THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Oct 07 2022
S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

APPENDIX

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

CONTENTS

The South Carolina Court of Appeals

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

Appellate Case No. 2019-001827

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ A.J.

Columbia, South Carolina

cc:
Michael Langford Brown, Jr., Esquire
Zachary Michael Merritt, Esquire
John P. Gettys, Jr., Esquire
James Nathanial Pierce, Esquire

John Martin Foster, Esquire
The Honorable William A. McKinnon

FILED
Sep 07 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

Appellate Case No. 2019-001827

Appeal From York County
William A. McKinnon, Circuit Court Judge

Unpublished Opinion No. 2022-UP-236
Submitted May 2, 2022 – Filed June 1, 2022

AFFIRMED

John Martin Foster, of Rock Hill, and Michael Langford Brown, Jr. and Zachary Michael Merritt, both of Law Office of Michael L. Brown, Jr., of Rock Hill, all for Appellant.

John P. Gettys, Jr. and James Nathanial Pierce, both of Morton & Gettys, LLC, of Rock Hill, for Respondent.

PER CURIAM: David J. Mattox appeals the circuit court's order affirming the probate court's denial of his motion for relief from its prior order, in which the probate court held David's brother, Jonathan Mattox, died intestate, leaving his

wife, Lisa Jo Bare Mattox, as his sole heir. On appeal, David argues (1) he was entitled to relief under Rule 60(b), SCRCP, due to the discovery of Jonathan's original will, which was outside of David's possession, and there was no lack of due diligence in his failure to discover the will before the original proceeding; (2) the probate court erred in relying on evidence outside the record; and (3) he was entitled to relief pursuant to section 62-3-412 of the South Carolina Code (2022) because he was effectively unaware of the original will's existence. We affirm.

1. The circuit court did not err in affirming the probate court's denial of David's Rule 60(b) motion. On appeal, David failed to properly challenge the probate court's finding that Lisa established her entitlement to an omitted spouse share pursuant to section 62-2-301 of the South Carolina Code (2022), making this finding the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief."). As an omitted spouse, Lisa receives the same share of Jonathan's estate as if he had not left a will, and the discovery of the original will does not change the result of the probate court's original order. *See* S.C. Code Ann. § 62-2-301(a) (2022) (stating an omitted spouse "shall receive the same share of the estate [s]he would have received if the decedent left no will"); *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007) (holding that in order to receive a new trial based on newly discovered evidence, the moving party must establish that the newly discovered evidence "(1) *will probably change the result if a new trial is granted*; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching" (emphasis added)).

2. David's argument that the probate court erred in relying on evidence outside the record is not preserved for appellate review because he did not raise this issue to the probate court. *See Ulmer v. Ulmer*, 369 S.C. 486, 491, 632 S.E.2d 858, 861 (2006) (holding an issue was not preserved for the circuit court's review because the appellant failed to raise the issue to the probate court in a post-trial motion).

3. David's argument he was entitled to relief pursuant to section 62-3-412 is not preserved for appellate review because the probate court did not rule on this issue, and David failed to make a post-trial motion to the probate court requesting a ruling. *See In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("South Carolina courts 'have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may

not be considered on appeal.'" (quoting *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993))); *id.* (holding that because a party did not raise an issue to the probate court, it could not raise that issue to the circuit court).

AFFIRMED.[1]

GEATHERS and HILL, JJ., and LOCKEMY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Jun 16 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

PETITION FOR REHEARING

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

BACKGROUND

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

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

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

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

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

RULE 60(b) RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

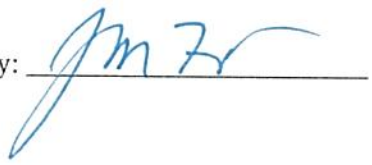
June 16, 2022

Respectfully submitted,

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: 

RECEIVED
Jun 16 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

CERTIFICATE OF SERVICE

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

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

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

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

Respectfully submitted,

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: 

June 16, 2022

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Oct 02 2020
SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

BRIEF OF APPELLANT

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

TABLE OF CONTENTS

*

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA

SUPREME COURT

COURT OF APPEALS

STATUTES

RULES OF COURT

UNITED STATES CIRCUIT COURTS

UNITED STATES DISTRICT COURTS

STATEMENT OF THE ISSUES ON APPEAL

I. THE APPELLANT IF ENTITLED TO RELIEF UNDER RULE 60 (B) DUE TO THE DISCOVERY OF EVIDENCE OUTSIDE HIS POSSESSION AND, AS TO WHICH, THERE WAS NO LACK OF DUE DILIGENCE.

II. THE APPELLANT IF ENTITLED TO RELIEF DUE TO THE PROBATE COURT'S RELIANCE ON EVIDENCE OUTSIDE THE RECORD.

III. THE APPELLANT IF ENTITLED TO RELIEF UNDER S.C. CODE § 62-3-412 RELATING TO AN ORIGINAL WILL WHERE HE WAS EFFECTIVELY UNAWARE OF ITS EXISTENCE.

STATEMENT OF THE CASE

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

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

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

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

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

Hearing on the Motion and Petition was heard by the Probate Court on October 5, 2018. The Probate Court denied Appellant's Motion and Petition by Order filed November 21, 2018 and received

by Appellant November 26, 2018. Appeal to the Circuit Court for York County was filed December 5, 2018.

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

STANDARD OF REVIEW

In *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct.App. 1993), this Court held:

> This court and the Supreme Court, in a line of recent cases, have clearly addressed the important rules concerning the standard of review of cases appealed from the probate court. *[Matter of] Howard*, [315 S.C. 356,] 434 S.E.2d 254 (1993); *Eagles v. South Carolina Nat'! Bank*, 301 S.C. 402, 392 S.E.2d 187 (Ct.App.1990). These cases hold that the determination of the standard of review by an appellate court of matters originating in the probate court is controlled by whether the cause of action is at law or in equity. *Id.* To make this determination, the appellate court must look to the essential character of the cause of action alleged by the petitioners in the court below. If the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence. *Eagles*, 301 S.C. at 408, 392 S.E.2d at 191.
>
> [313 S.C. 257, 437 S.E.2d at 155 (Ct.App. 1993); citation of *Howard, supra,* corrected]

Relief under Rule 60(b)(1), S.C.R.C.P is based, *inter alia*, upon mistake, inadvertence or excusable neglect; relief under Rule 60(b)(2) is based on newly discovered evidence; relief under Rule 60(b)(5) is based, inter alia, upon a claim that it is no longer equitable that a judgment have prospective application.

Relief as allowed under S.C. Code § 62-3-412 is stated in relevant part:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411, including an order that the decedent

left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

[*Emphasis added.*]

In *Sullivan v. Brown (IN RE Estate of Kay)*, 423 S.C. 476, 816 S.E.2d 542 (2018), the Supreme Court held:

> Under the framework set out in *Townes*, prior to our master in equity system, when circuit judges referred matters to special referees or masters to make findings of fact, the limited scope of appellate review over factual findings concurred in by two judges may have been appropriate. However, we hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence. Accordingly, we analyze this case through this broad lens.
>
> *[Id.*, 423 S.C. at 481, 816 S.E.2d at 545.]

The proof required under both Rule 60 and § 62-3-412 come down to the elements of knowledge, real and imputed, and the petitioner's care in searching for a newly-discovered will. The weighing of those elements are matters of equity and reviewable as such.

ARGUMENT

I. THE APPELLANT IF ENTITLED TO RELIEF UNDER RULE 60(b) DUE TO THE DISCOVERY OF EVIDENCE OUTSIDE HIS POSSESSION AND, AS TO WHICH, THERE WAS NO LACK OF DUE DILIGENCE.

The Probate Court recited, and based its ruling in part, upon a finding that the Appellant, David Mattox, lived with his mother Peggy Mattox at the time she discovered the will in her home. That Order recites that he lived in that house in 2017. [RECORD ON APPEAL, Order of Nov. 21, 2018, Finding 12. p.8.].

There is no evidence on record to show Mr. Mattox' residency as a fact as of the time the will was discovered. The first Probate Order is silent on this point, and there is no transcript of the earlier Probate hearing. This fact in the Order appealed to the Circuit Court is stated as based upon the Probate Judge's memory from the earlier hearing.

Assuming the truth of this memory, it is irrelevant in absence of evidence of his residence at the time the will was discovered. It is also irrelevant in the absence of any evidence that the Appellant controlled or had access to his mother's safe, in which the will was found. [RECORD ON APPEAL, Order of Nov. 21, 2018, p.6 – 10; Transcript of Hearing, p.197 - 227.].

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

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence:
> 1) will probably change the result if a new trial is granted;
> 2) has been discovered since the trial;
> 3) could not have been discovered before the trial;
> 4) is material to the issue; and
> 5) is not merely cumulative or impeaching.
> *[Id.*, 364 S.C. ___, 612 S.E.2d 459; paragraphing added.]

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

1) acceptance of the discovered will would change the result of the first Probate Order of September 27, 2017;
2) that the original will was discovered since the first Probate trial;

3) that the original will is material to the issue of Probate and the Decedent's heirs; and

4) that the original will in not merely cumulative or impeaching.

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

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

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

> [T]his court has previously held that evidence "in the possession of the party before the judgment was rendered . . . is not newly discovered evidence that affords relief." *American Cetacean* Soc'y v. *Smart*, 673 F.Supp. 1102, 1106 (D.D.C.1987) (Richey, J.). *See Coastal Transfer Co. v.* Toyota *Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir.1987) (evidence that is somehow in possession of a party at time of trial may not be "discovered"); *see also Longden v. Sunderman*, 979 F.2d 1095, 1103 (5th Cir.1992) (misplaced evidence is not newly discovered evidence); *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir.1987) (party may not "discover" after trial evidence that was within knowledge of employees at time of trial).
> [*Id.*, 364 S.C._____, 612 S.E.2d 460]

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

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

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

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

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

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

> 9. The Petitioner's [David Mattox'] attorney has spent much time and research attempting to locate the original Will but has been unsuccessful.
>
> 10. The Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, but he understood the Decedent kept it in a safe place.
>
> [RECORD ON APPEAL, Order of Probate Court, September 26, 2017, p.3.]

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

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

> 2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.

3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.

4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.

5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.

6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.

7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.

8. No one had told me the will had been placed in the safe.

9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.

[RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

The Probate Court, as affirmed, effectively ascribes to the Appellant knowledge or possession of a document he did not have, and finds (in apparent contradiction of its earlier findings) a lack of due diligence in obtaining that knowledge. There is no evidentiary basis for that finding. The Appellant is entitled to Relief under Rule 60, S.C.R.C.P.

ARGUMENT

II. THE APPELLANT IF ENTITLED TO RELIEF DUE TO THE PROBATE COURT'S RELIANCE ON EVIDENCE OUTSIDE THE RECORD.

In addition, in the absence of evidence as to the Appellant's later residence, the Probate Court's imputation of his residence during the time the will was discovered, was based on early testimony and was, at best, a matter of judicial notice. Rule 201(e) of the South Carolina Rules of Evidence affords the Appellant the right to be heard on this point. That right was not granted. *Gibbes v. Rose Hill* Plantation Devl. Co., 794 F.Supp. 1327 (1992).

ARGUMENT

III. THE APPELLANT IF ENTITLED TO RELIEF UNDER S.C. CODE § 62-3-412 RELATING TO AN ORIGINAL WILL WHERE HE WAS EFFECTIVELY UNAWARE OF ITS EXISTENCE.

S.C. Code § 62-3-412 allows relief on a broader basis than Rule 60(b), S.C.R.C.P., stating in relevant part:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Sections 62-3-409 through 62-3-411[1], including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:
>
> (1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.
>
> *[Emphasis added.]*

The Appellant contends that the reference to the "existence" of a will, as stated in the Statute above, must mean ignorance of the actual document as well as ignorance of the document itself. The only requirement to probate of a will under § 62-3-412 is that the Petitioner be unaware of the will's existence at the time of the earlier proceeding. The Appellant contends this language is broad enough to comprehend a situation where the Petitioner is unaware of an original will's location. The Order of the Probate Court of November 21, 2018 omits any discussion of § 62-3-412. The Orders of the Circuit Court apparently limits the applicability of § 62-3-412 to matters in which two or more wills are involved, citing the referenced language to "another will". This reading contradicts the emphasized language of the first paragraph of the Statute cited above.

---

1. S.C. Code § 62-3-409 through 62-3-411 have no application to this matter, and were not argued below.

S.C. Code § 62-3-412 is a part of the Uniform Probate Code enacted in this State. S.C. Code § 62-1-102 of that Code states, in relevant part:

> (a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (b) The underlying purposes and policies of this Code are:
>
> (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;
>
> (2) to discover and make effective the intent of a decedent in the distribution of his property; . . .

Appellant would also note the language of S.C. Code § 62-3-412(b)(4), which states:

> (4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances by the order of probate of the later-offered will or the order redetermining heirs.
>
> [*Emphasis added.*]

A narrow reading of § 62-3-412, which excludes the chance to apply that Statute to a sole lost will, defeats the general purpose of the Uniform Code and allows a distinction between litigation involving the discovery of two or more wills, and a lost will. There is no basis in law or equity in such a distinction and such a distinction defeats the general purpose of the Probate Code. The proper and logical reading of § 62-3-412 must include a factual situation such as found in this case, where relief may be granted "if appropriate under the circumstances."

CONCLUSION

All evidence in this matter evidences the Appellant's lack of possession and lack of knowledge as to the whereabouts of the original will of the Decedent. There is no basis to find a lack of due diligence on his part in discovering the will. He is entitled to relief under both Rule 60(b), S.C.R.C.P. and S.C.

Code § 62-3-412. He is entitled to enter his brother's will into Probate and proceed with the Estate.

October 2, 2020

Respectfully submitted,

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: 

RECEIVED
Oct 02 2020
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: _____

October 2, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant 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:

Brief and Reply Brief of Appellant; and
this Certificate of Service,

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 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; of 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, all pursuant to Rule 262, S.C.A.C.R.

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 Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: _____

October 2, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant 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:

Brief and Reply Brief of Appellant; and
this Certificate of Service,

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 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; of 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, all pursuant to Rule 262, S.C.A.C.R.

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 Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: _____

October 2, 2020

RECEIVED
Jul 21 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

FINAL BRIEF OF RESPONDENT

July 29 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

J. Nathanial Pierce, SC Bar No. 102803
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorneys for Respondent

Other Counsel of Record:
Michael L. Brown, Jr.
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

Zachary M. Merritt
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

John Martin Foster
John Martin Foster, Attorney
P.O. Box 106
Rock Hill, SC 29731
803.324.8100

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules of Court

Secondary Sources

STATEMENT OF ISSUES ON APPEAL

I. **Is Appellant entitled to relief under Rule 60(b)?**

II. **Is Appellant entitled to relief due to the Probate Court's reliance on evidence outside the record?**

III. **Is Appellant entitled to relief under S.C. Code Ann. § 62-3-412 relating to an original will where he was effectively unaware of its existence?**

STATEMENT OF THE CASE

Jonathan Ray Mattox ("Decedent") and Lisa Mattox ("Respondent") were married June 11, 2011. Decedent died October 1, 2016, in Georgetown County, South Carolina. The York County, South Carolina Probate Court opened Decedent's Estate and appointed Respondent as personal representative October 13, 2016. Appellant filed a Summons and Petition for Formal Appointment on April 28, 2017. (R. 24-28). The Petition demanded David J. Mattox ("Appellant") be appointed as personal representative of Decedent's Estate based on the existence of a purported original will wherein Appellant was allegedly named as Personal Representative. (R. 24-28). Additionally, Appellant sought to restrain Respondent, the Personal Representative of Decedent's estate. (R. 24-28).

A hearing was held before the Honorable Carolyn W. Rogers on August 9, 2017. Appellant and Respondent were the only witnesses called at the hearing. (R. 2). The purported original will was not presented at the hearing. (R. 3). However, a copy of the purported will was introduced and accepted into evidence. (R. 3). Following the hearing, and per the Court's Order September 26, 2017, Judge Rogers denied Appellant's Petition for Appointment as Personal Representative as well as his request to restrain the Personal Representative. (R. 5). As a result, the original will was, by law, presumed revoked and the Respondent was left as the sole beneficiary of the Decedent's Estate, which passed under the South Carolina intestacy statute. (R. 5).

