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.

APPENDIX

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The South Carolina Court of Appeals

David J. Mattox, Appellant,

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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
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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Unpublished Opinion No. 2022-UP-236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.

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William A. McKinnon, Circuit Court Judge

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DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

PETITION FOR REHEARING

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BACKGROUND

By its Unpublished Opinion herein dated June 1st, 2022, the Court holds, in relevant part:

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

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

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

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

RULE 60(b) RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

June 16, 2022

Respectfully submitted,

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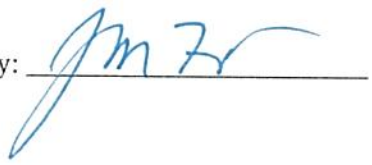
By: 

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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,

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Attorneys for Appellant

By: 

June 16, 2022

Rock Hill, South Carolina

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DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

BRIEF OF APPELLANT

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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:
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> *[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:

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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,

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SC Court of Appeals

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

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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.

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October 2, 2020

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APPEAL FROM YORK COUNTY
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October 2, 2020

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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

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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]

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