.

12 THE COURT - I think I've -- I mean if you think
13 -- go ahead. Yeah, go ahead.

14 MR. PIERCE - Well, Your Honor, only to say that
15 the standard of review is well settled. It is cited in my
16 memorandum in opposition, and the standard for review in
17 the underlying appellate argument was also cited in my
18 memorandum or my brief and was also addressed at the
19 hearing, so I'm not conjuring standards of review.

20 THE COURT - I'm going to deny the motion. The
21 basis for the Court's ruling is I still -- it's a Rule 59
22 -- I'm sorry -- lost my train of thought. It's a Rule
23 60(B)(2) motion and there has to be a diligence and I --
24 although there is an issue -- I mean sounds like there's a
25 factual issue as to where -- whether he stayed with his

1 mother and the Court's opinion, that's not a material
2 fact. It's undisputed that he had access to the
3 combination to the safe and the Court's view -- and it was
4 in the probate court's view that's the place they
5 should've looked. As far as 62-3-412, it's still the
6 Court's view that, although it's not the most clearly
7 drafted statute, there are -- in the Court's view there
8 are -- one and two are the different -- number one is the
9 situation where there is a Will that's been probated and
10 number two is the intestate provision, and so we will be
11 under the intestate provision in this case, and so there's
12 no provision for finding a Will after -- after the probate
13 court's found there's been intestacy.

14 So, Mr. Foster, you are right that I made an
15 error in my order where I said that the, um, -- that he
16 knew the combination, when, in fact, the evidence was he
17 had access to the combination. I'll be happy -- what I'll
18 do is a Form 4. I will make that correction and say, but
19 ---

20 MR. FOSTER - Your Honor is correct. If I may be
21 allowed? The statement that it was his safe ---

22 THE COURT - Okay. I mean do you want me to
23 reword that -- that quote? I mean I ---

24 MR. FOSTER - Well, the earlier statement says
25 that the safe belonged -- I'm characterizing -- the safe

1 was his and his mother's. I don't believe that's accurate
2 in terms of the evidence in ---

3 THE COURT - But that was just -- again, that --
4 but what I -- what I said was it was appellant and
5 decedent's mother's safe, meaning that the -- the
6 appellant's mother's safe and I was just trying to
7 identify who -- maybe I'm -- am I lacking an apostrophe,
8 just ---

9 MR. FOSTER - The fact that I still -- I have a
10 beard now does not mean the Court has to apologize to me.

11 THE COURT - No, it's -- I mean I -- I want to
12 write it clear, because what I'm trying to say is that the
13 mother is the mother of the appellant and the decedent and
14 it's her safe.

15 MR. FOSTER - Yes, sir.

16 THE COURT - That was what I was trying to write.

17 MR. FOSTER - Yes, sir.

18 THE COURT - So grammatically, what -- how can I
19 make that more clear?

20 MR. FOSTER - I defer to the Court.

21 THE COURT - Okay.

22 MR. FOSTER - I believe you stated it for the
23 record, sir.

24 THE COURT - Okay. Well, that's -- and I'll be
25 happy to put that -- um -- and for the -- I'll put in the

THE STATE OF SOUTH CAROLINA
In The Circuit Court

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APPEAL FROM YORK COUNTY PROBATE COURT

The Honorable Carolyn W. Rogers, Judge of Probate

Case File No. 2016-ES-46-01230

Case No. 2018-CP-46-_____

In the Matter of JONATHAN MATTOX,

DAVID J. MATTOX,

Appellant,

vs.

LISA JO BARE MATTOX,

Respondent.

NOTICE OF APPEAL

David J. Mattox appeals the Order on Omitted Spouse Claim of the Honorable Carolyn W. Rogers, Judge of the Probate Court, dated and filed November 21st, 2018. Appellant received written notice of entry of this order on November 26th, 2018.

Michael L. Brown, Jr.
SC Bar No. 943
Zachary M. Merritt
SC Bar No. 102079

403 East White Street
Post Office Box 1025
Rock Hill, S.C. 29731

803 328-8822
803 328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

December 5, 2018

Rock Hill, South Carolina

John Martin Foster
SC Bar No. 2086

The Guardian Building
223 East Main Street, Suite 520
Post Office Box 106
Rock Hill, S.C. 29731

803 324-8100
803 324-8109: Fax
jmfoster@comporium.net

Attorneys for Appellant

By: /s/ John Martin Foster

ELECTRONICALLY FILED - 2018 Dec 05 10:37 AM - YORK - COMMON PLEAS - CASE#2018CP4603672

Other Counsel of Record:

John P. Gettys, Jr.

SC Bar No.