On July 13, 2018, some ten months later, Appellant, by and through counsel, filed a Summons, Notice, Motion, and Petition for Relief from Judgment and Stay of Enforcement pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("S.C.R.C.P.") alleging, *inter alia*, newly discovered evidence. (R. 29-32). Appellant also filed multiple lis pendens against properties owned wholly by Respondent, some not within the jurisdiction of the Probate Court. At a hearing held October 5, 2018, Appellant and Respondent argued Appellant's S.C.R.C.P. 60 motion, along with Respondent's Motion to Quash the lis pendens, before Judge Rogers. (R. 197-227). On November 21, 2018, Judge Rogers issued an order denying Appellant's motion for relief under S.C.R.C.P. 60 and denying Respondent's Motion to Quash the remaining lis pendens (R. 10).

On December 5, 2018, Appellant filed Notice of Intent to Appeal the findings of the Probate Court to the York County Circuit Court. At oral argument before the Honorable William McKinnon, on July 31, 2019, Appellant argued matters listed in his Statement of Issues on Appeal, as well as others that were raised for the first time on appeal. (R. 228-262). In his order dated September 3, 2019, Judge McKinnon affirmed Judge Rogers, finding:

1. There is evidence that the Appellant did not act with due diligence in his attempt to locate the will of the Deceased, as it was found in his mother's safe, such that a motion under Rule 60(b)(2) cannot be sustained.
2. There is no basis for a Rule 60(b)(1) motion.
3. There is no basis for a Rule 60(b)(5) motion.
4. Section 62-3-412(1) does not apply because the judgment below was one of intestacy.
5. Appellant cannot obtain relief as an "independent action."

(R. 11-17). This appeal followed. (R. 276).

STANDARD OF REVIEW

Appellant claims this Court must review this case *de novo*, citing *Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993) for the proposition that "[i]f the essential character of the petitioner's cause of action is grounded on equitable rights and equitable relief is sought, the case is regarded as equitable and the appellate court has jurisdiction to make findings in accordance with its own view of the preponderance of the evidence." Initial Br. of Resp't, 5. Appellant goes on to claim that a motion under Rule 60(B), S.C.R. Civ. P. and a request for relief under S.C. Code Ann. § 62-3-412 are equitable in nature because they "come down to the elements of knowledge, real and imputed, and the petitioner's care in searching for the newly discovered will" and the "weighing of those elements are matters of equity." Initial Br. of Resp't, 6.

South Carolina jurisprudence is clear on this point. The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007)). An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Id.* Therefore, the appropriate standard of review in this case is an abuse of discretion standard, not *de novo* review.

ARGUMENT

I. The Appellant is not entitled to relief under Rule 60(b) of the of the South Carolina Rules of Civil Procedure based on his lack of due diligence.

a. Appellant is not entitled to relief under Rule 60(b)(1), S.C.R.C.P.

Rule 60(b)(1) is not applicable to this case. S.C.R.C.P. 60(b)(1) permits the court to relieve a party from a final judgment, order, or proceeding based on "mistake inadvertence, surprise, or excusable neglect." This rule is intended to allow a party relief based on errors committed by the party's counsel. *See* 2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.). There is no mistake by counsel alleged in this instance, and "it would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." *Id.* Here, the issue is not mistake by counsel but, rather, whether Appellant acted with due diligence in locating the original will ahead of trial. Rule 60(b)(2) specifically addresses this situation, and Appellant must not be allowed to circumvent the due diligence requirement of Rule 60(b)(2) by seeking to avail himself of Rule 60(b)(1).

To the extent this Court finds Rule 60(b)(1) is applicable in this matter, Appellant is not entitled to relief. In determining whether to grant relief under S.C.R.C.P. 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citing *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

First, Appellant failed to seek relief promptly. In her affidavit, Peggy M. Mattox ("Peggy"), the mother of the Appellant and Decedent attests that she found the Decedent's original will in a

safe in Peggy's house in or around October 2017. (R. 75). Peggy further attests that upon discovering the original will, she contacted Appellant and gave the original will to him. (R. 76). As such, Appellant was in possession of the original will for approximately ten months prior to making the motion for a new trial. Additionally, based on Peggy's affidavit, Appellant came into possession of the original will less than one month after the final Order of the Court was filed September 26, 2017. (R. 75). Appellant cannot provide a suitable reason for failing to act promptly. The crux of the underlying case was the non-existence of an original will. Within weeks of the Court's final Order, Peggy located the original will and provided it to Appellant.

Next, Respondent possesses a meritorious defense. In the underlying case, the Court concluded as a matter of law that "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." As such, even if Appellant were to be granted a new trial, Respondent would still prevail on an omitted spouse claim under S.C. Code Ann. § 62-2-301. *Id.* Finally, Respondent would be prejudiced should the Court grant Appellant's motion, as the property at issue in this matter was under contract at the time of the hearing on Appellant's 60(b) motion and has since been sold. For these reasons, Appellant is not entitled to relief under S.C.R.C.P. 60(b)(1).

b. Appellant is not entitled to relief under Rule 60(b)(2), S.C.R.C.P.

Pursuant to S.C.R.C.P. 60(b)(2), the Court may relieve a party from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial...." Due diligence is defined not as what a litigant actually discovered, but what the litigant could have discovered. *See Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). To prevail on a motion under Rule 60(b)(2), the purported newly discovered evidence must satisfy the following five-part test: (1) will probably change the

result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008) (citing *Lanier*, 364 S.C. at 211). The party seeking to have judgment set aside has burden of presenting the evidence proving facts essential to entitle him to relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

Appellant makes rote assertions regarding the status of four of the five elements of the *Southeastern Housing* test as beyond question. Initial Br. of Resp't, 7-8. While Respondent does not concede Appellant has carried its burden of proof as to any of the five elements, the two elements most at issue are that the newly discovered evidence would not change the result if a new trial is granted, and that Appellant did not exercise due diligence in attempting to locate the original will ahead of trial.

First, the result will not change if a new trial is granted. Appellant states in his Statement of the Case the Decedent signed the purported original will in Gwinett Count, Georgia in 2005. Initial Br. of Resp't, 4. As argued before the Probate Court on Appellant's motion under Rule 60, S.C.R.C.P., should the original will be submitted for probate, Respondent would ultimately be considered an omitted spouse under S.C. Code Ann. § 62-2-301 (2014). (R. 208). Pursuant to § 62-2-301(a), if the testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse is entitled to inherit as if there was no will unless it appears the omission was intentional or the decedent provided for the spouse outside the will. Here, it is undisputed Respondent and Decedent met and were married after 2005, and the Probate Court concluded "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." (R. 4). Based on the

above, it is unlikely the result of the underlying trial would change even were the purported original will to be introduced into evidence.

Second, Appellant did not exercise due diligence in locating the original will. In order to prove the third element of the five-part test prescribed by *Southeastern Housing*, supra, the "newly discovered evidence" must be evidence that could not have been discovered with due diligence in time to move for a new trial under Rule 59(b) of the South Carolina rules of Civil Procedure. *See Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). Further, in order for evidence to be "newly discovered," it could not have been known to the parties or discovered by the parties at the time of the trial court's decision. *See Fassett v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (Ct. App. 2005). "Due diligence" is defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. *Jamison*, 644 S.E.2d at 768. A party must make a specifically targeted search to find missing evidence in order to have exercised "due diligence." *Lanier*, 612 S.E.2d at 460.

The evidence in the record shows the requirements under *Lanier* and *Jamison* have not been met. Appellant failed to present any evidence on his motion under Rule 60(b) that he acted with the diligence reasonably expected of a party seeking to fulfill a legal obligation or that Appellant made a targeted effort to locate the original will, though Appellant was aware of the original will's existence. (R. 197-228; 26). The will was discovered in the Appellant and Decedent's mother's house, in a safe for which Appellant was one of three who knew the location and combination, the other two being the Decedent and the Decedent's mother. (R. 75). Appellant argues that because the will was not found in his home, but in his mother's home, he had no duty to attempt to search for the will there. Initial Br. of Resp't, 7. However, the affidavit of Appellant's

own mother established Appellant knew the location of and combination to the safe. (R. 75).

Further, the Probate Court Order dated September 27, 2017 provides in its Findings of Fact "[t]he Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the Will since 2005, *but he understood the Decedent kept it in a safe place*." (emphasis added). (R. 3). As Judge McKinnon noted in his order affirming the Probate Court, "a safe would be among the most likely places to store an important legal document." (R. 14). Based on the above, Appellant failed to exercise due diligence in searching for the will, and Appellant is not entitled to relief under S.C.R.C.P. 60(b)(2).

c. Appellant is not entitled to relief under Rule 60(b)(5), S.C.R.C.P.

Finally, Appellant is not entitled to relief pursuant to 60(b)(5). According to S.C.R.C.P. 60(b)(5), the court may relieve a party from a final judgment, order, or proceeding if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Relief under S.C.R.C.P. 60(b)(5) is available only in cases of fraud upon the court or rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake, citing *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d 249, 254 (Ct. App. 2012). Further, executed orders, such as those which mandate a one-time change in the ownership of property, are outside the scope of Rule 60(b)(5). *See Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505 (Ct. App. 2003). Based on the above, and the lack of any such allegations allowing for relief under Rule 60(b)(5), Appellant is not entitled to relief.

II. The Appellant is not entitled to relief due to the Probate Court's reliance on evidence outside the record.

Appellant asserts he is entitled to relief due to the Probate Court's reliance on evidence "outside the record." Appellant argues the issue of his residence at the time the purported original will was found is a matter of judicial notice and he was not granted the right to be heard on the point. Initial Br. of Resp't, 10.

First, the issue of Appellant's residence is not a matter of judicial notice, nor is it evidence outside the record. Appellant filed for relief under, *inter alia*, Rule 60(b)(2), SCRCP. A necessary element under a Rule 60(b)(2) analysis is whether the newly discovered evidence "will probably change the result if a new trial is granted." *Southeastern Housing Foundation,* 670 S.E.2d at 689. Necessarily, the judge ruling on the 60(b)motion must consider the evidence presented at the underlying trial in order to make this determination. It is an uncontested fact that Appellant once resided in the home where the purported original will was located. This fact was presented in evidence at the underlying trial. (R. 8). Based on the necessary scope of review, Judge Rogers did not need to take judicial review to recognize this fact, nor was this fact outside the record.

Next, to the extent the Court agrees the fact of Appellant's residence in the home where the purported original will was located does constitute an adjudicative fact of which judicial notice was taken, Appellant waived his right to object. Rule 201 of the South Carolina Rules of Evidence ("SCRE") provides, in part, "[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." Rule 201 goes on to say, "[i]n the absence of prior notification, the request may be made after judicial notice has been taken." SCRE, 201. In this instance, Appellant was provided a letter, dated November 2, 2018, from Judge Rogers, laying out her ruling and instructing Respondent's counsel to draft an

order based on her findings. (R. 88-89). This letter included the finding Appellant failed to exercise due diligence due, in part, to his prior testimony stating he lived at the residence where the purported original will was ultimately located. (R. 88). Neither Appellant nor his attorney requested an opportunity to be heard as to the propriety of Judge Rogers taking judicial notice of this fact. Respondent's counsel then provided Appellant's counsel a draft order containing the language regarding Appellant's residence. (R. 90-91). Neither Appellant nor his attorney requested a hearing on judicial notice. Finally, Judge Rogers filed the final Order, containing the language regarding Appellant's residence. Again, neither Appellant nor his counsel requested a hearing on the alleged judicial notice. Based on the above, Appellant has waived his right to appeal the denial of his Rule 60(b) motion on judicial notice grounds.

Finally, while Appellant's residence at the time the purported original will was found is mentioned in Judge Rogers's order, Judge McKinnon's order makes it abundantly clear that Appellant's residence is not a critical component of the applicable standards of behavior set forth in *Lanier* and *Jamison, supra.* Without regard to his residence, Appellant failed to make a sufficiently specific, targeted, search for the purported original will. It is undisputed, by the affidavit of Appellant's own mother, Appellant knew the location of and combination to the safe where the purported original will was located. To the extent Judge Rogers relied on Appellant's residence in reaching her decision, it was, at most, a harmless error.

III. The Appellant is not entitled to relief under S.C. Code § 62-3-412 because he had knowledge or constructive knowledge of the purported will.

Appellant argues he is entitled to relief under S.C. Code Ann. § 62-3-412 (2014). Initial Br. of Resp't, 11-12. However, Appellant's arguments both before the circuit court and in his initial brief before this court are limited to § 62-3-412 (1) which provides:

> Subject to appeal and subject to vacation as provided herein and in Section 62-3-413, a formal testacy order under Section 62-3-409 through 63-3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:
>
> (1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent *if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding* or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(emphasis added). Appellant contends the above language "comprehend[s] a situation where the Petitioner is unaware of an original will's location." Initial Br. of Resp't, 11.

It is well-established that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Grief v. Amisub of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 695-96 (2012) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Id.* Here, it is clear § 62-3-412(1) is not applicable. In using the phrases "later-offered will" and "another will," the legislature clearly intended this subsection to apply in situations where a will is offered for probate, and another, distinct, will of which the proponents had no knowledge is subsequently offered. The case at bar does not comport with this standard. Appellant sought to enter a copy of the purported will for probate. The Probate Court, after a hearing, found the Decedent "died without a will and had no children, and the Petitioner is his sole heir," leaving Respondent to inherit under the South Carolina intestacy statute. (R. 4). Now, Appellant seeks to gain a new trial by entering the original will "conforming in all respects to the copy submitted as evidence." Initial Br. of Resp't, 4. Appellant does not seek to enter a "later-offered will" or

"another will," he seeks to enter the original version of a will he knew to exist at the time of trial. (R. 26). Therefore, § 62-3-412(1) does not apply in this case.

To the extent this Court finds § 62-3-412(1) does apply to the facts of this case, it need look no further than the phrase "if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding." First, Appellant's own Complaint states "Decedent provided [Appellant] with a copy of his Last Will and Testament." (R. 26). Next, the Probate Court found as fact "the Petitioner testified that he had no knowledge of where the Decedent kept the original Will and had not seen or discussed the original Will since 2005, but he understood the Decedent kept it in a safe place." (R. 3). Further, the affidavit of the Decedent and Appellant's motion, introduced as an exhibit at the October 5, 2018 hearing, provides: "I know my son [Jonathan Ray Mattox] had executed a will; I saw it in his truck the day it was executed." The record shows Appellant and people close to Appellant had knowledge of the existence of the purported will in this case. (R. 75). Therefore, to the extent the Court finds § 62-3-412(1) applies generally, Appellant is not entitled to relief because he had actual and constructive knowledge of the existence of the purported will.

CONCLUSION

The trial court found that Appellant was not entitled to relief under Rule 60(b). The Circuit Court affirmed that ruling. For the reasons set forth above, Respondent respectfully requests this Court affirm.

[Signature Block on Following Page]

July 20, 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

J. Nathanial Pierce, SC Bar No. 102803
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

PROOF OF SERVICE

The undersigned certifies that she has served this Respondent's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on July __, 2020, addressed to its attorneys of record to the below addresses:

Michael L. Brown, Jr.
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

Zachary M. Merritt
Law Offices of Michael L. Brown, Jr.
P.O. Box 1025
Rock Hill, SC 29731
803.328.8822

John Martin Foster
John Martin Foster, Attorney
P.O. Box 106
Rock Hill, SC 29731
803.324.8100

July 20, 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Hon. William A. McKinnon, Circuit Court Judge

Civil Case No.: 2018-CP-46-03672
Appellate Case No. 2019-001827

RECEIVED
Jul 21 2020
SC Court of Appeals

David J. Mattox, Appellant,

v.

Lisa Jo Bare Mattox, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), South Carolina Appellate Court Rules.

