RECEIVED
Jun 26 2020
SC Court of Appeals

1 support of our opposition with attached case law, if you'd
2 like.
3 MR. FOSTER: Would you like to receive that
4 at this time?
5 THE COURT: Sure. We'll just go ahead and
6 hand up the whole thing. Obviously, they're not going to be
7 read during this hearing.
8 OPENING STATEMENT BY MR. FOSTER CONTINUES:
9 MR. FOSTER: The first issue we discussed in
10 our brief, ma'am, is whether this issue is res judicata. We
11 maintained this is a situation where the issue was raised -
12 well, let me go back a step. Assuming that the will we have
13 given you timely is what it seems to be, the question still
14 arises whether we have any right to make a claim given the
15 fact that Ms. Mattox would be an omitted spouse. That is to
16 say Mr. Jonathan Mattox married her after the execution of
17 the will. The will makes no reference to her and it makes no
18 provision directly as to what would to happen were he to
19 marry later. So, the first question would be whether this
20 matter is res judicata as to that issue. We maintain to the
21 Court that this issue was raised in the original order and
22 indeed arguably in the original action, but was not ruled
23 upon. We based that upon the language of the Court, which
24 states in the order of September 2017, that I referenced, and
25 I'm hoping I can find it right here. Um, even if the Court

1 were to rule on the omitted spouse issue, there was no
2 credible evidence presented to the Court, etcetera, etcetera.
3 While I appreciate the fact that a Court, or may I be
4 allowed, an attorney writing for the Court if that was the
5 case, may use subjunctive mode. That is not a ruling. That
6 is a statement about were I to do X, then Y would be the
7 case. We've cited the language from the Supreme Court of
8 Ohio, as well as early cases from South Carolina and the
9 United States Supreme Court about the effect of what is or is
10 not res judicata. The Ohio Supreme Court facing a similar
11 situation has held, "When judgment of a court is not
12 dispositive issues which a party later seeks to litigate res
13 judicata is not applicable. This is true even if the prior
14 court decision has discussed the issues that is a subject of
15 the current litigation", which of course in this case it
16 would be. So, assuming, ma'am, that we are not de- we are
17 not precluded by res judicata, what then must we prove to go
18 forward or to go to trial? There is no question that §62-2-
19 301 requires us to prove either A, that the omission from the
20 will of the later married spouse was intentional, which we
21 don't maintain, or that that testator provided for the spouse
22 by transfer outside the will and the intent of the testator
23 is shown by his statements or from the amount of a transfer
24 or other evidence. That is precisely what we contend. We
25 have set forth in our brief what we understand to be the

1 case. We have attached a deed, executed in June 9 - June
2 29th, 2015 by which Mr. Jonathan Mattox's aunt transferred to
3 himself and the Respondent, a resident - her residence as
4 joint tenants of right of survivorship. To the extent I'm
5 allowed to say so to the Court as an officer, we have not
6 provided an affidavit, but I was ensured by the trustee for
7 the grantor, Nancy Mildred Hayes, that this was done at the
8 request of the deceased. So, her name was put down as joint
9 tenant with right of survivorship. We've attached that deed.
10 Um, on his death, the house passed to her. Now, at this
11 point, I must confess to a mistake, which I hope the Court
12 can forgive. I made a big thing - or I made a notice of the
13 fact that Ms. Mattox - Mrs. Mattox did not list this in her
14 inventory and appraisement. Under the modern terms of
15 inventory and appraisement, as I read it, she is not required
16 to list it. I was relying upon the older language, at least
17 as I remembered it. It was, however, unlisted. We've
18 attached documentation showing that the residence was valued
19 by the County of York at $395,000. I believe the Court may
20 take judicial notice, and I do assert to it, that tax values
21 in this county, as in most counties, is low and therefore we
22 believe that we can suitably state that this residence, which
23 passed to Ms. Mattox without our knowledge any consideration
24 on her part, other than her spouse - spousal situation, um,
25 was therefore gratuitous. We believe that with discovery,