J. Nathaniel Pierce

SC Bar No. 102803

Morton & Gettys

Attorneys for Respondent

331 East Main Street, Suite 300

Post Office Box 707

Rock Hill, S.C. 29731

803 366-3388

803 366-4044

john.gettys@mortongettys.com

Nate.Pierce@mortongettys.com

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2018 NOV 21 AM 10:00

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE PROBATE COURT
CASE FILE NO.: 2016ES4601230

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

David J. Mattox

Lisa Jo Bare Mattox

PETITIONER(S)

RESPONDENT(S)

CHECK ONE:

DECISION BY THE COURT. This action came to trial or hearing before the court.
The issues have been tried or heard and a decision rendered.

ACTION DISMISSED _____

IT IS ORDERED AND ADJUDGED: See attached order; Statement of judgment by the court.

Dated at York, South Carolina, this 21 day of November, 2018.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 21st day of November, 2018, and a copy mailed first class this 21st day of November, 2018, to attorneys of record or to parties (when appearing *pro se*) as follows:

John Martin Foster, Esquire
Post Office Box 106
Rock Hill, SC 29731

John P. Gettys, Jr., Esquire
Post Office Box 707
Rock Hill, SC 29731

Zachary M. Merritt, Esquire
Post Office Box 1025
Rock Hill, SC 29731

J. Nathaniel Pierce, Esquire
Post Office Box 707
Rock Hill, SC 29731

NOV 26 2018

resident of York County and passed away on October 1, 2016.

2. The Decedent met his wife, now widow, Lisa Mattox, in 2006 and they were wed in 2011.

3. The Respondent filed an informal application for appointment on October 13, 2016, indicating the Decedent had died without a Will.

4. The Respondent was appointed Personal Representative of the estate on October 13, 2016.

5. Petitioner filed a Summons, Complaint and Petition for Formal Appointment on April 28, 2017.

6. Petitioner offered for probate a copy of a Will signed in Gwinnett County, Georgia, in 2005 by the Decedent, but was unable to produce the original Will.

7. A hearing was held on August 9, 2017.

8. At the August 9 hearing, both the Petitioner and Respondent had the opportunity to address the omitted spouse issue and the issue was thoroughly addressed.

9. The Court issued an order on September 26, 2017 denying Petitioner's application to be appointed Personal Representative of the Estate (the "Order").

10. The Order further states in paragraph G that the question of the omitted spouse share was rendered moot because Jonathan Mattox died intestate, and further states in paragraph H that there was no credible evidence presented to the Court that Jonathan Mattox provided for his surviving spouse outside of the Will or in lieu of a testamentary disposition.

11. Subsequently, the purported original Will was found in Decedent's mother's house in Pawley's Island, South Carolina.

12. Petitioner testified at the hearing held on August 9, 2017, that he lived with his mother in Pawley's Island where the Will was discovered.

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CONCLUSIONS OF LAW

1. Jurisdiction of this Court in the above matter is properly established and venue is properly laid in York County, South Carolina, and all parties were timely served with the Summons, Petition and Notice of Hearing.

2. For the following reasons, Petitioner did not exercise due diligence in discovering the original Will and is not entitled to relief under South Carolina Rule of Civil Procedure 60:

- a. Petitioner testified at the August 2017 hearing that he lived with his Mother in Pawley's Island, which is where the original Will was discovered;
- b. The original Will was discovered in a safe in the Mother's residence – a natural and obvious place for important papers to be placed; and
- c. Petitioner submitted an affidavit from his mother in which she affirms she knew the original Will existed.

3. It is well settled law in South Carolina that when a testator fails to provide by Will for his surviving spouse who married the testator after the execution of the Will, the omitted spouse shall receive the same share of the estate she would have received if the decedent left no Will. See *In Re Timmerman*, 331 S.C. 455, 502 S.E. 2d 920 (1998).

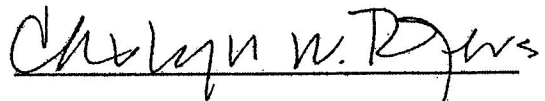
4. The Petitioner presented no credible evidence to the Court that the Decedent was contemplating marriage when the Will was executed in 2005. See *In Re Miles*, 440 S.E. 2d 882, 312 S.C. 408 (1994).

5. Because the Respondent established her entitlement to an omitted spouse share pursuant to S.C. Code Ann. § 62-3-301 in that she proved (1) the omission was not intentional as Mr. Mattox and Respondent did not know each other when the Will was executed, and (2) Mr. Mattox made no in-lieu provisions

for her, the discovery and probate of Mr. Mattox's original Will would not change the outcome of the 2017 proceeding. See *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).

6. All of the elements of *res judicata* as to the omitted spouse issue are satisfied – (1) the identity of the parties, (2) identity of the subject matter, and (3) a previous adjudication. See *Plum Creek Development Co., Inc. v. City of Conway*, 334 S.C. 30, 512 S.E.2d (1999).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Decedent died intestate without children, leaving his spouse as his sole heir pursuant to S.C. Code Ann. § 62-2-301 (1986, as amended). Petitioner's Notice, Motion and Petition for Relief from Judgment and For Stay of Enforcement is denied.