July 20, 2020

John P. Gettys, Jr., SC Bar No. 8673
Morton & Gettys, LLC
P.O. Box 707
Rock Hill, SC 29731
803.366.3388

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

REPLY BRIEF OF APPELLANT

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH CAROLINA

STATUTES

RULES OF COURT

UNITED STATES CIRCUIT COURTS

UNITED STATES BANKRUPTCY COURTS

ARGUMENT:

AS TO RULE 60(b)(1)

In Respondent's Brief, under discussion of Rule 60(b)(1), S.C.R.C.P. allowing relief for mistake, inadvertence or excusable neglect, the argument is made that:

> "This Rule is intended to allow a party relief based on errors committed by the party's counsel. [Citing to FEDERAL PRACTICE AND PROCEDURE.] There is no mistake by counsel alleged in this instance and "it would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." *Id.*

Whatever its derivation, this is a misstatement of the existing precedent. In *Associated Discount Corp. v. Goldman*, 524 F.2d 1051, 1053-1054 (3d Cir. 1975), the Third Federal Circuit held that the grounds for relief under this rule "may be invoked whether they apply to counsel or to client." *Associated Discount* is cited by the Fourth Circuit in *Tauber v. E.F. Hutton & Co., Inc.*, 813 F.2d 403 (4th Cir. 1986).

Appellant would note that it has even been held that the error forming a basis for relief under Rule 60(b)(1) can be that of the Court itself. *Cappillino v. Hyde Park Cent. Sch. Dist.*, 135 F.3d 264, 265-266 (2d. Cir. 1998), cited in *IN RE Moore*, C/A No. 04-15363-HB (Bankr. S.C. 3/26/2008) (Bankr. S.C. 2008). *Oliver v. Home Indemnity Co.*, 470 F.2d 329, 330 (5th Cir. 1972), cited in *Phillips v. Consol. Publ'g Co.* (S.D. Ga. 2015).

The proposition that any mistake allowing relief under Rule 60(b)(1) must be that of counsel cannot be maintained.

ARGUMENT:

AS TO RULE 60(b)(2)

In responding to the Appellant's claim under Rule 60(b)(2) as to newly-discovered evidence, the Respondent states:

> In her affidavit, Peggy M. Mattox ("Peggy") the mother of the Appellant and Decedent attests she found the Decedent's original will in a safe in Peggy's house on or around October 2017. Aff. Peggy M. Mattox ¶ 5.

Respondent goes on to argue that the Appellant's filing of his Petition and Motion herein on July 13, 2018 demonstrates a lack of promptness in seeking relief. This argument is based on a mis-reading of Peggy Mattox' affidavit. The actual language is as follows:

> 4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.
> 5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.
>
> [RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

Mrs. Mattox recites the events leading to her discovery; she does not recite the time of discovery, because she could not. All her affidavit states is that the discovery occurred after her purchase of a new car.

The Respondent asserts that a new trial is pointless, given her rights as an omitted spouse. There is no question that, under the discovered will, she is an omitted spouse. The evidence set out in the record before the Probate Count, and recited in Appellant's Brief before the Circuit Court, demonstrates, or can demonstrate at trial, that the Decedent, pursuant to the requirements of S.C. Code § 62-2-301(a)(2):

> . . . provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown. . . from the amount of the transfer or other evidence.

The weight of this evidence can be established only by litigation and discovery. The Appellant has the right to proceed to that end.

Finally, the Respondent argues, again citing Peggy Mattox' affidavit:

> The will was discovered in the Appellant and Decedent's mother's house, in a safe for which the Appellant was one of the three who knew the location and combination, the other two being the Decedent and the Decedent's mother.

Again, this is a mis-reading of the Affidavit. The actual language used is:

6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.
7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe.

[RECORD ON APPEAL, Affidavit of Peggy M. Mattox, p.43 – 44.].

To say the that Appellant knew where to find the combination of the safe in his mother's house is not to say he knew the combination. To say that it was his house is, again, to perpetuate a finding made outside the record and as to which no evidence exists.

CONCLUSION

All evidence in this matter evidences the Appellant's lack of possession and lack of knowledge as to the whereabouts of the original will of the Decedent. There is no basis to find a lack of due diligence on his part in discovering the will. He is entitled to relief under both Rule 60(b), S.C.R.C.P. and S.C. Code § 62-3-412. He is entitled to enter his brother's will into Probate and proceed with the Estate.

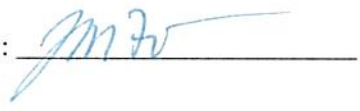
October 2, 2020

Respectfully submitted,

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: 

RECEIVED
Oct 02 2020
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Reply Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

Michael L. Brown, Jr.
Zachary Merritt
Post Office Box 1025
Rock Hill, SC 29731
(803) 328-8822

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

Attorneys for Appellant

By: _____

October 2, 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,

RECORD ON APPEAL

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

INDEX

b

FILED RECEIVED

STATE OF SOUTH CAROLINA **IN THE PROBATE COURT**
CASE FILE NO: 2016ES4601230

2017 SEP 27 AM 8:40

COUNTY OF YORK

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX LISA JO BARE MATTOX

PETITIONER(S) RESPONDENT(S)

CHECK ONE:

[X] 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: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

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

Attorney(s) for the Respondent(s)

FILED RECEIVED

2017 SEP 26 PM 4:07

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 dwr

CERTIFIED TRUE COPY
Carolyn W Rogers
PROBATE JUDGE, YORK COUNTY, SC

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

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

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

8. No original Will has been presented to the Court.

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

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

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 CWR

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court 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.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 cwr

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations.

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

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

York, South Carolina
September 26, 2017.

#4 of 4 CWR

STATE OF SOUTH CAROLINA **IN THE PROBATE COURT**
CASE FILE NO.: 2016ES4601230

COUNTY OF YORK

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

David J. Mattox — Lisa Jo Bare Mattox

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] 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: [X] 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. Nathanial Pierce, Esquire
Post Office Box 707
Rock Hill, SC 29731

NOV 26 2018

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER ON OMITTED SPOUSE CLAIM
PETITIONER	
vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

FILED RECEIVED
2018 NOV 21 AM 9:29
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

The within matter came before the Court on October 5, 2018, pursuant to the Notice, Motion and Petition for Relief from Judgment filed by David J. Mattox ("Petitioner"), represented by John Martin Foster and Zach Merritt. Present for the hearing were the Petitioner and his attorneys; and the Respondent, Lisa Jo Bare Mattox, and her attorneys, John P. Gettys, Jr. and J. Nathanial Pierce.

The hearing was initiated upon the filing of a Summons, Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement on July 13, 2018. A Notice of Hearing was mailed on September 7, 2018, with Proof of Delivery evidencing service upon the appropriate parties. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

I have reviewed the evidence and case law presented at the October 5, 2018, hearing, as well as the recording of the testimony given in the hearing held on August 9, 2017, and I make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a

NOV 26 2018

#1 of 4

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.

#2 of 4 CWR

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

#3 of 4 CWR

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

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**SIXTEENTH JUDICIAL CIRCUIT**
COUNTY OF YORK)	
)	
David J. Mattox,)	Case No.: 2018-CP-46-03672
)	
Appellant)	
v.)	
)	**ORDER AFFIRMING PROBATE COURT**
Lisa Jo Bare Mattox, LLC,)	
)	
Respondent.)	
)	

PRESIDING JUDGE:	The Honorable William A. McKinnon
DATE OF HEARING:	July 31, 2019
APPELLANTS'S ATTORNEY:	Michael L. Brown Jr.; John M. Foster; Zachary M. Merritt;
RESPONDENT'S ATTORNEY:	John P. Gettys, Jr.; J. Nathanial Pierce

This matter came before the Court on appeal after the Probate Court denied the Appellant's Motion for relief under South Carolina Rule of Civil Procedure 60. For the reasons set forth below, the judgment of the Probate Court is AFFIRMED.

Facts on Appeal:

This underlying matter in this appeal began on October 1, 2016 with the death of Jonathan Mattox ("Decedent"). Decedent had signed a valid Last Will and Testament ("will") in 2005, appointing his brother, David J. Mattox, as personal representative. After the signing of the will, Decedent then married Lisa Jo Bare Mattox ("Respondent"), but purportedly failed to execute another will. Additionally, the original 2005 will could not be located at the time of the Decedent's death. The Probate Court determined that the inability to locate the will indicated it had been intentionally revoked. As a result, the Probate Court found that the Decedent had died intestate and without children, leaving the Respondent as his sole heir. The Respondent was awarded the entirety of the Decedent's estate.

According to a July 12, 2018 affidavit filed by Peggy Mattox (the mother), the original will was discovered in her safe on or about October 2017. The affidavit also states both Decedent and Decedent's brother (the appellant) David Mattox knew of the safe and had access to the combination. On July 13, 2018, approximately nine months after discovery of the alleged original will, Appellant filed a Motion and Petition for Relief from Judgment and Stay of Enforcement under South Carolina Rule of Civil Procedure 60. Appellant argued that he had obtained newly discovered evidence in the form of the original will, requiring that the Decedent's assets be redistributed according to that will. The bases for the "Notice, Motion and Petition" were: SCRCP 60(b)(1), (2), and (5) and S.C. Code. Ann. § 62-3-412(1). The "Notice, Motion and Petition" was also alleged to be an "independent action in equity." On November 21, 2018 Judge Rogers issued an order denying the Appellant's Motion. This appeal followed.

Standard on Appeal:

An appeal from the probate court is governed by the provisions of the South Carolina Probate Code. *Matter of Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The probate code provides that a final order or decree of the probate court may be appealed to the circuit court, and the circuit court must hear and determine the appeal "according to the rules of law." S.C. Code Ann. § 62–1–308 (1987). This phrase means according to the rules governing appeals. *Howard*, 315 S.C. at 360, 434 S.E.2d at 257. On appeal from the final order of the probate court, the circuit court should apply the same standard of review as the Court of Appeals. *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E.2d 784, 786–87 (Ct. App. 1997). The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d

793, 795 (Ct. App. 2007)). An abuse of discretion arises where the order was controlled by an error of law or based on factual conclusions that are without evidentiary support. *Id.*

Discussion:

I. There is evidence that the Appellant did not act with due diligence in his attempt to locate the will of the Deceased, as it was found in his mother's safe, such that a Motion under Rule 60(b)(2) cannot be sustained.

Under SCRCP 60(b)(2) a court may relieve a party from a judgment on the basis of newly discovered evidence. SCRCP 60(b)(2): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons…(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

A five part test is used to determine whether the evidence offered satisfies Rule 60(b)(2): (1) the evidence will probably change the result if a new trial is granted; (2) it has been discovered since the trial; (3) it could not have been discovered before the trial; (4) it is material to the issue; and (5) it is not merely cumulative or impeaching. *Jamison*, at 272, 644 S.E.2d at 767 (citing *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005)). The movant has the burden of presenting evidence proving the facts essential to secure relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991). To satisfy Rule 60(b)(2), and the third factor of the test, "newly discovered evidence" must be evidence which could not have been discovered with due diligence in time to move for a new trial under Rule 59(b). *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007). "Due diligence" is defined as the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Jamison* at 272, 644 S.E.2d at 767 (citing *Black's Law Dictionary.*)

When evidence is misplaced, a party must make a specifically targeted search to find the missing evidence in order for due diligence to be satisfied. *Lanier* at 220, 612 S.E.2d at 460. Additionally, in order for evidence to be newly discovered, it must not have been known to the parties or discovered by the parties at the time of the trial court's decision. *See Fassett v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (Ct. App. 2005); *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct.App.2004) (where a party could have discovered the "new" evidence prior to trial, the party is not entitled to relief under Rule 60(b)(2).)

Here, the factors as they are set out in *Jamison* and *Lanier* are not met. The evidence shows Appellant did not act with due diligence in searching for the original will. Due diligence requires that a movant act with the diligence reasonably expected of a party seeking to fulfil a legal obligation, and that the movant make a targeted effort to locate missing evidence. The Appellant has offered no evidence to suggest that a targeted search for the will occurred, even though he was aware of its existence. The fact the will was discovered in the Appellant and Decedent's mother's safe, is, in fact, evidence of a lack of due diligence. Appellant argues that because the will was not found in his own residence, but his mother's residence under which he had no control, that he had no duty to attempt to search for the will there. However, His mother's own affidavit established that Appellant had access to his mother's safe and knew the combination to that safe. Further, a safe would be among the most likely places to store an important legal document. Because of the lack of due diligence in searching for the safe, the Probate Court correctly denied relief under Rule 60(b)(2).

II. <u>There is no basis for a 60(b)(1) Motion.</u>

Under Rule 60(b)(1) of the South Carolina Rules of Civil Procedure, a court may relieve a party from any final judgment, order, or proceeding if the party shows there has been "mistake,

inadvertence, surprise, or excusable neglect." SCRCP 60(b)(1). This rule is intended to allow relief from errors by counsel. As Wright and Miller write regarding the analogous Federal Rule: "[C]ourts have held that a party should not be deprived of the opportunity to present the merits of the claim because of a technical error or slight mistake by the party's attorney." §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.). There is no mistake by counsel here.

Further, it is inappropriate to allow the "excusable neglect" provision to apply when there are specific rules to the contrary – or else the "excusable neglect" exception would swallow the whole of the Rules. The "excusable neglect" in question in this matter is failure to discover the original will – and that is covered by Rule 60(b)(2), not Rule 60 (b)(1). "[I]t would be a perversion of [Rule 60(b)(1)] and its purpose to permit it to be used to circumvent another rule." §2858 Mistake, Inadvertence, Surprise, or Excusable Neglect, 11 Fed. Prac. & Proc. Civ. § 2858 (3d ed.) (citing Edwards v. Velvac, Inc., 19 F.R.D. 504 (E.D. Wis. 1956)). Rule 60(b)(1) has no application here.

III. There is no basis for a 60(b)(5) Motion.

Under Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, a judgment may be set aside if it has been "satisfied, released, discharged, or a prior judgment upon which the judgment is based is reversed or vacated, or it is no longer equitable that the judgment should have prospective application." This Rule has no application here, either. Rule 60(b)(5) only applies to judgments which have prospective application, such as a paternity order or an injunction. Executed orders, such as those which determine the ownership of property, are beyond the ambit of Rule 60(b)(5). *See Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 49, 590 S.E.2d 502, 505 (Ct. App. 2003) (orders which "mandate a one-time change in the ownership of property are " wholly outside the scope of Rule 60(b)(5)").

IV. Section 62-3-412(1) does not apply because the judgment below was one of intestacy.

S.C. Code. Ann. § 62-3-412(1) is an exception to the finality of probate proceedings. It provides: "The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication" (emphasis added). It is clear from this language ("later-offered will" and "another will") that this provision applies when the probate court distributed property to a will. Intestate distributions, such as the instant one, are governed by S.C. Code. Ann. § 62-3-412(2). S.C. Code. Ann. § 62-3-412(1) has no bearing on this matter.

V. Appellant cannot obtain relief as an "independent action"

Finally, Appellant asserts an "independent action" in equity. Such action are permitted in the case of a fraud on the court, or "rare, special, exceptional or unusual circumstances that may warrant equitable relief." Mr. T v. Ms. T, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008). No such fraud or "rare or unusual" issue is present here – this matter is an issue of after-acquired evidence, which is properly handled pursuant to Rule 60 (b)(2).

Conclusion:

For the reasons set forth above, the judgment of the Probate Court is AFFIRMED.

JUDGMENT AFFIRMED. IT IS SO ORDERED.

THIS THE ____ DAY OF _____, 2019.

_____

THE HONORABLE WILLIAM A. MCKINNON

York Common Pleas

Case Caption: David J Mattox VS Lisa Jo Bare Mattox

Case Number: 2018CP4603672

Type: Order/Other

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP4603672

David J Mattox
PLAINTIFF(S)

Lisa Jo Bare Mattox
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **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** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing yesterday, Plaintiff-Appellant's Motion to Reconsider is GRANTED IN PART and DENIED in PART. The motion is granted with respect to the correction of two factual issues in the Court's prior Order:

First, the Court clarifies that it understood that the evidence reflected the safe belonged solely to decedent's mother. Second, the Court corrects the sentence in the prior order which erroneously stated Plaintiff-Appellant "knew" the combination to the safe, when the evidence reflected that he only had access to the combination.