1 other property may be discovered and that is what we ask to
2 do in this case. Now, as I understand it, my opponents spent
3 a good bit of time discussing Rule 60 and I wish to go into
4 that. Rule 60, in my opinion, specifically allows for this
5 by allowing us to come forward where there has been a mistake
6 or where there has been newly discovered evidence. I would
7 suggest to the Court that this is a classic example of newly
8 discovered evidence, if it ever existed. I'm not going to
9 argue those points, but I ask the Court if it would have the
10 patience to let me respond. We require also to be able to
11 show that we have a meritorious defense or claim. That's
12 what I've attempted to set forward in going through the
13 property that was transferred, that we know that was
14 transferred to Ms. Mattox gratuitously. We believe there to
15 be other property. We're not required to prove that we will
16 prevail on that issue, but merely that we have set out a good
17 case, which if established at trial, will constitute a valid
18 claim of defense. We've cited the federal law to that effect
19 under the federal rules.
20 THE COURT: Are you saying other property
21 than what's listed on the inventory?
22 MR. FOSTER: I'm sorry, ma'am. I have to
23 ask ----
24 THE COURT: Are you saying other property
25 than what's listed on the inventory?

1 MR. FOSTER: We - it may be listed on the
2 inventory, ma'am. We do not know the tittle to that
3 property, and therefore that, among other property is what we
4 seek to discover.
5 THE COURT: Okay.
6 MR. FOSTER: The federal precedent also
7 states that we have to state it with sufficient particularity
8 for the Court to determine that there is legal merit. We
9 believe that we have done so in setting out the in - the
10 facts as to this residence. We also state the fact that
11 under federal precedence, we have the right to a generous
12 interpretation of our attempted case. We cannot go forward
13 with that issue without discovery. Discovery is what we
14 seek. We believe that what we have in this case is a prima
15 facie case to reopen the estate, to pursue discovery, and to
16 see if, after that discovery is made, whether grounds exist
17 under the statute in question to allow Mr. Matt- David Mattox
18 to claim a portion of the estate. That would be again §62-2-
19 301(a)2. Ma'am, that is where we're at, basically. I will
20 be happy to answer any question and I defer to opposing
21 counsel.
22 THE COURT: Thank you, Mr. Foster. Mr.
23 Pierce and Mr. Gettys?
24 OPENING STATEMENT BY MR. PIERCE:
25 MR. PIERCE: Yes, Your Honor. We are going

1 to have a two-part argument. I'm going to argue the 60B
2 argument, as well as the statutory provisions raised by the
3 Petitioner and Mr. Gettys is going to address our Motion to
4 Cancel the lis pendens, which was included in our response.
5 Your Honor, I believe the Court does have a sufficient
6 statement of the facts, so I'm not going to go through those.
7 The Petitioner has made a Motion for Relief under the
8 judgment of Rule 60, specifically reciting 60(b)2 and 60(b) -
9 excuse me, 60(b)1, 60(b)2 and 60(b)5, which we'll address
10 those more specifically herein. Um, as a threshold issue,
11 um, there are two threshold issues. Um, the trial court does
12 have absolute discretion under Rule 60(b) to grant relief
13 under a judgement and the moving party does bear the burden
14 of proving the facts entitling (inaudible) relief. Starting,
15 um, with the statutory provisions cited, Your Honor, I
16 believe the only one cited in the - the actual motion was
17 actually §62-3-412(1), um, and it provides that if there is a
18 will that the parties are unaware of that could provide
19 grounds - that could provide grounds for reopening the
20 estate. In the affidavit, um, attached to the motion, which
21 I believe is provided with the Court, Paragraph 2 says, and
22 this is, uh, Peggy - this is Peggy Mattox, um, mother of the
23 decedent, what I understand. Paragraph 2 says, "I knew my
24 son, Jonathan Ray Mattox, had executed a will. I saw it in
25 his truck the day it was executed. I did not see it again

1 until the events described below." I believe this is
2 directly in opposite to the requirements of the statute that
3 the parties were unaware that the will existed. Um, moving
4 to Rule 60(b)1, Your Honor, um, it does allow the Court to
5 set aside a judgement for a mistake, inadvertent surprise or
6 excusable neglect under (inaudible) 388S.C.301, which I
7 included in my packet. In determining whether relief under
8 60(b)1 would be granted, the Court must consider the
9 promptness was in which the (inaudible) reasons for the
10 failure to act promptly, existence of a meritorious defense,
11 and prejudice to a non-moving party. As far as promptness
12 goes, Your Honor, Peggy Mattox's affidavit states that she
13 discovered the will in October of 2017 and turned around and
14 gave it to the Petitioner shortly, thereafter, meaning the
15 Petitioner has been in possession of this purported original
16 will for nine months before filing anything with the Court.
17 We would say that that is an obvious lack of promptness. Um,
18 there has - there has been nothing alleged to explain the
19 failure to act promptly. The entire crux of this case, Your
20 Honor, was the lack of an original will. It was found one
21 month after the final order was issued and it wasn't raised
22 for nine months. There's no reasonable explanation as to why
23 that would be the case, if it was in hand and it was
24 dispositive for them the underlying case. Mr. Foster
25 mentioned the meritorious defense requirement. I believe it