Carolyn W. Rogers
Judge of Probate, York County, SC

York, South Carolina
November 21, 2018.

#4 of 4
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THE STATE OF SOUTH CAROLINA
In The Circuit Court

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APPEAL FROM YORK COUNTY PROBATE COURT

2018 DEC 5 PM 4:26

The Honorable Carolyn W. Rogers, Judge of Probate

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

Case File No. 2016-ES-46-01230

Case No. 2018-CP-46-_____

In the Matter of JONATHAN MATTOX,

DAVID J. MATTOX,

Appellant,

vs.

LISA JO BARE MATTOX,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal dated December 5, 2018, on the following counsel or persons of record:

John P. Gettys, Jr.
J. Nathaniel Pierce
Morton & Gettys
Post Office Box 707
Rock Hill, S.C. 29731

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(b), S.C.A.C.R.

December 5, 2018

/s/ John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
803 324-8100
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Case No. 2017-CP-46-03672

David J. Mattox,

Appellant,

v.

Lisa Jo Bare Mattox,

Respondent.

NOTICE OF APPEAL

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SC Court of Appeals

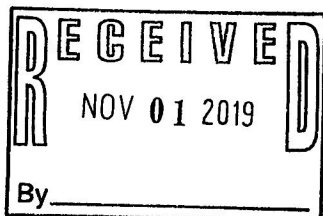
David J. Mattox appeals the following orders:

Order Affirming Probate Court, filed September 3, 2019, by the Honorable William A. McKinnon; and

Order denying Plaintiffs' Motion to Alter or Amend Judgment, filed October 2, 2019, by the Honorable William A. McKinnon.

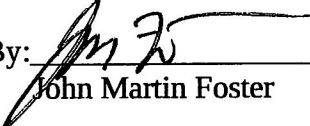
Appellants received written notice of entry of the final Order listed above on October 2, 2019.

Michael L. Brown, Jr.
Zachary M. Merritt
Post Office Box 1025
Rock Hill, S.C. 29731
803 328-8822



John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731
803 324-8100

Attorneys for Appellant

By: 
John Martin Foster

October 28, 2019

Rock Hill, South Carolina

Other Counsel of Record:

John P. Gettys, Jr.
J. Nathaniel Pierce
Morton & Gettys
Post Office Box 707
Rock Hill, S.C. 29731
Attorneys for Respondent
803 366-3388

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Case No. 2017-CP-46-03672

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SC Court of Appeals

David J. Mattox,

Appellant,

v.

Lisa Jo Bare Mattox,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellants in the civil appeal above, hereby certifies that on the date written below he served copies of the following pleadings or documents in the above-captioned and numbered civil action:

Notice of Appeal, with referenced Orders; and
this Certificate of Service

the original of which was sent to be filed with the Clerk of the Court for the Court named above,

by depositing the same with the United States Postal Service on the date above, with sufficient postage affixed and directed to the respective last known address(es) of those attorney(s) and/or persons set out below, or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable

age and discretion then residing therein:

John P. Gettys, Jr.
J. Nathaniel Pierce
Morton & Gettys
Post Office Box 707
Rock Hill, S.C. 29731
Attorneys for Respondent

Michael L. Brown, Jr.
Zachary M. Merritt
Post Office Box 1025
Rock Hill, S.C. 29731
803 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731
803 324-8100

Attorneys for Appellant

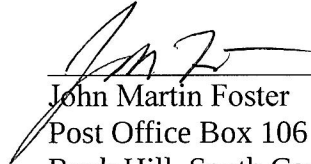
By:  _____
John Martin Foster

October 28, 2019

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



John Martin Foster
Post Office Box 106
Rock Hill, South Carolina 29731
(803) 324-8100
Attorney for Appellant

June 26, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2019-001827

DAVID J. MATTOX,

v.

LISA JO BARE MATTOX,

CERTIFICATE OF SERVICE

I certify that I have, on the date below, served one (1) copy of the Record on Appeal, on the following party of record:

John P. Gettys, Jr.
J. Nathaniel Pierce
Morton & Gettys
Post Office Box 707
Rock Hill, S.C.29731
Attorneys for Respondent

by using opposing counsels' e-mail addresses listed in the Attorney Information System (AIS), as allowed by Section (g)(3) of the Amended Order of the Appellate Courts during the Coronavirus Emergency (As Amended May 29, 2020).

June 26, 2020

Michael L. Brown, Jr.
Zachary M. Merritt
Post Office Box 1025
Rock Hill, S.C.29731
803 328-8822

John Martin Foster
Post Office Box 106
Rock Hill, S. C.29731
803 324-8100

Attorneys for Appellant

By: 

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Jun 26 2020

SC Court of Appeals