The motion is DENIED in all other respects, for the reasons stated in the prior order, and the decision of the Probate Court remains AFFIRMED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/02/2019 .

Case Party Info Protected

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

SCRCP Form 4CE (08/31/2017) Page 1 of 2

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

York Common Pleas

Case Caption: David J Mattox VS Lisa Jo Bare Mattox

Case Number: 2018CP4603672

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
COUNTY OF: YORK)

FILED RECEIVED
2017 FEB 22 AM 11:57
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

INVENTORY AND APPRAISEMENT: PROBATE PROPERTY
☒ ORIGINAL
☐ SUPPLEMENTARY, AMENDED OR CORRECTED #
(must restate the unchanged information from the original inventory)

IN THE MATTER OF: JONATHAN RAY MATTOX
(Decedent)

CASE NUMBER: 2016ES4601230

File the original Inventory and Appraisement with the Probate Court within ninety (90) days following the fiduciary appointment. A copy shall be sent to each interested person who has demanded it. A Proof of Delivery must be filed with the Court. The gross fair market value of all probate assets, regardless of location (whether in this state or elsewhere), should be listed as of the date of death. Continue on additional sheets if necessary. A Supplementary, Amended, or Corrected Inventory should be utilized for correcting, adjusting or adding to an original Inventory, and *must restate the unchanged information from the original Inventory.* A qualified and disinterested appraiser may be employed to ascertain the value of any asset. If an appraiser is employed, his/her name and address must be indicated with the item or items he/she appraised.

RECAPITULATION

Schedule A - Real Estate	$2,274900.00
Schedule B – Stocks and Bonds	
Schedule C – Notes Due Decedent and Cash	2283.65
Schedule D – Insurance of Decedent's Life Payable to the Estate	
Schedule E - Jointly Owned Property	
Schedule F - Other Miscellaneous Assets	72125.00
Schedule G - Transfers during Decedent's Life Payable to the Estate	
Schedule H - Powers of Appointment Payable to the Estate	
Schedule I – Annuities and Retirement Accounts Payable to the Estate	
TOTAL GROSS VALUE OF DECEDENT'S ESTATE	$ 2349308.65

The undersigned, being sworn, states: That the following schedules contain a complete and accurate inventory and appraisement of all probate real and personal property of this estate so far as the undersigned is informed; that he/she has estimated and/or appraised all listed property at its fair market value, according to the best of his/her knowledge and ability.

SWORN to me this 14th day of February, 20 17

Notary Public for South Carolina
My Commission Expires: 3/6/17

BRANNON B MACK JR
NOTARY PUBLIC
SOUTH CAROLINA

Personal Representative Signature: Lisa J Mattox
Print Name: LISA J. MATTOX
Address: 321 RIVER POINT RD.
LAKE WYLIE, SC 29710
E-Mail:
Telephone (Work):
(Home): 704-756-7937
(Cell):
(Email):

Attorney:
Address:
E-Mail:
Telephone:

Co-Personal Representative Signature
Name:
Address:
E-Mail:
Telephone (Work):
(Home):
(Cell):
(Email):

FORM #350ES SF (1/2014)
62-2-305, 62-3-704, 62-3-706, 62-3-707, 62-3-708, 62-3-1203, 62-3-1204

Page 1 of 3

(If none, so state)

		% Owned by Decedent	Fair Value of Decedent's Interest
A.	**REAL ESTATE** in Decedent's name alone or tenants in common (not as joint with right of survivorship). Describe each property by listing its full address, tax map number, deed book and page and description consistently (house, lot, buildings, acreage). Also list oil / mineral rights and time shares, if it is real property. If the property is encumbered, list the full fair market value of the property here and the encumbrance on Encumbrance section below		
1.	26.055 ACRES, CHARLOTTE HWY, LAKE WYLIE, SC MAP#575-00-00-016	100%	$2,274900.00
2.			
3.			
B.	**STOCKS, BONDS** in Decedent's name alone or tenants in common (not as joint with right of survivorship). List each type of security and number of shares.		
1.			
2.			
3.			
C.	**CASH, BANK ACCOUNTS, NOTES RECEIVABLES** in Decedent's name alone or as tenants in common. List each separate account type and institution and the last two digits of each account. List all bank accounts owned by Decedent alone or as tenants in common (checking, savings, CDs, money market, brokerage, employment bonus, cash award, final paycheck etc.), cash on hand, notes payable to Decedent, and survival action proceeds.		
1.	FAMILY TRUST FEDERAL CREDIT UNION (CHECKING)	100%	1,259.67
2.	FAMILY TRUST FEDERAL CREDIT UNION (SAVINGS)	100%	1,023.98
3.			
D.	**LIFE INSURANCE** payable to the Decedent's estate.		
1.			
2.			
E.	**JOINTLY OWNED PROPERTY – REPORTING IS NOT REQUIRED**		N/A
F.	**ALL OTHER MISCELLANEOUS PERSONAL PROPERTY** in Decedent's name alone or as tenants in common. List below any tangible personal property, including household goods & furnishings, vehicles, boats/motors/trailers, mobile homes that are not de-titled, airplanes, equipment, interest in a partnership or unincorporated business, articles or collections having either artistic or intrinsic value, including coins, guns, artwork, jewelry, etc., and any other miscellaneous probate items not listed elsewhere, including any digital assets		
1.	2015 DODGE RAM TRUCK	100%	26,000.00
2.	2016 HARLEY DAVIDSON	100%	27,325.00
3.	2004 BOAT AND MOTOR	100%	18,800.00
4.			
G.	**TRANSFERS DURING DECEDENT'S LIFE PAYABLE TO ESTATE ONLY** Any transfers intended to take effect at death If payable to the Estate shall be reported. A trust created by Decedent in which income for life was retained by the Decedent, power to revoke or other incidents of ownership retained by the Decedent, lifetime transfers of real property in which Decedent retained life estate, etc.		
1.			
2.			
H.	**POWERS OF APPOINTMENT PAYABLE TO THE ESTATE ONLY** List property, both real and personal, over which Decedent possessed a Power of Appointment whether testamentary or otherwise, if such property is payable to the Estate.		
1.			

FORM 8360EB SF(1/2014)
62-2-405, 62-3-704, 62-3-706, 62-3-707, 62-3-708, 62-3-1203, 62-3-1204

(If none, so state)

I. **ANNUITIES AND IRA, ETC. PAYABLE TO THE ESTATE ONLY** List any annuities or retirement accounts owned by the Decedent and payable to the Estate.

1. _____ _____
2. _____ _____

TOTAL PROBATE ESTATE VALUE $_____

ENCUMBRANCES (e.g., mortgages, liens, judgments, etc., but not general debts of the estate). List debts of the Decedent secured by assets on the above schedule and describe the debt and the specific asset encumbered.

1. TRUCK 38,080.35
2. MOTORCYCLE 30,657.52
3. Boat 2004 Sea Ray 20,337.17

TOTAL ENCUMBRANCES $ 89,075.24

FORM #3568ES SF(1/2014)
62-2-805, 62-3-704, 62-3-706, 62-3-707, 62-3-708, 62-3-1203, 62-3-1204

Page 3 of 3

FILED RECEIVED

STATE OF SOUTH CAROLINA)
2017 APR 28 PM 1:38 IN THE PROBATE COURT
COUNTY OF YORK)
CAROLYN W. ROGERS Case No.: ~~2017-~~ 2016ES4601230
JUDGE OF PROBATE
YORK COUNTY, SC
)
DAVID J. MATTOX) **SUMMONS**
)
Petitioner,)
)
vs.)
)
Lisa Jo Bare Mattox, David A. Mattox)
Respondents.)

YOU ARE HEREBY SUMMONED and required to answer the Summons and Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said Summons and Complaint on the subscribed at his office at 541 E. Main Street, Rock Hill, SC 29730, within thirty (30) days after the service hereof, exclusive of the day of such service; and, if you fail to answer the Summons and Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
PO Box 4211
Rock Hill, South Carolina 29732
Telephone: (803) 325-7788
Facsimile: (803) 325-7889

ATTORNEY FOR PETITIONER

April 28 2017

FILED RECEIVED

STATE OF SOUTH CAROLINA)
2017 MAR 28 PM 1:39 THE PROBATE COURT
COUNTY OF YORK)
CAROLYN W. ROGERS Case No.: 2017- 2016ES4601230
JUDGE OF PROBATE
YORK COUNTY, SC

IN RE THE MATTER OF:
Jonathon Ray Mattox
(Decedent)

DAVID J. MATTOX

Petitioner,

vs.

Lisa Jo Bare Mattox,
Respondent.

COMPLAINT

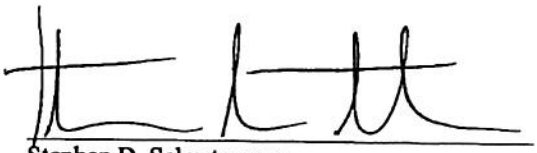
NOW COMES the Petitioner, above-named, does allege and show unto this Honorable Court as follows:

1. The Petitioner is a resident of Pawleys Island, Georgetown County, South Carolina and is the brother of the Decedent and is an interested party in this matter as he is named as a beneficiary in the Decedent's Last Will and Testament.
2. The Respondent, Lisa Jo Bare Mattox is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.
3. The Decedent, Jonathon Ray Mattox, was a resident of Lake Wylie, York County, South Carolina at the time of his death.
4. This Court has jurisdiction of this matter pursuant to S. C. Code §62-1-302 and York County is the proper venue of this matter.
5. The Decedent died on October 1, 2016 of natural causes in Georgetown County, South Carolina. (Copy of Death Certificate is attached hereto and incorporated herein by reference).

6. Respondent, Lisa Mattox is the surviving spouse of the Decedent. The parties were married on June 11, 2011.
7. Based upon information and belief, this Court has not been notified by any party regarding the death of the Decedent.
8. Based upon information and belief, the Respondent, Lisa Mattox has not brought any informal probate proceed, either intestacy or testacy.
9. Based upon information and belief, no personal representative has been appointed on behalf of the Decedent.
10. The Last Will and Testament was executed by the Decedent on February 17, 2005 in Gwinnett County, Georgia. A copy of this Last Will and Testament is attached hereto and incorporated herein by reference.
11. The Decedent provided Petitioner with a copy of his Last Will and Testament. Subsequent to the death of the Decedent, the Petitioner, upon going through his briefcase in January, 2017, located the copy of the Will that was provided to him by the Decedent.
12. Since discovering the copy of Decendent's Will, the Petitioner has contacted the law firm that was responsible for drafting the Will and they were not cooperative in providing any information over the telephone.
13. Pursuant to the terms of the Last Will and Testament, all real and personal property of the Decedent was bequeathed and devised to the Petitioner in fee simple and forever *per stirpes*. The Respondent, Mark Anthony Mattox was intentionally omitted from said Last Will and Testament due to personal reasons.
14. Pursuant to the terms of the Last Will and Testament, in the event the Petitioner did not predecease the Decedent, and left no lineal descendants, then the rest and remainder of

the all property was bequeathed and devised to Decedents mother, Peggy Yvonne Mattox.

15. Pursuant to the terms of the Last Will and Testament, all the rest, residue and remainder of Decedent's estate would be given to the persons so entitled under the Laws of Georgia as if the Decedent had died intestate.
16. The Petitioner has been unable to locate the original Last Will and Testament of the Decedent despite due diligence in doing so.
17. The Petitioner seeks an Order of this Court declaring the Last Will and Testament of the Decedent, dated February15, 2005 as a valid Last Will and Testament and that the Decedent died testate and to administer Decedent's estate pursuant to said Last Will and Testament.
18. In the event an informal proceeding has been commenced, the Petitioner seeks an Order suspending the informal proceeding pending the adjudication of this matter.
19. In the event a personal representative has been appointed, the Petitioner seeks an Order restraining such personal representative from exercising any powers granted to him/her to make any distributions from the estate.
20. Subsequent to the death of the Decedent, the Respondent has sold a piece of Decedents property and received all the proceeds from that sale. The Petitioner requests a full accounting of all funds disbursed from that property and seeks an Order restraining the Petitioner from disposing any funds that may still be in existence or in the alternative, upon disposition of the Decedent's estate, Respondent's share would be diminished by any funds she has received or any property she has disposed of.



Stephen D. Schusterman
SCHUSTERMAN LAW FIRM, PA
PO Box 4211
Rock Hill, South Carolina 29732
Telephone: (803) 325-7788
Facsimile: (803) 325-7889

ATTORNEY FOR PETITIONER

April 28, 2017

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	NOTICE, MOTION and PETITION:
	]	
DAVID J. MATTOX,	]	FOR RELIEF FROM JUDGMENT
	]	
Petitioner,	]	and FOR STAY OF ENFORCEMENT
vs.	]	
	]	Pursuant to:
LISA JO BARE MATTOX,	]	S.C. Code § 62-3-412,
	]	RULE 60(b)(1) and (2), S.C.R.C.P.,
Respondent.	]	and RULE 62(b) and (c), S.C.R.C.P.

FILED RECEIVED
2018 JUL 13 PM 4:54
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

To: The Respondent above named and
John P. Gettys, Jr.
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion and Petition herein, as follows:

DATE AND TIME: To be set by the Judge or Clerk of the Probate Court, or as soon thereafter as counsel may be heard.

PLACE: The Probate Court
York County Courthouse
1 South Congress Street
York, South Carolina 29745,
or at such other place as the Court may designate

Pursuant to Rule 60(b), S.C.R.C.P., the Petitioner DAVID J. MATTOX, by and through his attorneys, moves this Court for an Order:

1) Relieving the Movant from the Order filed September 26, 2017 in the above-captioned action in the Probate Cased indicated; a copy of the said Order is attached hereto and incorporated herein as Exhibit "A".

Or, in the alternative,

2) To treat this Motion and Petition and its requested relief as an independent action to

relieve the said person from the above-referenced judgment, order or proceeding;

And, in either event,

3) Staying any execution of, or any proceedings to enforce, the said judgment of this Court,

   a) pending the disposition of Movant's Motion and Petition for Relief from the said judgment, order or proceeding made pursuant to Rule 60(b), S.C.R.C.P., now pending in this Court, and

   b) permanently; and

4) For such other and further relief as this Court may deem just and proper.

Pursuant to Rule 11(a), S.C.R.C.P., counsel for the Movant are under no duty, prior to filing this Motion and Petition, to consult with opposing Counsel or to attempt in good faith to resolve the matter contained in this Motion and Petition due to the conclusory nature hereof. Counsel for the Movant further certifiy that such consultation would serve no useful purpose, as defined by the said Rule.

This Motion and Petition is based upon the applicable law, the matter set out herein below in this Motion and Petition by way of affidavits and other attachments hereto, and on the files, papers and pleadings in this Probate action.

1. By its Order of September 26, 2017, this Court determined that the late JONATHAN RAY MATTOX signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing of this matter on June 19, 2017. [Finding of Fact 4.]
2. The said Order further found that both the Petitioner DAVID J. MATTOX and the Respondent LISA JO BARE MATTOX testified to their lack of knowledge as to where the original Will of the deceased was kept. [Findings of Fact 10. and 11.]
3. The said Order further found that no original will had been located [Finding of Fact 11. and generally], and concluded that there was no evidence that the original will had been inadvertently lost or destroyed. [Conclusion of Law No. D.]
4. The said Order concluded that in the absence of evidence that the Will had been inadvertently lost or destroyed, the legal presumption was was the Will had been intentionally revoked. [Conclusion of Law E.]