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

1 packet we handed to the Court initially under Breen v.
2 Inegrity, which is a 2018 South Carolina Court of Appeals
3 case cited as 2018 West Law WL1937099. Um, belief under
4 60(b)2 depends on a presentation of the evidence that could
5 not have been found before trial with due diligence. Your
6 Honor, Peggy Mattox's affidavit states that they knew a will
7 existed, they knew that - excuse me. The Petitioner, Peggy
8 Mattox and the decedent all knew of the location and
9 combination of the safe in which the will was found. Um, a
10 safe is a natural and obvious place that people would keep
11 important documents, like a will. We - we believe that all
12 of that, Your Honor, shows that the - the original - the
13 purported original will could have been discovered prior to
14 trial with due diligence. And additionally, um, based on the
15 discussion of the omitted spouse statute earlier, we believe
16 the outcome of the trial would be the same if the estate were
17 to be reopened. Finally, Your Honor, under 60(b)5, South
18 Carolina Court of Appeals in Malarky v. Malarky has held
19 belief under 60(b)5 is available only in cases of fraud upon
20 the Court or in rare special exceptional or unusual
21 circumstances that may warrant equitable relief including
22 accident or mistake. I don't believe there's been any fraud
23 alleged and I don't believe a lack of due diligence in
24 finding an original will constitutes a rare, special,
25 exceptional or unusual circumstance. All that being said,

1 Your Honor, I do not believe the Petitioners are entitled to
2 relief either the (inaudible) Code or the Rules of Civil
3 Procedure. And I do hand it over to Mr. Gettys now to
4 address our Motion to Cancel unless you have any questions.
5 THE COURT: Thank you. I don't think I do.
6 Um, Mr. Foster, do you want to respond to that argument
7 first?
8 MR. FOSTER: Does the Court wish me to, or
9 shall I wait for Mr. Gettys?
10 THE COURT: It's up to you.
11 MR. FOSTER: Okay. Well, I will do so
12 briefly. First of all, with respect to Mr. Pierce who - a
13 good lawyer with whom I've locked horns many times.
14 Apparently, I have confused him by my affidavit. Let me go
15 through this. The lady says she was not aware that the will
16 was there. She sold her car in October '17 and then after
17 that went to her safe. She did not say, and her affidavit
18 does not say, "I found the thing in October." That is
19 conscious because she could not say when she found the thing.
20 She knew it was after the event. She could not say;
21 therefore, I did not seek to say it in the affidavit.
22 Secondly, we go to the question, I may be anticipating Mr.
23 Gettys, of the breach of the lis pendens. The lis pendens is
24 perfectly proper if this Court allows us to go forward and to
25 seek discovery on the full case. If, for whatever reason, it

1 decides we're not so entitled, it of course, is
2 challengeable. However, with respect to Counsel, this is a
3 situation solvable by either placing the money in the
4 lawyer's trust or by putting up a bond. In either event,
5 there is no harm recognized to Ms. Mattox and consequently,
6 my view is there is no issue there. The matter comes down to
7 whether this Court believes we are entitled to relief. That
8 would be my brief response.
9 THE COURT: Mr. Gettys?
10 OPENING STATEMENT BY MR. GETTYS:
11 MR. GETTYS: Thank you, Your Honor. Your
12 Honor, just because I'm a big picture guy I think more than
13 anything else. This is an omitted spouse claim. I mean,
14 that what this all revolves around is an omitted spouse claim
15 and if the will that's purported original will were to be
16 found to be a truly an original will, the Court would then
17 entertain why that will would take away from the spouse's
18 intestate rights of a hundred percent of the assets because
19 there are no children of the decedent. And so, we tried the
20 case, based upon the issues related to a copy of the will
21 being handed up by the brother of the decedent and had much
22 testimony at the time relative to the omitted spouse claim,
23 as well, and are prepared to do that again, if need be. But
24 the fact of the matter is that at some point after that
25 trial, this purported proper original will was located and it

