THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

October 26, 2022

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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). Appellant did not present the purported original will at the hearing. (R. 3). However, Appellant did introduce a copy of the purported will, and the Court accepted it into evidence. (R. 3). Following the hearing, and per the Court's Order dated 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). The Court held 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, nearly 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, including Respondent's entitlement to an omitted spouse's share pursuant to S.C. Code Ann. § 62-2-301 and Appellant's entitlement to relief pursuant to S.C. Code Ann. § 62-3-412. (R. 228-262). In his order dated September 3, 2019, Judge McKinnon affirmed Judge Rogers, finding (1) 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).

The South Carolina Court of Appeals filed an unpublished opinion, bearing Unpublished Opinion Number 2022-UP-236, on June 1, 2022, affirming Judge McKinnon. Petitioner filed a Petition for Rehearing, which was summarily denied on September 7, 2022. This Writ of Petition for Certiorari followed.

ARGUMENT

Appellant failed to delineate distinct questions addressed to this Court, instead referencing various portions of the Court of Appeals' Order and arguing against the rulings. Respondent has attempted to discern Appellant's questions to this Court and present counterarguments below in conformity with Rule 242(f), South Carolina Rules of Appellate Procedure ("S.C.R.A.P."). To the extent this Court determines Appellant raised questions not addressed herein, Respondent respectfully requests the right to respond accordingly.

I. The Court of Appeals correctly held Appellant is not entitled to relief under Rule 60(b) of the of the South Carolina Rules of Civil Procedure.

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...." To prevail on a motion under Rule 60(b)(2), the court must find 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. *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 the rote assertion that four of the five elements under *Southeastern Housing* have been conclusively established. However, as determined by the Court of Appeals and as set forth below, Appellant's argument fails in at least two respects.

a. The Court of Appeals correctly held Appellant is not entitled to relief under Rule 60(b)(2), S.C.R.C.P. because the purported newly discovered evidence would not change the result if a new trial were granted.

The South Carolina Probate Code provides that 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. S.C. Code Ann. § 62-2-301(a). Appellant states in his Final Brief the Decedent signed the purported original will in 2005. Final Br. of Resp't, 4. Respondent and Decedent were married in 2011, subsequent to the execution of the purported original will. (R. 8). Respondent timely submitted an omitted spouse's claim in response to Appellant's Summons and Complaint filed April 28, 2017. (R. 9). The parties fully litigated Respondent's omitted spouse claim, and the Probate Court issued a ruling. (R. 9).

The Probate Court held at the conclusion of trial that Respondent's omitted spouse claim was moot based on Decedent's ultimate intestacy, but also held "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. 9). The Probate Court also held Respondent is Decedent's sole heir. (R. 9). It is clear Respondent is entitled to an omitted spouse's share, and she would stand to receive "the same share of the estate [she] would have received if the decedent left no will." S.C. Code Ann. § 62-2-301(a). Therefore, regardless of whether the purported original will be accepted, Respondent stands to take Decedent's entire estate. The "newly discovered" purported original will cannot change the result if a new trial is granted, and Appellant's claim for relief under S.C.R.C.P. 60(b)(2) fails as a matter of law.

b. The Court of Appeals correctly held Appellant is not entitled to relief under Rule 60(b)(2), S.C.R.C.P. because the original will does not constitute "newly discovered evidence" and Appellant failed to exercise due diligence in his search for the original will.

Appellant did not exercise due diligence in locating the original will, nor does the original will constitute newly discovered evidence. In order to satisfy *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 also 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.

Appellant was aware of the original will's existence and admitted as much in his original Summons and Petition. (R. 197-228; 26). Indeed, Appellant entered a photocopy of the original will into evidence at trial. Appellant testified at trial he knew Decedent kept the original will "in a safe place." (R. 8). Appellant's mother testified that she discovered the original will in her home, in a safe for which only she, Decedent, and Appellant knew the location and combination. (R. 75). Appellant confirms he lived in the home with his mother at the time she discovered the original will. Resp't's Pet. Writ of Cert., 5. At trial, the Probate Court took testimony that Appellant lived with his mother in 2017, at the time when the underlying action was tried. (R. 4). 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). Because Appellant was aware of the existence of the original will and could have discovered the original will at the time of trial, the original will does not constitute newly discovered evidence. Further, 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).

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

As a threshold matter, as noted by the Court of Appeals, Appellant failed to acquire a ruling on his evidentiary argument, to the extent such argument was properly raised at oral argument of his 60(b) motion. Such failure precludes Appellant from raising the issue on appeal. *See BMW of North America, LLC v. Complete Auto Recon Services, Inc.*, 399 S.C. 444, 454-455, 731 S.E.2d 902, 908 (Ct. App. 2012) (holding where a party raised the issue of an illusory insurance policy to the Court at oral argument, but the Court did not address the issue in its order, and the party raising the issue failed to file a Rule 59(e) motion to ask the Court for a ruling, the issue was not preserved for appellate review).

Appellant argued to the Court of Appeals 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. Final Br. of Resp't, 10. However, 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 resided, at the time of trial, in the home where the purported original will was located, and the Probate Court accepted this fact as evidence. (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.

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 ("S.C.R.E.") 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, Judge Rogers sent a letter, dated November 2, 2018, 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 original will was ultimately found. (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 in response to this letter, if in fact judicial notice was taken. 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 at that time either. 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 grounds until Appellant's Motion to Reconsider before the Circuit Court, following the Circuit Court's affirmation of the Probate Court. (R. 184).

Based on the above, Appellant is not entitled to relief on this evidentiary issue procedurally or substantively.

III. The Appellant is not entitled to relief under S.C. Code § 62-3-412.

Here again, Appellant failed to preserve this issue for appellate review. *See BMW of North America*, 399 S.C. at 454-455, 731 S.E.2d at 908 (holding where a party raised the issue of an illusory insurance policy to the Court at oral argument, but the Court did not address the issue in its order, and the party raising the issue failed to file a Rule 59(e) motion to ask the Court for a ruling, the issue was not preserved for appellate review).

Substantively, Appellant's arguments both before the Circuit Court and Court of Appeals were limited to section 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." Final 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, section 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 photocopy of the original will for probate. The Probate Court, after a hearing at which Appellant was present and represented by counsel, 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." Final Br. of Resp't, 4. Appellant does not seek to enter a "later-offered will" or "another will." Rather, he seeks to enter the original version of a will he knew to exist at the time of trial. (R. 26). Therefore, section 62-3-412(1) does not apply in this case.

To the extent this Court finds section 62-3-412(1) does apply generally, 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" to find the statute does not apply to the facts at issue. 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, Appellant's mother's affidavit 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, 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. The Court of Appeals affirmed the Circuit Court. Further, the Court of Appeals ruled Appellant failed to preserve his evidentiary argument and his argument for relief under S.C. Code Ann. § 62-3-412(1). For the reasons set forth above, Respondent respectfully requests this Court deny Appellant's Petition for Writ of Certiorari.

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PROOF OF SERVICE

The undersigned certifies that he has served this Respondent's Return to Appellant's Petition for Writ of Certiorari via Federal Express, postage prepaid, on October 26, 2022, addressed to its attorneys of record to the below addresses:

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