5. In light of that legal presumption, the decedent was found to be intestate without children, leaving his wife, the Respondent as his sole heir. [Conclusion of Law F. and the Order proper]
6. The original Will, conforming in all respects to the copy submitted as evidence, has lately been discovered in the possession of Mrs. Peggy M. Mattox. A copy of the said Will, as placed in evidence at the hearing on August 9, 2017, is attached hereto and incorporated herein as Exhibit "B".
7. Simultaneously with this Motion and Petition, the original Will is filed with this Court.
8. Mrs. Mattox has executed an Affidavit setting out the circumstances of her finding the original Will. This Affidavit is attached hereto and incorporated herein, unmarked but refererenced as Exhibit "C".
9. This Motion under Rule 60, S.C.R.C.P., and Petition under S.C. Code § 62-3-412, is filed within one year after the judgment contained in the said Order filed September 26, 2017.
10. A *Lis Pendens* relating to the real property of the Estate of JONATHAN RAY MATTOX has been filed on behalf of the Petitioner as 2018-LP-46-00407. A copy thereof is attached hereto and incorporated herein as Exhibit "D".
11. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, allow this Court to entertain a Petition for modification or vacation of its order filed September 26, 2017 in that the proponent of the original Will of JONATHAN RAY MATTOX was unaware of its existence at the time of the earlier proceeding, as defined under S.C. Code § 62-3-412(1).
12. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute mistake, inadvertence, surprise, or excusable neglect on the part of Petitioner, as defined by Rule 60(b)(1), S.C.R.C.P.
13. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), S.C.R.C.P., as defined by Rule 60(b)(2), S.C.R.C.P.
14. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that it is no longer equitable that the judgment should have prospective application, as defined by Rule 60(b)(5), S.C.R.C.P.
15. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that the Petitioner herein is entitled to stay the execution or any proceedings to enforce any judgment, order or proceeding resulting in, or represented by, the civil action and

judgment herein, pending the disposition of his Motion and Petition for relief made pursuant to Rule 60(b), S.C.R.C.P.

16. On knowledge and information, the facts alleged herein, considered as an Independent Action in Equity, and the reasonable inferences thereof, constitute a good, meritorious, and sufficient defense to the judgment, order or proceeding complained of, to the extent the same is required pursuant to Rule 60(b), S.C.R.C.P.

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
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

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 Petitioner

By: _____

July 13, 2018

Rock Hill, South Carolina

FILED RECEIVED

STATE OF SOUTH CAROLINA — IN THE PROBATE COURT
CASE FILE NO: 2017ES4601230

COUNTY OF YORK

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX — LISA JO BARE MATTOX

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] 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: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

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

Attorney(s) for the Respondent(s)

Exhibit "A83

FILED/RECEIVED

2017 SEP 26 PM 4:07

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathon Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 dwr

CERTIFIED TRUE COPY
Carolyn W Rogers
PROBATE JUDGE, YORK COUNTY, SC

Exhibit "A"

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

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

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

8. No original Will has been presented to the Court.

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

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

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 OWR

Exhibit "A"3

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court 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.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 cwr

Exhibit "A"

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations..

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

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

York, South Carolina
September 26, 2017.

#4 of 4 CWR

Exhibit "A"

LAST WILL AND TESTAMENT

OF

JONATHAN RAY MATTOX

STATE OF GEORGIA:
COUNTY OF GWINNETT

I, **JONATHAN RAY MATTOX**, of the said county and state, being of sound and disposing mind and memory, do hereby make and publish this my Last Will and Testament, hereby revoking all other Wills and Codicils heretofore made by me.

ITEM I

I wish my body buried in a suitable manner and a suitable memorial erected and the costs thereof paid out of my estate.

I direct that all of my legal debts be paid out of my estate as soon as practicable.

ITEM II

I give, bequeath and devise all of my property, both real and personal, of whatever kind and wherever situated to my brother, **DAVID JAMES MATTOX**, in fee simple and forever, *per stirpes*. As for my brother, **MARK ANTHONY MATTOX**, I have intentionally made no provision for said brother hereunder and I purposefully exclude him as a beneficiary hereunder for personal reasons.

ITEM III

Should my brother, **DAVID JAMES MATTOX**, predecease me leaving no lineal descendants, then I give, bequeath and devise all the rest and remainder of my property of whatever kind and wherever situated to my mother, **PEGGY YVONNE MATTOX**, in fee simple and forever *per stirpes*.

J. R. M.
Initials

Exhibit "B"

ITEM IV

I give, bequeath and devise all the rest, residue and remainder of my property of every kind and description, and wherever located, including any lapsed or void legacy or devise to the persons who would have been entitled thereto under the laws of descent and distribution of the State of Georgia if I had died intestate at that time owning such property in fee simple.

ITEM V

I hereby constitute and appoint my mother, **PEGGY YVONNE MATTOX**, as Executor of this Will, relieving her of the necessity of making returns or giving bond to any court, and I specifically empower her to sell any and all of my property, at public or private sale, with or without notice, and without order of any court, for the purpose of paying debts of my estate or carrying out the provisions of this Will.

ITEM VI

In the event my mother, **PEGGY YVONNE MATTOX**, shall predecease me or fail to serve as Executrix of this Will, then and in that event I name and appoint my brother, **DAVID JAMES MATTOX**, as Executor of this Will.

ITEM VII

In the management, care and disposition of my estate and any trust created hereunder, I confer upon the Executrix and the survivors and successors in office, the power to do all things in each instance as may be, in the sole discretion of my Executrix, necessary, proper or advisable, including the powers contained in *O.C.G.A.*, § 53-12-232, as they now exist, that is, as such powers may have been amended up to and through the date of execution of this Will, which powers are expressly incorporated into this Will by reference, with the same effect as though such language were set forth verbatim herein.

J.R.M.

Exhibit "B"

IN WITNESS HEREOF, I have hereunto set my hand and affixed my seal to this my Last Will and Testament consisting of 3 pages, including this page, identifiable by my signature or initials.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Candi Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B"

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared **JONATHAN RAY MATTOX**, Stacey Brown and Justin Skaggs, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn. **JONATHAN RAY MATTOX**, declared to me and to the said witnesses in my presence and that said instrument is his Last Will and Testament and that he had willingly made and executed it as his free act and deed for the purpose therein expressed. The witnesses, each on his or her oath, stated to me in the presence and hearing of the Testator that the Testator had declared to them that the instrument is his Last Will and Testament and that he executed same as such and wanted each of them to sign it as a witness; and upon his or her oath each witness stated further that he or she did sign the same as a witness in the presence of the Testator and at his request; that he or she was at that time fourteen (14) years of age or over and was of sound mind; and that each of said witnesses was then at least fourteen (14) years of age.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Carolin Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B"

Exhibit 98

Last Will

and

Testament

of

JONATHAN RAY MATTOX

NELSON H. TURNER
ATTORNEY AT LAW
FIVE HURRICANE SHOALS ROAD
LAWRENCEVILLE, GEORGIA 30045
(770) 962-8111

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	
	]	
DAVID J. MATTOX,	]	
	]	AFFIDAVIT
Petitioner,	]	
	]	IN SUPPORT OF MOTION
vs.	]	
	]	
LISA JO BARE MATTOX,	]	
	]	
Respondent.	]	
	]	

PERSONALLY appeared before me, a notary public, the undersigned affiant, who being duly sworn, deposes and says that:

1. I am Peggy M. Mattox. I am the mother of the late JONATHAN RAY MATTOX and of DAVID J. MATTOX. I live at 218 Shore Line Drive, Town of Pawley's Island in Georgetown County, South Carolina.
2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.
3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.
4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.
5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.
6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.
7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.
8. No one had told me the will had been placed in the safe.

4

9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.

Peggy M. Mattox
PEGGY M. MATTOX

SWORN TO and subscribed before me
this day of July 12, 2018.

JAMIECE C ARCHIE
My Commission Expires
NOTARY PUBLIC
09-27-2027
STATE OF SOUTH CAROLINA

NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 9.27.2027

STATE OF SOUTH CAROLINA COUNTY OF YORK	]]	IN THE PROBATE COURT PROBATE CASE FILE No. 2016-ES-46-01230
In the Matter of JONATHAN MATTOX, DAVID J. MATTOX, Petitioner, vs. LISA JO BARE MATTOX, Respondent.	]]]]]]]]]]]	*LIS PENDENS*

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in the Probate Court upon the Complaint and Motion of the above-named Petitioner against the above-named Respondent to probate the newly-located original will of JONATHAN RAY MATTOX, and regarding the below-described real estate under the following, respectively:

Being all of Tract 1 as shown on the Mattox Subdivision Survey by Tony B. Sanders, Survey & Mapping Control, Inc., dated March 5, 2013, and recorded in Plat Book E 195 at Page 10, in the Office of the Clerk of Court for York County, South Carolina, to which reference is made for a more complete description.

Being a portion of that real property described in the Hayes/Mattox Subdivision Survey by Tony B. Sanders, Survey & Mapping Control, Inc., dated September 24, 2007 and in that certain deed recorded in Record Book 6269 at Page 216 in the Office of the Clerk of Court for York County, South Carolina, consisting of 26.55 acres, more or less.

Derivation: Being the identical real property conveyed to Jonathan R. Mattox by deed from Phillip W. Hegg, Trustee of the Nancy Mildred Hayes Revocable Trust U/A dated October 12, 2012 and recorded in Record Book 14633 at Page 233 in the Office of the Clerk of Court for York County, South Carolina; and

Conveyed to Lisa J. Mattox by Deed of Distribution from the Estate of Jonathan Ray Mattox (also known as Jonathan Mattox), the same having died on October 1, 2016, by Lisa J. Mattox, Personal Representative, the said deed being dated October 24, 2016 and recorded November 4, 2016 in Record Book 16044 at Page 61 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map No. 575-00-00-016

Street Address: 26.055 acres
Highway 49
Lake Wylie, S.C. 29710

and

All that certain tract of land situate in Bethel Township, York County, State of South Carolina, on Lake Wylie, being shown and desigated as Lot 5 on plat of River Point

Exhibit "E

property of Jimmie Hayes Mattox dated August 10, 1978, and recorded on September 28, 1978 in Plat Book 56, Page 41, in the Office of the Clerk of Court for York County, South Carolina, said plat being incorporated herein and made a part hereof for the metes and bounds shown thereon, and being a portion of that certain tract of land described in the deed of Crescent Land & Timber Corp., to Jimmie Hayes Mattox and Peggy M. Mattox dated July 24, 1978, and recorded in Deed Book 476, Page 807 in the Office of the Clerk of Court for York County, South Carolina.

Derivation: Being the identical real property conveyed to Jonathan R. Mattox and Lisa Mattox by deed from Phillip W. Hegg, Trustee of the Nancy Mildred Hayes Revocable Trust U/A dated December 16, 2014 and recorded in Record Book 146977 at Page 287 in the Office of the Clerk of Court for York County, South Carolina; and

Conveyed to Lisa J. Mattox by Deed of Distribution from the Estate of Jonathan Ray Mattox (also known as Jonathan Mattox), the same having died on October 1, 2016, by Lisa J. Mattox, Personal Representative, the said deed being dated October 24, 2016 and recorded November 4, 2016 in Record Book 16044 at Page 61 in the Office of the Clerk of Court for York County, South Carolina.

Tax Map No. 576-00-00-070

Street Address: 321 Riverpointe Road
Lake Wylie, S.C. 29710

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
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

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 Petitioner

By: / s / John Martin Foster

July 11, 2018

Rock Hill, South Carolina

Exhibit "D"

STATE OF SOUTH CAROLINA COUNTY OF YORK	]]	IN THE PROBATE COURT PROBATE CASE FILE No. 2016-ES-46-01230
In the Matter of JONATHAN MATTOX,	]	
DAVID J. MATTOX, Petitioner,	]]	CERTIFICATE OF SERVICE
vs.	]	
LISA JO BARE MATTOX, Respondent.	]]	

The undersigned certifies that he has served the following pleadings or documents in the above-captioned and numbered civil action:

Notice, Motion and Petition for Relief from Judgment, pursuant to Rule 60(b)(1) and (2), S.C.R.C.P., and for Stay of Enforcement, pursuant to Rule 62(b) and (c), S.C.R.C.P.; and
This Certificate of Service

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 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; of 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, all pursuant to Rule 6(b), S.C.R.C.P.

John P. Gettys, Jr.
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

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
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

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 Petitioner

July 13, 2018

By: JMF

Rock Hill, South Carolina

FILED RECEIVED

2018 AUG 10 PM 3:49

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF YORK IN RE: Estate of Jonathan Mattox David J. Mattox, PETITIONER, vs. Lisa Jo Bare Mattox, RESPONDENT.	IN THE PROBATE COURT Case No: 2016-ES-46-01230 RESPONSE TO PETITIONER'S NOTICE, MOTION and PETITION FOR RELIEF FROM JUDGMENT and FOR STAY OF JUDGMENT

Respondent Lisa Jo Bare Mattox, by and through her attorney of record responds to the allegations of the Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement filed on July 13, 2018, as follows:

1. As to the allegations and petition requesting relief from this Court's prior order and stay of execution as requested in paragraphs 1-4 of the motion, the Respondent respectfully objects to same as such relief is not available to Petitioner based upon the doctrine of Res Judicata as said allegations fail to qualify for relief under the provisions of Rule 59(b) and Rule 60(b) of the South Carolina Rules of Civil Procedure.

2. All allegations or statements of Petitioner, as found in its Petition for Relief from Judgment, not specifically admitted herein are denied and strict proof demanded thereof.

RECEIVED
AUG 20 2018
By_____

3. As to the allegations found in paragraphs 1, 2, 3, 4, 5, 7, 8, 9 of the Petition for Relief from Judgment and for Stay of Enforcement dated July 13, 2018, Respondent shall admit same.

4. As to the allegations found in paragraph 6 of the Petition for Relief from Judgment and for Stay of Enforcement dated July 13, 2018, Respondent shall admit the original will has been filed with the Court of Probate. As to the allegations related to the timing of discovery of such original will, Respondent has no knowledge as to same, and therefore, denies such allegation and demands strict proof thereof.

5. As to the allegations found in paragraph 10 of Petitioner's Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement dated July 13, 2018, Respondent admits same has been filed but disputes such filing is proper and appropriate pursuant to the statutory and case law of this State.

6. As to the allegations found in paragraph 11 of the Petition for Relief from Judgment and for Stay of Enforcement dated July 13, 2018, Respondent has no information or belief as to such allegations and, therefore, denies same and demands strict proof thereof.

7. As to the allegations found in paragraph 12, 13, 14, 15 and 16 of the Petition for Relief from Judgment and for Stay of Enforcement dated July 13, 2018, Respondent denies the allegations of same and demands strict proof thereof.

RESPONDENT'S MOTION TO CANCEL LIS PENDENS

8. The filing of a notice of lis pendens is "an extraordinary privilege granted by statute, and strict compliance with the statutory provisions is required." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002).

9. The filing of a lis pendens is only permitted when the action "affect[s] the title to real property." Id. at 18; S.C. Code Ann. § 15–11–10 (2005). When an action does not affect the title to real property, the filing of a lis pendens is not authorized by the statute and it should be cancelled. Id.

10. A notice of lis pendens may be filed in an action affecting the title to real property to protect an interested party's ownership interest in the property subject to the litigation. S.C.Code Ann. § 15–11–10 (2005). *Pond Place Partners*, 567 S.E.2d at 889.

11. As noted by the Court of Appeals, actions that support filing a lis pendens include: (1) actions attempting to set aside a fraudulent conveyance of real property; (2) actions to establish a constructive trust over real estate; (3) actions to quiet title; (4) actions to establish the existence of an easement; (5) actions to reform deeds to resolve a boundary dispute; (6) actions for specific performance; and (7) actions for mortgage foreclosure. 567 S.E.2d at 889–90 (citations omitted).

12. The Petitioner has filed lis pendens against two separate properties owned by Respondent. The first is a 26.055-acre lot located on Highway 49 in Lake

STATEMENT OF ISSUES ON APPEAL

I. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX?

II. Is the Appellant precluded from litigation by the doctrine of *res judicata*?

III. Has the Appellant demonstrated prima facie evidence for the equitable relief sought?

STATEMENT OF THE CASE

JONATHAN RAY MATTOX died October 1, 2016. By its Order in this Estate entered September 27, 2017, the Probate Court determined that the late JONATHAN RAY MATTOX signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing on his Estate held June 19, 2017. [Finding of Fact 4.] That Will named his brother DAVID J. MATTOX as his heir.