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

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

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

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

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

1 THE COURT: Thank you. Couple of
2 questions. Mr. Foster, do you have - do you argue with the
3 fact that that deed was a - a deed into the husband and wife
4 as joint tenants, rights to survivorship. Do you have any
5 consternation about that deed?
6 MR. FOSTER: No, ma'am. My concern about
7 that is quite simply this and I hope the Court will allow me
8 to be as blunt as Mr. Gettys. We have no knowledge of any of
9 this property being sold and I got involved with this when
10 this matter was solved. However, it may appear to
11 Respondent. However, within days after, and I believe this
12 is something admissible, within days after your Court's
13 order, the Respondent received proceeds of 2.1 million
14 dollars from the sale of property that was in the estate.
15 That was to my knowledge also listed in the inventory and
16 appraisement. If this Court's decision, if I may continue,
17 ma'am, if this Court's decision is based upon its concern as
18 we acknowledge that the resident was not estate property, it
19 must act accordingly. My concern is this and it goes back to
20 my point about discovery; we don't know what assets are
21 available in this case. We don't know what's been paid; we
22 don't know what's been saved. We simply don't know, and we
23 are asserting a cause of action, which should we be able to
24 produce the evidence to succeed to trial, which would allow
25 my client, if I understand the law correctly, one-half of

1 those assets. On that basis, I don't think, I at least, the
2 Court must act as it sees fit, I don't see where I, at least,
3 can lift the lis pendens in good faith. We have proposed and
4 we again propose, a trust, an interest-bearing account or a
5 bond, as the Court may determine. I did wish to respond to
6 Mr. Gettys, if this is a good time.
7 THE COURT: Uh-huh. Go ahead.
8 MR. FOSTER: Shall I go ahead, ma'am?
9 THE COURT: Well, let me ask you a couple
10 of questions, first. So, Mr. Gettys has - is this property
11 under contract or has it actually been sold?
12 MR. GETTYS: Yes, ma'am. On the affidavit -
13 well, I think, and I probably should say, there are three
14 tracts. There was one tract that was under contract prior to
15 the original hearing before this court and it sold, and those
16 proceeds distributed appropriately.
17 THE COURT: How is it titled?
18 MR. GETTYS: That one was an estate asset.
19 THE COURT: And it was entitled in the
20 decedent's name?
21 MR. GETTYS: The decedent's name. Yes.
22 (inaudible)
23 THE COURT: And I do recall that there was
24 a contract pending at that time.
25 MR. GETTYS: Yes, ma'am. That's right.

1 THE COURT: No, is that the property that's
2 listed on the inventory as the 26 acres?
3 MR. GETTYS: At least that or some portion
4 of that. Yeah, a portion of that.
5 THE COURT: A portion of the 26 acres?
6 MR. GETTYS: Yes, ma'am. The remaining
7 portion of 26 acres is under contract and that contract is
8 attached to my client's affidavit before you.
9 THE COURT: Okay.
10 MR. GETTYS: There is a third parcel and
11 that is my client's residence.
12 THE COURT: And that's the one that you are
13 maintaining is joint with rights to survivorship.
14 MR. GETTYS: That is the one that we believe
15 to be joint - and I should say, Your Honor, you know, this
16 idea that there are other assets out there. You know, my
17 client prepared an inventory that's the assets unless there's
18 some showing that we've hidden something purposely from the
19 Court, it's again this esoteric argument that we need
20 discovery to harass and intimidate our client is our
21 position.
22 THE COURT: And, um, do you agree with Mr.
23 Foster that your client received the 2.1 million in proceeds
24 from those asset ----
25 MR. GETTYS: Yes, ma'am.