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

The 2017 Order of the Probate Court concluded that in the absence of evidence that the Will had been inadvertently lost or destroyed, the legal presumption was that Will had been intentionally revoked. [Conclusion of Law E.] In light of that legal presumption, the decedent was found to be intestate and without children, leaving his wife, the Respondent, as his sole heir. [Conclusion of Law F. and the Order proper]

The original Will, conforming in all respects to the copy submitted as evidence, was later discovered in the possession of Mrs. Peggy M. Mattox, mother of the Deceased and the Appellant DAVID J. MATTOX, and filed with the Probate Court. The Appellant also filed his Motion under Rule 60, S.C.R.C.P. and Petition under S.C. Code § 62-3-412, both within one year after the judgment contained in the said Order of September 27, 2017.

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

ARGUMENT

I. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX?

In its November, 2018 Order, the Honorable Probate Court concluded [Conclusion of Law No. 2] that the Appellant did not exercise due diligence in discovering the original Will of his deceased brother as submitted to that Court with his Petition for Relief from Judgment and for Stay of Enforcement. The basis for this conclusion was, *inter alia*, a statement made in an earlier hearing, of the Appellant's residence with his mother, who discovered the original will. No evidence as to his present residence nor of his control of his mother's premises, was presented. The Honorable Probate Court was without sufficient evidence to make this conclusion.

In the same Order, the Honorable Probate Court found or implied that the Appellant's mother, as the discoverer of the original will, should have discovered the same at an earlier date. The Appellant's mother's evidence, as stated in her Affidavit to the Probate Court, does not sustain this interpretation. [RECORD ON APPEAL, pp.27 - 28.] Dereliction on her part is refuted by her Affidavit. Further, it is axiomatic that any alleged dereliction on the part of the Appellant's mother cannot be ascribed to the Appellant.

No credible or cognizable evidence exists to impute a lack of due diligence to the Appellant DAVID J. MATTOX in the discovery or presentation of the original Will of JONATHAN RAY MATTOX. The grounds cited by the Honorable Probate Court for a lack of due diligence cannot be sustained.

ARGUMENT

II. Is the Appellant precluded from litigation by the doctrine of *res judicata*?

The November, 2018 Order of the Honorable Probate Court finds [Finding of Fact No. 10] and concludes [Conclusion of Law No. 5] that the decedent "made no in-lieu provisions for" the decedent's widow, the Respondent herein. It goes on to conclude that this issue is precluded by *res judicata* by reason of the previous Order of the Probate Court issued on September 27,

2017. In fact, that earlier Order denied relief based upon the presented copy of the Deceased's Will. The September, 2017 Order went on to state as follows:

> H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the will or in lieu of a testamentary disposition.
>
> [*Underlining added.*]

The first question as to the cited language is whether this is, in fact, a ruling at all. It is obvious that for an issue to be precluded by *res judicata*, the issue must in fact be ruled upon. A litigant cannot be bound by a mere expression of opinion, or by a statement in a subjunctive voice. Thus, the commentators of AMERICAN JURISPRUDENCE 2D state:

> It is said that the defense of collateral estoppel is to be allowed with caution, and it must rest upon a more solid basis than mere speculation as to what was actually adjudicated in the prior action.
>
> [Ftn. 92, *citing JeToCo Corp.* v. *Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980); *Casad* v. *Qualls*, 70 Cal.App.3d 921, 139 Cal.Rptr. 243 (Cal.App. 1977); *Riverbluff Dev. Co.* v. *Insurance Co. of North America*, 412 N.W.2d 792 (Minn.App. 1987).]
>
> There can be no preclusion where there is a reasonable doubt whether a fact was actually adjudicated.
>
> [Ftn. 93, *citing Burchett* v. *Bower*, 355 F.Supp. 1278 (D.Ariz. 1973); *Boyles* v. *State*, 647 P.2d 1113 (Alaska App. 1982), *cert. den.* 460 U.S. 1042, 75 L.Ed.2d 795, 103 S.Ct. 1437 (1983); *JeToCo Corp.* v. *Hailey Sales Co.*, *supra*; *Wolfson* v. *Northern States Management Co.*, 221 Minn. 474, 22 N.W.2d 545 (Minn.App. 1946); *Hughes* v. *Miner*, 15 Ohio App.3d 141, 473 N.E.2d 53 (Ohio App. 1984); *Gregory* v. *Gregory*, 803 S.W.2d 242 (Tenn.App. 1990).]
>
> Any doubt as to what was decided in the prior action will generally be resolved against the application of collateral estoppel or res judicata.
>
> [Ftn. 94, *citing Welch* v. *Johnson*, 907 F.2d 714 (7th Cir. 1990); *Torres* v. *Rebarchak*, 814 F.2d 1219 (7th Cir. 1987); *Republic of Philippines* v. *Westinghouse Elec. Corp.*, 782 F.Supp. 972 (D. N.J. 1992), *later proceeding* 821 F.Supp. 292 (D. N.J. 1993);

Hittel v. *Rosenhagen*, 492 So.2d 1086 (Fla.App. 1986), *later proceeding* 522 So.2d 1036 (Fla.App. 1988); *Northern Trust Co.* v. *Aetna Life & Surety Co.*, 192 Ill.App.3d 901, 549 N.E.2d 712 (Ill.App. 1989), *app. den.* 132 Ill.2d 546, 555 N.E.2d 378 (1990); *Emory* v. *Gardner*, 415 So.2d 339 (La.App. 1982).]

[47 AM.JUR.2D *Judgments* § 727 (2002); *paragraphing added.*]

An issue cannot be treated as *res judicata* in a different cause of action when the Court has not been passed on by the Court in its earlier decision. In order to bind the parties, the earlier Order must pass on the issue in question and do so in a clear and final manner. The quoted language of the September 27, 2017 Order is, at best, *dicta* on the question at hand.

RESTATEMENT (SECOND) OF JUDGMENTS, § 27, comment o. (1977) also makes the point that where, as here, a judgment was not dependent on the determination of a particular issue, such determination is akin to *dicta*, and its relitigation is not precluded.

If it should be argued that the Probate Court is the best judge of the intention of the earlier Order quoted above, the Appellant would point out that this is not the standard: as stated in the above-cited authority, the question is whether the earlier language was so clear as to bind the parties to the litigation or, to state the matter in different form, to show its clear meaning to a third party. Here, it is not, and that lack cannot now be supplied.

The Appellant has argued and preserved this issue by his Memorandum submitted to the Probate Court and by argument at the hearing. [RECORD ON APPEAL, pp.38 – 41; TRANSCRIPT OF HEARING, p. 4 – 5; 6 – 10; 22 – 23; 26 - 27..] Under the body of precedent cited above, the cited language of the earlier, September, 2017 Order cannot constitute *res judicata* or preclude a litigation of this issue.

ARGUMENT

III. Has the Appellant demonstrated *prima facie* evidence for the equitable relief sought?

In further response to the referenced factual finding of the Order on Appeal as to provision for the decedent's spouse, the Appellant notes that he argued and produced evidence at

the hearing on October 5, 2018 that:

a. By deed dated June 29, 2015, the Decedent caused the residence of his aunt, Nancy Mildred Hayes, to be titled to himself and the Respondent, his wife, as joint tenants with the right of survivorship;

b. Upon the Deceased's death, the said house passed to the Respondent wife;

c. On knowledge and information, these transfers to the Respondent wife referenced herein were made gratuitously, and without monetary payment on her part;

d. The said residence was last valued by the York County Tax Assessor at $395,000.00; on knowledge and information, Tax Assessor values in York County are lower than true market value;

e. On knowledge and information, the above actions of the Deceased gifted the Respondent with property outside his Will worth at least $400,000.00; this property transfer was not listed on the Inventory and Appraisement submitted to this Court by the Respondent; and

f. On knowledge and information, the Deceased has gifted other property to the Respondent, which matter can only be determined by discovery.

[RECORD ON APPEAL, pp. 22 – 28; 42 – 47; 48 – 50; TRANSCRIPT OF HEARING, p. 4 – 5; 6 – 10; 22 – 23; 26 - 27.]

The evidence set out above and the inferences therefrom, as presented or raised, demonstrates, or can demonstrate, that the decedent, pursuant to the requirements of S.C. Code § 62-2-301(a)(2). That is, that he:

> . . . provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . from the amount of the transfer or other evidence.

The weight of this evidence can be established only by litigation and discovery. The Appellant has the right to proceed to that end.

CONCLUSION

To conclude,: there is no evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of JONATHAN RAY MATTOX. The Appellant is not precluded from litigation by the doctrine of *res judicata.* He has set out a *prima facie* case showing his right to pursue the equitable relief sought. The Appeal should be granted and the Appellant's case should be allowed to proceed in the Probate Court.

Respectfully submitted,

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

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

By: /s/ John Martin Foster

June 10, 2019

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY PROBATE COURT

THE HONORABLE CAROLYN W. ROGERS, PROBATE JUDGE

York County Civil Action Number 2016-ES-46-01230

Appellate Case No.: 2018-CP-46-03672

DAVID J. MATTOX, ...Appellant,

v.

LISA JO BARE MATTOX,.....Respondent.

BRIEF OF RESPONDENT

---

s/ John P. Gettys, Jr.
John P. Gettys, Jr., S.C. Bar No. 8673
J. Nathanial Pierce, S.C. Bar No. 102803
Morton & Gettys, LLC
Attorneys for Respondent
P.O. Box 707, Rock Hill, SC 29731
T: 803.366.3388; F: 803.366.4044
john.gettys@mortongettys.com
nate.pierce@mortongettys.com

June 25, 2019
Rock Hill, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules of Court

STATEMENT OF ISSUES ON APPEAL

1. Is there evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of Jonathan Ray Mattox?

2. Is the Appellant precluded from litigation by the doctrine of *res judicata?*

3. Has the Appellant demonstrated prima facie evidence for the equitable relief sought?

STATEMENT OF THE CASE

The underlying matter in this case was initiated by the filing of a Summons and Petition for Formal Appointment on April 28, 2017. The Petition demanded David J. Mattox ("Appellant") be appointed as personal representative of the Estate of Jonathan Mattox ("Decedent") based on the existence of a purported original will wherein Appellant was allegedly named as Personal Representative. Additionally, Appellant sought to restrain Lisa Jo Bare Mattox ("Respondent"), the Personal Representative of Decedent's estate.

A hearing was held before the Honorable Carolyn W. Rogers on August 9, 2017. Appellant and Respondent were the only witnesses called at the hearing. The purported original will was not presented at the hearing. Following the hearing, and per the Court's Order September 26, 2017, Judge Rogers denied Appellant's Petition for Appointment as Personal Representative as well as his request to restrain the Personal Representative.

On July 13, 2018, some ten months later, Appellant, by and through counsel, filed a Summons, Notice, Motion, and Petition for Relief from Judgment and Stay of Enforcement pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("SCRCP"). Appellant also filed multiple lis pendens against properties owned wholly by Respondent. At a hearing held October 5, 2018, Appellant and Respondent argued Appellant's SCRCP 60 motion, along with Respondent's Motion to Quash the lis pendens, before Judge Rogers. On November 21, 2018, Judge Rogers issued an order denying Appellant's motion for relief under SCRCP 60 and Respondent's Motion to Quash the remaining lis pendens.

This appeal followed. As discussed further below, Appellant's Statement of Issues on Appeal far exceeds the sole issue on appeal: Judge Rogers's denial of Appellant's motion under SCRCP 60.

An appeal from the probate court is governed by the provisions of the South Carolina Probate Code. *Golini v. Bolton*, 326 S.C. 333, 338, 482 S.E.2d 784, 786-87 (Ct. App. 1997) (citing *Howard v. Mutz*, 315 S.C. 356, 434 S.E.2d 254 (1993)). The Probate Code provides that a final order or decree of the probate court may by appealed to the Circuit Court. *Id* (citing S.C. Code Ann. § 62-1-308(a) (Supp. 1996)). The circuit court must hear and determine the appeal "according to the rules of law. *Id* (citing S.C. Code Ann. § 62-1-308(d) (1987)). The phrase "according to the rules of law" means according to the rules governing appeals. *Id* (citing *Howard*, 315 S.C. at 360, 434 S.E.2d at 257)). 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 on appeal. *Id.*

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 124, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007)). An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Id.*

ARGUMENT

I. There is evidence establishing a lack of due diligence in discovering or filing the original Last Will and Testament of Johnathan Ray Mattox.

In his motion for relief from judgment, Appellant cited Rules 60(b)(1), 60(b)(2), and 60(b)(5). Appellant argued each of these in front of Judge Rogers at the October 2, 2018, hearing and the same are discussed individually below.

Rule 60(b)(1)

SCRCP 60(b)(1) permits the court to relieve a party from a final judgment, order, or proceeding based on "mistake inadvertence, surprise, or excusable neglect." In determining

whether to grant relief under SCRCP 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (citing *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

First, Respondent argued Appellant failed to seek relief promptly. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, l. 3 through p. 13, l. 18. In her affidavit, Peggy M. Mattox ("Peggy"), the mother of the Appellant and Decedent attests that she found the original copy of the Decedent's will in a safe in Peggy's house on or around October 2017. Aff. Peggy M. Mattox ¶ 5. Peggy further attests that upon discovering the original will, she contacted Appellant and gave the original will to him. As such, Appellant was in possession of the original will for approximately ten months prior to making the motion for a new trial. Additionally, based on Peggy's affidavit, Appellant came into possession of the original will less than one month after the final Order of the Court was filed September 26, 2017. Appellant has not, and likely cannot, provide a suitable reason for failing to act promptly. The crux of the underlying case was the non-existence of an original will. Within weeks of the Court's final Order, Peggy located the original will and provided it to Appellant.

Next, Respondent argued she possesses a meritorious defense. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, ll. 24-25 through p. 13, ll. 1-8. In the underlying case, the Court concluded as a matter of law that "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition." As such, even if Appellant were to be granted a new trial, Respondent would still prevail on an omitted spouse claim under S.C. Code Ann. § 62-2-301. *Id.* Appellant had his day in court and failed to persuade the finder of fact that the Decedent provided for Respondent outside of his will.

Finally, Respondent argued she would be prejudiced should the Court grant Appellant's motion based on then-existing contractual obligations. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 13, ll. 9-18. For this reason and other discussed above, Respondent presented ample evidence that Appellant is not entitled to relief under SCRCP 60(b)(1), which Judge Rogers found to be persuasive.

Rule 60(b)(2)

Pursuant to SCRCP 60(b)(2), the Court may relieve a party from a final judgment, order, or proceeding based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial...." Due diligence is defined not as what a litigant actually discovered, but what the litigant could have discovered. *See Lanier v. Lanier*, 354 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). Appellant specifically argues Judge Rogers's order denying relief under SCRCP 60 is without evidentiary support. Specifically, Appellant argues "[n]o evidence as to [Appellant's] present residence nor of his control of [Appellant's] mother's premises, was presented." Appellant Statement of Issue on Appeal, ¶ 1.

Respondent's argument regarding due diligence was based largely on Peggy's affidavit, which was attached to Appellant's memorandum in support of his motion. In pertinent part, the affidavit provides the following: (1) that Peggy, the affiant and mother of the Appellant and Decedent, knew the Decedent executed a will; (2) that during or after October of 2017, Peggy found the will in a safe in her home; and (3) that the Decedent, Appellant, and Peggy knew the location and the combination of Peggy's safe. Aff. Peggy M. Mattox, ¶ 2, 4, 5, 7.

As Appellant notes in his Statement of Issues on Appeal, Appellant's residence was only one of several arguments made regarding his lack of due diligence. Appellant Statement of Issue on Appeal, ¶ 1. At the October 5, 2018, hearing, Respondent, through the undersigned counsel,

argued (1) the purported original will was known to the Decedent's personal representative; (2) that the safe was a natural and obvious place where important documents are kept and was located in a home where the Appellant currently or recently had resided; and (3) the Appellant, Decedent, and Petitioner each knew the combination and location of the safe. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 14, ll. 7-14. This testimony is in direct conflict with Respondent's arguments before this Court.