1 THE COURT: ---- from the sale of that
2 portion of the property?
3 MR. GETTYS: Absolutely.
4 THE COURT: And do you know where those
5 funds are right now?
6 MR. GETTYS: My client has possession or has
7 spent or has done with whatever she would've done with her
8 property. You still have all that (inaudible)
9 MS. MATTOX: I received $526,000 of my
10 husband's (inaudible) from my proceeds. Peggy Mattox
11 received some, David Mattox received some and Jonathan ----
12 THE COURT: So that was owned ----
13 MS. MATTOX: That was joint.
14 MR. GETTYS: Yes, ma'am.
15 MS. MATTOX: The 2.1 million was the joint
16 between the three parties.
17 MR. GETTYS: Yeah, let me clarify that.
18 THE COURT: IT shows a hundred percent
19 interest on the inventory.
20 MR. GETTYS: That - that hundred percent
21 interest was a portion of a larger tract owned by others that
22 together was sold for $2.1 million with family members.
23 THE COURT: Okay.
24 MR. GETTYS: (inaudible)
25 THE COURT: So, he did, in fact, have title

1 to the 26.055 acres?
2 MR. GETTYS: Of which he still retains
3 ownership of the unsold portion of the bigger tract sold for
4 that $2.1 million. Yes, ma'am.
5 THE COURT: But I guess my question is,
6 there's still something left of this 26.055 acres?
7 MR. GETTYS: Under contract before you; yes,
8 ma'am.
9 THE COURT: Okay. All right. All righty.
10 But again, I go back to you, Mr. Foster, do you have any
11 argument, or do you contend that the residence is not joint
12 with rights of survivorship?
13 MR. FOSTER: No, ma'am. It is joint tenants
14 with rights of survivorship.
15 THE COURT: Okay.
16 MR. FOSTER: And if that is the Court's
17 decision as to its disposition, that is what the Court must
18 do. My position on that is what we attempted to state
19 earlier.
20 THE COURT: Right. I understand. All
21 right. Go ahead. I believe you had another argument you
22 wanted to make. Mr. Foster, I believe you had another
23 argument you wanted to make?
24 MR. FOSTER: Briefly, I made my point about
25 the intent of the Petitioner in this matter. I would make

1 the point that I do not understand the proof that we must
2 give to this Court under the probate court statute in
3 question requires us to prove that the property in question
4 that was distributed away gratuitously was estate property at
5 the end. It's merely enough to say that it was given away.
6 Now, I grant the fact that there is a distinction to be made
7 if at this point, we claim the right to put a hold on it.
8 That is up to the Court. I am concerned about the fact that
9 we are hearing, Your Honor, arguments about what could cause
10 a default or what the Sheriff might do. I defer to Mr.
11 Gettys who certainly has more knowledge of these things
12 possibly than I do, but I question as to what extent this can
13 considered to be evidence as considered by this Court. Our
14 position is what I attempted to state earlier. We have made
15 a prima facie case to open this matter to take evidence and
16 to move forward. If at the end of it or even after the
17 discovery, we discover that there's no basis for this, I can
18 assure this Court that no one will be quicker than me to
19 acknowledge that fact. But in effect, what Mr. Gettys wants
20 to do, with respect, is to cut us off right now before any of
21 that gets done. We don't believe that to be proper and we
22 ask the Court for relief.
23 THE COURT: Let me ask you this question.
24 Did your client receive any of the $2.1 million proceeds in
25 the sale of this property?

1 MR. FOSTER: I don't think so. No, ma'am.
2 THE COURT: I'm just asking the question.
3 I don't ----
4 MR. FOSTER: I don't know. Mr. Gettys
5 closed the thing. He would be able to say more than I.
6 THE COURT: All right. Mr. Gettys, do you
7 have ----
8 MR. GETTYS: Your Honor, my law partner did.
9 I'm not very familiar with it, but I do believe I ----
10 MS. MATTOX: David received a couple of
11 hundred thousand and his mom received about a million.
12 THE COURT: Okay. And you're not under
13 oath yet.
14 MR. GETTYS; Yes, ma'am.
15 MS. MATTOX: Oh, sorry.
16 THE COURT: Are you going to be putting up
17 any (inaudible) any testimony?
18 MR. GETTYS: I had not planned for
19 (inaudible)
20 THE COURT: Well, we're here on a motion
21 hearing, so. I don't think you need to.
22 MR. GETTYS: Yes, ma'am. But if the Court -
23 ---
24 THE COURT: I don't want to hear anything
25 that's not sworn testimony.

1 MR. GETTYS: Um, he - my understanding is
2 each of the family members, my client's deceased husband
3 being a family member, the Mattox family, owned portions of a
4 larger tract that their great aunt and father had owned and
5 of those portions, there was amalgamation of several parcels
6 to create one, uh, saleable piece and that's - different
7 owners of that saleable piece did get cashed out, which I
8 believe the Petitioner in this case was one of those parties.
9 THE COURT: Okay. Thank you.
10 (background)
11 THE COURT: All right. Mr. Foster, would
12 there be any issue or heartburn on behalf of your client if
13 this sale were to go through and the proceeds were just
14 escrowed until a ----
15 MR. FOSTER: That's what we proposed.
16 THE COURT: ---- a result of the, uh ----
17 MR. FOSTER: That is what we proposed.
18 THE COURT: Outcome (inaudible)
19 MR. FOSTER: One of the things we propose.
20 THE COURT: Okay. What do you have to say
21 about that, Mr. Pierce or Mr. Gettys?
22 MR. GETTYS: Your Honor, as to the
23 residential property ----
24 THE COURT: I'm not talking about the
25 residential property, I'm talking about the other.

1 MR. GETTYS: Yes, ma'am. We need the
2 proceeds of the residential to buy a new house, so we could
3 not agree or consent to that.
4 THE COURT: Uh-huh.
5 MR. GETTYS: As to the commercial property,
6 again, we don't believe that the Petitioner has shown a
7 purpose to reopen this estate other than to find new assets,
8 but if that were the case, if this Court ordered those monies
9 be held in some kind of trust account that we - that the
10 Court had control over or one of the lawyer's, we'd be
11 amenable to that.
12 THE COURT: All right. And you're saying
13 that this is - what were you saying, that there's a due
14 diligence period that's about to expire or a closing?
15 MR. GETTYS: At the end of this month.
16 THE COURT: The due diligence period.
17 MR. GETTYS: The due diligence period
18 expires at the end of this month and has been under contract
19 since, I believe March.
20 JUDGE'S RULING:
21 THE COURT: Okay. All right. Thank you.
22 Okay. Mr. Foster, I am going to direct that Mr. Gettys
23 prepare an order lifting the lis pendens from the joint
24 property so that that can go forward. I think he's exactly
25 correct that that property is not converted into a probate

1 asset just by virtue of these - this controversy. I am going
2 to - I haven't decided what to do about ruling on the- the
3 Rule 60 portion of this and the 3-412 portion of this. I am
4 going to consider that. I do - I don't know if y'all have
5 read the comments for §62-3-412, but it clearly states that
6 these are exceptions to the concept of res judicata. So, in
7 - in my view there's a certain equity involved when an
8 original will is discovered and going forward to probate that
9 original will. That's not to say that other claims cannot be
10 filed, such as an omitted spouse claim, but I - I'm not
11 saying that today, I'm just saying that I'm going to take
12 these briefs and - and read them and make a decision as to
13 whether Mr. Foster's client can go forward.
14 MR. GETTYS: Yes, ma'am.
15 THE COURT: And hopefully that will be done
16 before the end of this month.
17 MR. FOSTER: Thank you, ma'am. We can ask
18 no more.
19 THE COURT: So, that we can go forward on
20 other issues.
21 MR. GETTYS: Thank you.
22 THE COURT: All right?
23 MR. FOSTER: Thank you, ma'am.
24 THE COURT: Anything else?
25 MR. PIERCE: No, Your Honor.

1 MR. GETTYS: That'll do it.

2 THE COURT: Thank you. That'll conclude

3 our hearing.

4 MR. GETTYS: Thank you, Judge.

5 [END OF HEARING IN THIS MATTER]

6 [END OF TRANSCRIPT]

1 THE COURT - All right, now, let's move on to the
2 case of Mattox vs. Mattox. Who is the appellant in this
3 case?
4 MR. FOSTER - We are, sir.
5 THE COURT - Okay, Mr. Foster, give me one
6 second. I have all the case files on my IPad, if you'll
7 give me one second to pull it up.
8 (WHEREUPON, BRIEF PAUSE)
9 THE COURT - Yes, sir. All set.
10 MR. FOSTER - Okay, thank you, sir.
11 This is an appeal from a probate court order. I
12 was going to briefly recite the background.
13 THE COURT - Okay.
14 MR. FOSTER - I am not going to recite the dates
15 except the order, but if the Court ---
16 THE COURT - Yes, sir.
17 MR. FOSTER - --- wishes, we can.
18 Mr. Jonathan Mattox signed a deed in 2005.
19 After that, he married Ms. Lisa Mattox in 2011. There was
20 a deed caused to be given into her on his behalf and hers
21 where they were designated as joint tenants with the right
22 of survivorship on a property valued currently by tax
23 value -- this is the record on appeal -- at three hundred
24 and ninety-five thousand dollars. Mr. Jonathan Mattox --
25 or I should go back and say -- in his original Will left a