Further, Appellant's Statement of Issues on Appeal does not correctly represent Respondent's argument at the October 5, 2018, hearing. Respondent does not argue, as Appellant states, that Appellant's mother should have discovered the original will at an earlier date. That is not the standard prescribed by SCRCP 60(b)(2). SCRCP 60(b)(2) provides for relief where there is newly discovered evidence that could not, without diligence, have been discovered in time for trial. Respondent argued, as noted above, had Appellant acted with due diligence, the original will could have, and should have, been discovered prior to trial and well within the time to move for a new trial. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 13, l. 18 through p. 14, l. 17.

Rule 60(b)(5)

Finally, in addition to the above-described arguments, Respondent argued that Appellant is not entitled to relief pursuant to 60(b)(5). According to SCRCP 60(b)(5), the court may relieve a party from a final judgment, order, or proceeding if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Respondent argued to the Probate Court that relief under SCRCP 60(b)(5) is available only in cases of fraud upon the court or rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake, citing *Mullarkey v. Mullarkey*, 397 S.C. 182, 191, 723 S.E.2d

249, 254 (Ct. App. 2012)

As Respondent argued before the Probate Court, there is no allegation of fraud in this case. There are no rare, special, exceptional, or unusual prospects present. There is no accident or mistake. There is only an Appellant who did not look in a natural and obvious place for the one document necessary to bolster his case and, upon finding said document, failed to promptly avail himself of his post-judgment rights. Again, Appellant held onto this will outside of his time to request a new trial, for a period of nearly ten months, before availing himself of this court's jurisdiction. Granting relief under these circumstances prejudices only one party in this proceeding: the Respondent. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 14, ll. 17-25.

II. Appellant is precluded from litigation by the doctrine of *res judicata*.

The issue of *res judicata* is limited to the "meritorious defense" consideration under a SCRCP 60(b)(1) analysis. *See* SCRCP 60(b)(1); *Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208. In determining whether to grant relief under SCRCP 60(b)(1), the court must consider the following factors: (1) the promptness within which the relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.

All factors having previously been discussed in this reply, the omitted spouse rule stands as a meritorious defense in the event the court were to grant relief from judgment and order a new trial. Respondent's argument at the October 5, 2018, hearing was that, even should the court grant relief from judgment and a new trial, the outcome would be the same based on the omitted spouse rule. Tr. Hr'g on Pet'r's Mot. for Relief from J., p. 12, ll. 24-25, p. 13, ll. 1-8. The Probate Court correctly ruled the omitted spouse issue was *res judicata* based on the evidence presented at the underlying trial.

The Supreme Court of South Carolina has held "absent specific language in the Will, or

sufficient extrinsic evidence that a bequest was made 'in contemplation of marriage,' a spouse has not been 'provided for' under the "omitted spouse's statute." *Miles v. Miles*, 312 S.C. 408, 410-11, 440 S.E.2d 882, 883 (1994). In *Miles*, the Court held there was no evidence the bequest in question was made in contemplation of marriage because the purported omitted spouse had "rejected numerous marriage proposals from Decedent finally agreeing to marriage one year *after*, the Will was executed," meaning the Will made no provision for the purported omitted spouse in her capacity as spouse. *Id.* The Court ultimately held that "a spouse has not been "provided for" within the meaning of S.C. Code Ann. § 62-2-301 (2014) unless the decedent considered the surviving spouse *in that capacity* at the time with will was executed. *Id.* In the present case, the Decedent not only executed the will prior to Respondent accepting his marriage proposal, the Decedent executed the will prior to meeting the Respondent. Based on the Supreme Court's ruling in *Miles*, and the facts presented to the Probate Court in the underlying trial, the Respondent has a meritorious defense to any claim by Appellant under the omitted spouse statute.

Res judicata applies where there is (1) identity of the parties; (2) identity of the subject matter; and (3) an adjudication of the issue in the prior suit. *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina*, 259 S.C. 9, 362 S.E.2d 176 (1987). A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Id.*

The elements of *res judicata* have been met in this case. The parties are identical, the subject matter is identical, and the court ruled "there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the will or in lieu of a testamentary disposition."

III. Appellant has not demonstrated *prima facie* evidence for the equitable relief sought.

Appellant argues the Probate Court incorrectly found the issue of the omitted spouse's share was *res judicata*. Appellant's Statement of Issues on Appeal, ¶ 3. Appellant goes on to enumerate the "evidence" presented at the October 5, 2018, hearing regarding the omitted spouses share. Appellant's Statement of Issues on Appeal, ¶ 4.

First, the evidence enumerated in paragraph 4 of Appellant's Statement of Issues on Appeal is of no value and has no bearing on the underlying case, Appellant's motion to the Probate Court for relief from judgment, nor this appeal. The purpose of a motion for relief from judgment under SCRCP 60 – the sole basis for relief pled by Appellant before the Probate Court – is not to allow a party to make arguments it could have or should have made at the underlying trial. Rule 60 provides a limited number of case-specific grounds entitling parties to relief from judgment. These limited grounds include (1) clerical mistakes; (2) mistake, inadvertence, surprise, or excusable neglect; (3) newly discovered evidence; (4) fraud, misrepresentation, or other misconduct of an adverse party; (5) void judgment; and (6) satisfied judgment.

All the evidence listed in Appellant's Statement of Issues on Appeal was available and existed at the time of the underlying trial. In no way, shape, or form does Appellant's entrance of this "evidence" into the record at a hearing on a SCRCP 60 hearing entitle Appellant to relief from judgment. The question at the October 5, 2018 hearing, was whether Appellant was entitled to relief pursuant to SCRCP 60 and the evidence referenced in Appellant's Statement of Issues does not affect whether Appellant is so entitled.

CONCLUSION

Based on the above, the transcript from the hearing, and the court record, it is clear Judge Rogers correctly decided to deny Appellant's Motion for Relief from Judgment and Stay of

Enforcement. Judge Rogers's order was not controlled by an error of law nor did it lack evidentiary support. Respondent hereby prays this Honorable Court affirm the Probate Court's ruling.

Respectfully submitted,

s/ John P. Gettys, Jr.

John P. Gettys, Jr., S.C. Bar No. 8673
J. Nathanial Pierce
Morton & Gettys, LLC
Attorney for Respondent
P.O. Box 707
Rock Hill, SC 29731
T: 803.366.3388
F: 803.366.4044
nate.pierce@mortongettys.com

June 25, 2019
Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Circuit Court

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-46-03672

In the Matter of JONATHAN MATTOX,

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

RECORD ON APPEAL

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

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

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

INDEX

STATE OF SOUTH CAROLINA **IN THE PROBATE COURT**
CASE FILE NO.: 2016ES4601230

COUNTY OF YORK

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

David J. Mattox — Lisa Jo Bare Mattox

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] 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: [X] 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. Nathanial Pierce, Esquire
Post Office Box 707
Rock Hill, SC 29731

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER ON OMITTED SPOUSE CLAIM
PETITIONER	
vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

FILED RECEIVED
2018 NOV 21 AM 9:19
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

The within matter came before the Court on October 5, 2018, pursuant to the Notice, Motion and Petition for Relief from Judgment filed by David J. Mattox ("Petitioner"), represented by John Martin Foster and Zach Merritt. Present for the hearing were the Petitioner and his attorneys; and the Respondent, Lisa Jo Bare Mattox, and her attorneys, John P. Gettys, Jr. and J. Nathanial Pierce.

The hearing was initiated upon the filing of a Summons, Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement on July 13, 2018. A Notice of Hearing was mailed on September 7, 2018, with Proof of Delivery evidencing service upon the appropriate parties. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

I have reviewed the evidence and case law presented at the October 5, 2018, hearing, as well as the recording of the testimony given in the hearing held on August 9, 2017, and I make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a

NOV 26 2018

#1 of 4

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.

Prof 4 CW

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

FILED RECEIVED

STATE OF SOUTH CAROLINA
IN THE PROBATE COURT
CASE FILE NO: 2018ES4603672 40

COUNTY OF YORK

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX
LISA JO BARE MATTOX

PETITIONER(S)
RESPONDENT(S)

CHECK ONE:

[X] 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: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

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

Attorney(s) for the Respondent(s)

FILED RECEIVED

2017 SEP 26 PM 4:07

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 dwr

CERTIFIED TRUE COPY
Carolyn W Rogers
PROBATE JUDGE, YORK COUNTY, SC

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

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

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

8. No original Will has been presented to the Court.

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

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

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 CWR

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court 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.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 cwr

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations..

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

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

York, South Carolina
September 26, 2017.

#4 of 4 CWR

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	FILED RECEIVED
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
		2019 JUL 13 PM 4:55
In the Matter of JONATHAN MATTOX,	]	CAROLYN W. ROGERS
	]	JUDGE OF PROBATE
DAVID J. MATTOX,	]	YORK COUNTY, SC
	]	
Petitioner,	]	SUMMONS
vs.	]	
	]	
LISA JO BARE MATTOX,	]	
	]	
Respondent.	]	
	]	

TO THE RESPONDENT:

IF UPON AN INDIVIDUAL, OTHER THAN A MINOR, OR AN INCOMPETENT PERSON, CORPORATION, PARTNERSHIP, OR OTHER UNINCORPORATED ASSOCIATION WHICH IS SUBJECT TO SUIT UNDER A COMMON NAME:

YOU ARE REQUIRED to answer the Petition in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within thirty (30) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within thirty (30) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Petition.

IF UPON A MINOR, A PERSON JUDICIALLY DECLARED INCAPABLE OF CONDUCTING HIS OWN AFFAIRS, OR AN INCOMPETENT PERSON:

YOU ARE NOTIFIED if you have a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may defend on your behalf.

If you are not otherwise represented in this civil action or the Court shall deem it proper, the Court shall appoint a Guardian *ad litem* for you.

If you are a minor party of the age of 14 years or over, you may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If you are a minor party under the age of 14 years, your parent, general or testamentary guardian, relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If you are an imprisoned person, you, your relative or friend may apply for the appointment of a Guardian *ad Litem* to represent your interests in the above-entitled matter.

If no application for the appointment of a Guardian *ad litem* is made by or in your behalf within Thirty (30) days after service of this Summons upon you, then the undersigned as attorney for the Plaintiff will make application for the appointment of such Guardian *ad Litem*, after first giving notice of such application to the person or persons to whom such notice must be given under Rule 17(d)(3), (4), or (5), S.C.R.C.P.

IF UPON THE UNITED STATES OF AMERICA:

YOU ARE REQUIRED to answer the Petition in this action and to serve a copy of your Answer on the subscriber of this Summons at 223 East Main Street, Suite 520, Post Office Box 106, Rock Hill, South Carolina 29731, within Sixty (60) days after service of this Summons, exclusive of the day of service.

YOU ARE NOTIFIED that in case of your failure to appear and defend within Sixty (60) days after service of this Summons, judgment by default will be rendered against you for the relief demanded in the Petition.

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
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

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 Petitioner

By: 

July 13, 2018

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	NOTICE, MOTION and PETITION:
	]	
DAVID J. MATTOX,	]	FOR RELIEF FROM JUDGMENT
	]	
Petitioner,	]	and FOR STAY OF ENFORCEMENT
vs.	]	
	]	Pursuant to:--
LISA JO BARE MATTOX,	]	S.C. Code § 62-3-412,
	]	RULE 60(b)(1) and (2), S.C.R.C.P.,
Respondent.	]	and RULE 62(b) and (c), S.C.R.C.P.

2019 JUL 13 PM 4:57
KATHRYN W. ROGERS
YORK COUNTY PROBATE

To: The Respondent above named and
John P. Gettys, Jr.
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion and Petition herein, as follows:

DATE AND TIME: To be set by the Judge or Clerk of the Probate Court, or as soon thereafter as counsel may be heard.

PLACE: The Probate Court
York County Courthouse
1 South Congress Street
York, South Carolina 29745,
or at such other place as the Court may designate

Pursuant to Rule 60(b), S.C.R.C.P., the Petitioner DAVID J. MATTOX, by and through his attorneys, moves this Court for an Order:

1) Relieving the Movant from the Order filed September 26, 2017 in the above-captioned action in the Probate Cased indicated; a copy of the said Order is attached hereto and incorporated herein as Exhibit "A".

Or, in the alternative,

2) To treat this Motion and Petition and its requested relief as an independent action to

relieve the said person from the above-referenced judgment, order or proceeding;

And, in either event,

3) Staying any execution of, or any proceedings to enforce, the said judgment of this Court,
   a) pending the disposition of Movant's Motion and Petition for Relief from the said judgment, order or proceeding made pursuant to Rule 60(b), S.C.R.C.P., now pending in this Court, and
   b) permanently; and

4) For such other and further relief as this Court may deem just and proper.

Pursuant to Rule 11(a), S.C.R.C.P., counsel for the Movant are under no duty, prior to filing this Motion and Petition, to consult with opposing Counsel or to attempt in good faith to resolve the matter contained in this Motion and Petition due to the conclusory nature hereof. Counsel for the Movant further certifiy that such consultation would serve no useful purpose, as defined by the said Rule.

This Motion and Petition is based upon the applicable law, the matter set out herein below in this Motion and Petition by way of affidavits and other attachments hereto, and on the files, papers and pleadings in this Probate action.

1. By its Order of September 26, 2017, this Court determined that the late JONATHAN RAY MATTOX signed a Last Will and Testament in 2005 in Gwinett County, Georgia, a copy of which was entered into evidence at the hearing of this matter on June 19, 2017. [Finding of Fact 4.]
2. The said Order further found that both the Petitioner DAVID J. MATTOX and the Respondent LISA JO BARE MATTOX testified to their lack of knowledge as to where the original Will of the deceased was kept. [Findings of Fact 10. and 11.]
3. The said Order further found that no original will had been located [Finding of Fact 11. and generally], and concluded that there was no evidence that the original will had been inadvertently lost or destroyed. [Conclusion of Law No. D.]
4. The said Order concluded that in the absence of evidence that the Will had been inadvertently lost or destroyed, the legal presumption was was the Will had been intentionally revoked. [Conclusion of Law E.]

5. In light of that legal presumption, the decedent was found to be intestate without children, leaving his wife, the Respondent as his sole heir. [Conclusion of Law F. and the Order proper]
6. The original Will, conforming in all respects to the copy submitted as evidence, has lately been discovered in the possession of Mrs. Peggy M. Mattox. A copy of the said Will, as placed in evidence at the hearing on August 9, 2017, is attached hereto and incorporated herein as Exhibit "B".
7. Simultaneously with this Motion and Petition, the original Will is filed with this Court.
8. Mrs. Mattox has executed an Affidavit setting out the circumstances of her finding the original Will. This Affidavit is attached hereto and incorporated herein, unmarked but refererenced as Exhibit "C".
9. This Motion under Rule 60, S.C.R.C.P., and Petition under S.C. Code § 62-3-412, is filed within one year after the judgment contained in the said Order filed September 26, 2017.
10. A *Lis Pendens* relating to the real property of the Estate of JONATHAN RAY MATTOX has been filed on behalf of the Petitioner as 2018-LP-46-00407. A copy thereof is attached hereto and incorporated herein as Exhibit "D".
11. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, allow this Court to entertain a Petition for modification or vacation of its order filed September 26, 2017 in that the proponent of the original Will of JONATHAN RAY MATTOX was unaware of its existence at the time of the earlier proceeding, as defined under S.C. Code § 62-3-412(1).
12. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute mistake, inadvertence, surprise, or excusable neglect on the part of Petitioner, as defined by Rule 60(b)(1), S.C.R.C.P.
13. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, constitute newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), S.C.R.C.P., as defined by Rule 60(b)(2), S.C.R.C.P.
14. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that it is no longer equitable that the judgment should have prospective application, as defined by Rule 60(b)(5), S.C.R.C.P.
15. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that the Petitioner herein is entitled to stay the execution or any proceedings to enforce any judgment, order or proceeding resulting in, or represented by, the civil action and

judgment herein, pending the disposition of his Motion and Petition for relief made pursuant to Rule 60(b), S.C.R.C.P.

16. On knowledge and information, the facts alleged herein, considered as an Independent Action in Equity, and the reasonable inferences thereof, constitute a good, meritorious, and sufficient defense to the judgment, order or proceeding complained of, to the extent the same is required pursuant to Rule 60(b), S.C.R.C.P.

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

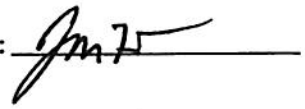
803 328-8822
803328-0523: Fax
lynn@mlblaw.com
zachmer@gmail.com

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 Petitioner

By: 

July 13, 2018

Rock Hill, South Carolina

FILED RECEIVED

STATE OF SOUTH CAROLINA — IN THE PROBATE COURT
CASE FILE NO: 2018CP4603672 40

COUNTY OF YORK

CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

DAVID J. MATTOX — LISA JO BARB MATTOX

PETITIONER(S) — RESPONDENT(S)

CHECK ONE:

[X] 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: [X] See attached order; [ ] Statement of judgment by the court.

Dated at York, South Carolina, this 26th day of September, 2017.

Carolyn W Rogers

Carolyn W. Rogers
Judge of Probate

This judgment was entered on the 26th day of September, 2017, and a copy mailed first class this 27th day of September, 2017 to attorneys of record or to parties (when appearing *pro se*) as follows:

Stephen D. Schusterman
Post Office Box 4211
Rock Hill, SC 29732

Attorney(s) for the Petitioner(s)

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

Attorney(s) for the Respondent(s)

Exhibit "A" 1

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	ORDER
PETITIONER	
Vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came on for hearing August 9, 2017, on the Summons and Petition for Formal Appointment filed by David J. Mattox (hereinafter referred to as the Petitioner), represented by attorney Stephen D. Schusterman. Present were the Petitioner and his attorney; Lisa Jo Bare Mattox (hereinafter referred to as the Respondent), and her attorney, John P. Gettys Jr. The Petitioner and the Respondent were the only witnesses to provide testimony at trial.

PLEADINGS FILED IN ACTION

1. This matter was initiated by the filing of a Summon and Petition for Formal Appointment on April 28, 2017.

2. A Notice of Hearing was mailed on June 19, 2017 with Proof of Delivery evidencing service upon the appropriate parties.

3. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

Based on the pleadings, testimony and evidence presented at trial, I

#1 of 4 ovr

Exhibit "A" 2

make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a resident of York County and passed away on October 1, 2016.

2. The Respondent is a resident of Lake Wylie, York County, South Carolina and is the surviving spouse of the Decedent.

3. The Court has jurisdiction pursuant to S. C. Code §62-1-302 and York County is the proper venue for this matter.

4. The Decedent signed a Last Will and Testament. (hereinafter referred to as the Will) in 2005 in Gwinnett County, Georgia, a copy of which was submitted into evidence at the hearing.

5. The Decedent met his wife, the Respondent, in 2006 and they were wed in 2011.

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

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

8. No original Will has been presented to the Court.

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

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

11. The Respondent testified she had no knowledge the Decedent had a Will, and his important papers were kept in his safe and neither a copy nor the original Will had been found.

#2 of 4 DWR

Exhibit "A" 3

CONCLUSIONS OF LAW

Based on the record, the findings above, testimony and evidence provided at the hearing, the court concludes:

A. Jurisdiction of this Court 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.

B. It is well settled law in South Carolina that when a testator takes possession of his Will and it cannot be found after his death, a presumption arises that it was deliberately destroyed. Davis et al. v. Davis et al., 52 SE2d 192 (1949).

C. If the original Will cannot be found there is a presumption it was intentionally destroyed. Golini v. Bolton, 482 SE2d 784 (Ct. App. 1997).

D. The Petitioner presented no credible evidence to the court to rebut the presumption of intentional revocation, nor any evidence the Will was accidentally destroyed or unintentionally revoked as is required to be proven by clear and convincing evidence in order to rebut the presumption defined in the Golini case.

E. The Petitioner presented no evidence of the 2005 Will being inadvertently lost or destroyed nor any evidence to rebut the presumption said Will was intentionally revoked.

F. The Decedent died without a Will and had no children, and the Petitioner is his sole heir.

G. The Decedent's intestacy renders moot the Respondent's petition for the omitted spouse share.

H. Even if the Court were to rule on the omitted spouse issue there was no credible evidence presented to the Court that the Decedent provided for his spouse outside of the Will or in lieu of a testamentary disposition.

#3 of 4 mm

Exhibit "A" 4

I. There being no evidence presented by the Petitioner as to the unintentional revocation of the 2005 Will and no evidence the Decedent provided for his wife in lieu of a testamentary disposition and outside of the Will should one exist, I find that the Petitioner qualifies for relief under S. C. Code Ann. 62-1-111 which allows the court to award attorney's fees and costs as justice and equity may require, including reasonable attorney's fees.

J. The Petitioner shall pay one-half ($3,750.00) of the attorney's fees of Respondent (one-half of $7,500.00) as a result of Petitioner's failure to provide any credible proof of his allegations..

IT IS HEREBY ORDERED that the Decedent died intestate without children, leaving his spouse as his sole heir. Petitioner's request to restrain the Personal Representative from exercising her powers and the Petition for appointment as Personal Representative are denied. The Petitioner is ordered to remit the sum of $3,750.00 to the Respondent as payment of one-half (1/2) of the attorney's fees incurred in this matter.

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

York, South Carolina
September 26, 2017.

#4 of 4 CWR

Exhibit "A" :

LAST WILL AND TESTAMENT

OF

JONATHAN RAY MATTOX

STATE OF GEORGIA:
COUNTY OF GWINNETT

I, **JONATHAN RAY MATTOX**, of the said county and state, being of sound and disposing mind and memory, do hereby make and publish this my Last Will and Testament, hereby revoking all other Wills and Codicils heretofore made by me.

ITEM I

I wish my body buried in a suitable manner and a suitable memorial erected and the costs thereof paid out of my estate.

I direct that all of my legal debts be paid out of my estate as soon as practicable.

ITEM II

I give, bequeath and devise all of my property, both real and personal, of whatever kind and wherever situated to my brother, **DAVID JAMES MATTOX**, in fee simple and forever, *per stirpes*. As for my brother, **MARK ANTHONY MATTOX**, I have intentionally made no provision for said brother hereunder and I purposefully exclude him as a beneficiary hereunder for personal reasons.

ITEM III

Should my brother, **DAVID JAMES MATTOX**, predecease me leaving no lineal descendants, then I give, bequeath and devise all the rest and remainder of my property of whatever kind and wherever situated to my mother, **PEGGY YVONNE MATTOX**, in fee simple and forever *per stirpes*.

J. R. M.
Initials

Exhibit "B" 1

ITEM IV

I give, bequeath and devise all the rest, residue and remainder of my property of every kind and description, and wherever located, including any lapsed or void legacy or devise to the persons who would have been entitled thereto under the laws of descent and distribution of the State of Georgia if I had died intestate at that time owning such property in fee simple.

ITEM V

I hereby constitute and appoint my mother, **PEGGY YVONNE MATTOX**, as Executor of this Will, relieving her of the necessity of making returns or giving bond to any court, and I specifically empower her to sell any and all of my property, at public or private sale, with or without notice, and without order of any court, for the purpose of paying debts of my estate or carrying out the provisions of this Will.

ITEM VI

In the event my mother, **PEGGY YVONNE MATTOX**, shall predecease me or fail to serve as Executrix of this Will, then and in that event I name and appoint my brother, **DAVID JAMES MATTOX**, as Executor of this Will.

ITEM VII

In the management, care and disposition of my estate and any trust created hereunder, I confer upon the Executrix and the survivors and successors in office, the power to do all things, in each instance as may be, in the sole discretion of my Executrix, necessary, proper or advisable, including the powers contained in *O.C.G.A.*, § 53-12-232, as they now exist, that is, as such powers may have been amended up to and through the date of execution of this Will, which powers are expressly incorporated into this Will by reference, with the same effect as though such language were set forth verbatim herein.

J.R.M.

Exhibit "B" :

IN WITNESS HEREOF, I have hereunto set my hand and affixed my seal to this my Last Will and Testament consisting of 3 pages, including this page, identifiable by my signature or initials.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Candi Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B" 3

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared **JONATHAN RAY MATTOX**, Stacey Brown and Justin Skaggs, known to me to be the Testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, **JONATHAN RAY MATTOX**, declared to me and to the said witnesses in my presence and that said instrument is his Last Will and Testament and that he had willingly made and executed it as his free act and deed for the purpose therein expressed. The witnesses, each on his or her oath, stated to me in the presence and hearing of the Testator that the Testator had declared to them that the instrument is his Last Will and Testament and that he executed same as such and wanted each of them to sign it as a witness; and upon his or her oath each witness stated further that he or she did sign the same as a witness in the presence of the Testator and at his request; that he or she was at that time fourteen (14) years of age or over and was of sound mind; and that each of said witnesses was then at least fourteen (14) years of age.

Jonathan Ray Mattox
JONATHAN RAY MATTOX

Stacey Brown
Witness

Justin Skaggs
Witness

Sworn to and subscribed before me by **JONATHAN RAY MATTOX**, and sworn to and subscribed before me by Stacey Brown and Justin Skaggs, witnesses, this 17th day of February, 2005.

Caroline Knight
NOTARY PUBLIC

My Commission Expires:
10-22-07

Exhibit "B"

Exhibit "B" :

Last Will

and

Testament

of

JONATHAN RAY MATTOX

NELSON H. TURNER
ATTORNEY AT LAW
FIVE HURRICANE SHOALS ROAD
LAWRENCEVILLE, GEORGIA 30045
(770) 962-8111

STATE OF SOUTH CAROLINA	]	IN THE PROBATE COURT
	]	
COUNTY OF YORK	]	PROBATE CASE FILE No. 2016-ES-46-01230
	]	
In the Matter of JONATHAN MATTOX,	]	
	]	
DAVID J. MATTOX,	]	
	]	AFFIDAVIT
Petitioner,	]	
vs.	]	IN SUPPORT OF MOTION
	]	
LISA JO BARE MATTOX,	]	
	]	
Respondent.	]	

PERSONALLY appeared before me, a notary public, the undersigned affiant, who being duly sworn, deposes and says that:

1. I am Peggy M. Mattox. I am the mother of the late JONATHAN RAY MATTOX and of DAVID J. MATTOX. I live at 218 Shore Line Drive, Town of Pawley's Island in Georgetown County, South Carolina.
2. I knew my son JONATHAN RAY MATTOX had executed a will; I saw it in his truck the day it was executed. I did not see it again until the events described below.
3. During the litigation between DAVID J. MATTOX and LISA JO BARE MATTOX above, no one contacted me about the location of JONATHAN RAY MATTOX' will. Had anyone done so, I would have had no information to give them.
4. In or about October, 2017, I bought a new car. I then looked into selling my old car, which was then 17 years old.
5. I went into my safe to find the title to the old car. While looking for the title, I found the original will of JONATHAN RAY MATTOX in my safe.
6. Until I found this document, I had no knowledge of its presence in my safe. I very seldom use my safe or go into it.
7. JONATHAN RAY MATTOX, DAVID J. MATTOX and I know the location of the combination to my safe. I can only speculate that JONATHAN RAY MATTOX placed it there because the will named me as Personal Representative.
8. No one had told me the will had been placed in the safe.

9. Upon discovering the will, I contacted my son DAVID J. MATTOX and gave the original to him.

Peggy M. Mattox
PEGGY M. MATTOX

SWORN TO and subscribed before me this day of July 12, 2018.

JAMIECE C ARCHIE
My Commission Expires
NOTARY PUBLIC
09-27-2027
STATE OF SOUTH CAROLINA

NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 9-27-2027

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

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.

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

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

THE COURT - Right.

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

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

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

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

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

MR. PIERCE - Correct, Your Honor.

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

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

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

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

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

MR. PIERCE - Correct, Your Honor.

THE COURT - Okay. All right.

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

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

THE COURT - Okay.

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

THE COURT - All right.

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

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

THE COURT - Okay.

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

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

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

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

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

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

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

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

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

MR. PIERCE - No, that's okay. I'm -- I'm pulling up the rule now, Your Honor. And also, Your Honor, regardless I guess of whether or not the Court's interpretation or Mr. Foster's interpretation of that rule stands, you know, it does require that there was no -- there was no knowledge of the existence of the Will. One way or the other I believe that's clear. And in Peggy Ann Mattox's affidavit, at paragraph two it 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. So I believe there was knowledge that it existed, and regardless of whether it has to be a second Will or a newly discovered Will at a later time, I believe that there was knowledge that this

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

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

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

THE COURT - Anything else, Mr. Pierce?

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

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

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

THE COURT - Thank you, sir.

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

THE COURT - Thank you, Mr. Pierce.

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

THE COURT - You certainly may.

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

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

THE COURT - Thank you, sir.

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

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

THE COURT - Yes, sir.

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

THE COURT - Okay.

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

THE COURT - Okay.

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

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

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

THE COURT - Oh, ---

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

THE COURT - Thank you, Mr. Pierce.

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

MR. FOSTER - Thank you, sir.

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

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

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

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

THE COURT - Okay.

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

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

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

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

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

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

THE COURT - Yes, sir.

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

THE COURT - Okay, hold on one moment.

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

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

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

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

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

(WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

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

THE COURT - Thank you, Mr. Foster.

MR. FOSTER - Sorry I was so slow.

If I may go ahead or should I ---

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

MR. FOSTER - Thank you.

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

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

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

THE COURT - You may.

(WHEREUPON, DOCUMENT HANDED UP TO THE COURT)

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

THE COURT - Let me ---

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

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

MR. FOSTER - Okay, sir.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT - Thank you, Mr. Foster.

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

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

MR. PIERCE - Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FOSTER - Yes, sir.

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

MR. FOSTER - Yes, sir.

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

MR. FOSTER - I defer to the Court.

THE COURT - Okay.

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

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

THE STATE OF SOUTH CAROLINA
In The Circuit Court

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

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

December 5, 2018

Rock Hill, South Carolina

By: /s/ John Martin Foster

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

STATE OF SOUTH CAROLINA **IN THE PROBATE COURT**
CASE FILE NO.: 2016ES4601230

COUNTY OF YORK

IN THE MATTER OF JONATHAN MATTOX

JUDGMENT

David J. Mattox — PETITIONER(S)

Lisa Jo Bare Mattox — RESPONDENT(S)

CHECK ONE:

[X] 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: [X] 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. Nathanial Pierce, Esquire
Post Office Box 707
Rock Hill, SC 29731

NOV 26 2018

STATE OF SOUTH CAROLINA	IN THE PROBATE COURT
COUNTY OF YORK	Case No: 2016-ES-46-01230
IN RE: Estate of Jonathan Mattox	
David J. Mattox,	
PETITIONER	ORDER ON OMITTED SPOUSE CLAIM
vs.	
Lisa Jo Bare Mattox,	
RESPONDENT	

The within matter came before the Court on October 5, 2018, pursuant to the Notice, Motion and Petition for Relief from Judgment filed by David J. Mattox ("Petitioner"), represented by John Martin Foster and Zach Merritt. Present for the hearing were the Petitioner and his attorneys; and the Respondent, Lisa Jo Bare Mattox, and her attorneys, John P. Gettys, Jr. and J. Nathanial Pierce.

The hearing was initiated upon the filing of a Summons, Notice, Motion and Petition for Relief from Judgment and for Stay of Enforcement on July 13, 2018. A Notice of Hearing was mailed on September 7, 2018, with Proof of Delivery evidencing service upon the appropriate parties. Proof of Service of the Summons, Petition and Notice of Hearing are in the Court's file.

I have reviewed the evidence and case law presented at the October 5, 2018, hearing, as well as the recording of the testimony given in the hearing held on August 9, 2017, and I make the following:

FINDINGS OF FACT

1. Jonathan Mattox (hereinafter referred to as the Decedent) was a

#1 of 4

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.

#2 of 4 CWR

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

#3 of 4 CWR

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

THE STATE OF SOUTH CAROLINA
In The Circuit Court

FILED RECEIVED
2018 DEC -5 PM 4:26
CAROLYN W. ROGERS
JUDGE OF PROBATE
YORK COUNTY, SC

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.

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

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

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

RECEIVED
Jun 26 2020
SC 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: _____