1 sole heir, his brother, David, no provision and no mention
2 of a wife. He died in 2016. No original Will had been
3 found at that point. Ms. Lisa Mattox began probate. Mr.
4 David Mattox by counsel filed a petition to be
5 substituted. All at that -- at that time all he could
6 come up with was a copy of the Will. The order of the
7 probate court at that time quite properly denied that
8 request saying that effectively under the law, you show us
9 a copy of a Will there's a presumption that the original
10 has been destroyed. In that order, the Court went on, and
11 I am quoting by memory, but I think I am being accurate
12 here, to state, if I were to rule on the question -- and
13 we can go on into it -- but of course what that refers to
14 is the language of 62-2-301, which refers to the
15 circumstances under which a spouse omitted from a Will can
16 still be held as bound by the terms of that Will,
17 specifically, if there's been sufficient provision made
18 outside the Will. That's 301(A). After that order, Mr.
19 David and Jonathan Mattox's mother, Peggy, found the
20 original Will in her safe. A petition was file under Rule
21 60 and under South Carolina 63-2-412 in July of 2018. We
22 had a hearing. The Court denied us the relief of
23 modification or reopening. We are appealing that order.
24 I am going to try to deal with the grounds that the Court
25 used to deny us that relief. First of all, the Court

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

1 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)
2 MR. FOSTER - Extra copy for ---
3 Now, in addition to that, the Judge -- I believe
4 -- I -- I'm summarizing but I -- summarizing accurately,
5 basically, said, well, his mother should've been -- he or
6 his mother should've found the thing earlier. Well, ---
7 THE COURT - Can I just make sure I'm
8 understanding all the facts correctly?
9 MR. FOSTER - Yes, sir.
10 THE COURT - My -- my understanding is -- the
11 order that you're appealing is an order on the
12 reconsideration of the probate court's order based on the
13 -- there was a -- I suppose an original Will was found in
14 a safe in the house on Pawley's Island.
15 MR. FOSTER - Yes, sir. Yes, sir.
16 THE COURT - And the probate court, basically,
17 said your client didn't exercise the due diligence that it
18 was an obvious place to look for a Will, and they can't
19 come back later and say, well, now, we've got the
20 original.
21 MR. FOSTER - That wouldn't be quite the way they
22 said it, but that's, basically, the fact.
23 THE COURT - Okay, I just -- it just says ---
24 MR. FOSTER - I understand.

1 THE COURT - I just want to make -- you know,
2 want to make sure I'm understanding, so that's -- okay.
3 MR. FOSTER - And I want to be sure I state it
4 correctly, too. The petition was stated as under the
5 statute and under the cited stat -- statute I cited, as a
6 petition to modify or open.
7 THE COURT - Okay.
8 MR. FOSTER - We would first of all point out as
9 I say, there's no evidence of what the Court took notice
10 of. On the -- on -- the second thing we'd point out is --
11 we've handed up the case of Lanier vs. Lanier. This is a
12 South Carolina Family Court case heard before the Court of
13 Appeals, but it's a discussion of when and where you can
14 come in with newly discovered evidence and what that is.
15 The Court of Appeals in Lanier confirmed the view of older
16 Courts that you are bound to look for things timely, that
17 that includes people like attorneys, CPAs and so forth.
18 It is not state (sic), and I wish to emphasize this, that
19 it includes elderly female family members. It does not
20 state, includes your mother. Ms. Peggy Mattox, the mother
21 who discovered this, stated in her affidavit, which is
22 part of the record on appeal, that she had no idea that
23 the matter was there. She stated that she found it --
24 this is by inference, but it's in there -- after October
25 2017 when she had to go into her case, to her -- to her

1 safe. She stated that her sons, both Jonathan who died
2 and David who is the appellant, knew where to find her
3 combination. That is not to say they knew the combination
4 or had access to the safe. Our argument is under Lanier
5 and under the rules as stated therein, Mr. David Mattox
6 cannot be held responsible for the fact that he did not
7 immediately think of his mother and her safe as a place
8 where this was. That is the basis for our claim.
9 THE COURT - Mr. Foster, talk me through a
10 timeline. So when did Mr. Mattox die?
11 MR. FOSTER - Ms. Mattox -- well, Mr. Mattox died
12 October 1st, 2016.
13 THE COURT - Okay, and --
14 MR. FOSTER - The first order which denied relief
15 based on a copy and which represented, um, I believe also
16 held that Ms. Lisa Mattox, the wife, was the sole heir --
17 there were no children -- was issued September 26th, 2017.
18 THE COURT - All right, and when was the original
19 Will found in the safe?
20 MR. FOSTER - All that Ms. Peggy Mattox was able
21 to say in her affidavit, which is in our record on appeal
22 -- that is on -- record on appeal page 27 -- was that she
23 sold a car in October, 2017 and some time after it
24 undesignated she found the thing in her safe, because she
25 had to go there.

1 THE COURT - Okay, when was it first presented as
2 a motion or brought to the Court's attention?
3 MR. FOSTER - When we filed -- we filed in July
4 13th, 2018 within one year of the Court's decision and
5 certainly within one year of the Will being discovered.
6 THE COURT - Okay. All right, thank you, sir.
7 MR. FOSTER - Thank you, sir.
8 Going forward, basically, argument here as I
9 understand it in part is, well, it should've been
10 discovered earlier. Well, Ms. Mattox, Ms. Peggy Mattox,
11 said she hadn't been asked for it and had no reason to be
12 asked for it. She is not, in my understanding of Lanier
13 and the cases cited there under, one of the people that is
14 required by David to go look. She is not an agent; she is
15 not an attorney; she is not a CPA. She's not bound by Mr.
16 David Mattox or his employer, his employee, I should say.
17 Therefore, she's outside that area. The other rule under
18 Lanier is -- and the reason I believe in part they decided
19 the case it was -- because in that case the newly
20 discovered evidence was never entered as an issue in the
21 earlier case. In this case it was the issue. In this
22 case, as I say, that was where we were going from. In
23 Lanier, they state that the document has to be found,
24 quote, in the possession of the party for the Lanier rule
25 about how quickly one has to act and how expeditiously one

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

1 existence of the lost document was alleged at trial, as
2 here. When the documents were found, the Court's held the
3 original documents themselves were material and were not
4 merely cumulative of other evidence as to their contents,
5 thus, retrials were allowed, pardon, merited. That
6 argument there has to do with retrials. We believe
7 they're directly relevant to the question here of
8 amendment and reopening. Basically, that's where we're at
9 with regard to the question of Lanier and the older
10 things. The other question, the one we spent some time
11 on, is the language of the Court ---
12 THE COURT - Mr. Foster, can -- if I can have
13 just one second. I'm -- I'm looking at the statute, 62-3-
14 412, and it looks to me that the paragraph one is limited
15 to the cases where there's already a Will ---
16 MR. FOSTER - Yes, sir.
17 THE COURT - --- and it -- because it refers to
18 another Will. It says the Court shall entertain a
19 petition for modification or vacation of its order if it
20 is shown the components of the later offered Will and ---
21 MR. FOSTER - Your Honor is referring ---
22 THE COURT - --- and then the paragraph two seems
23 to be the only time the Court will reconsider an intestacy
24 holding. Isn't that -- I mean the -- we're looking at the
25 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

1 situation of this kind where, basically, you have a Will
2 ---
3 THE COURT - Let me stop you. I just want to
4 make -- it seems to me that the statute has one of two
5 stipulations. Paragraph one is where there was a Will,
6 and that's the order you want to be reconsidered, and
7 paragraph two is if there wasn't a Will. Isn't that the
8 scheme that statute sets up?
9 MR. FOSTER - Reading it that way would
10 essentially mean that a Will can never be found after the
11 event even under the best case scenario even under good
12 faith.
13 THE COURT - Under this statute.
14 MR. FOSTER - Yeah, if that's -- if that's our
15 reading.
16 THE COURT - But I mean it seems to me that it's
17 -- that their -- paragraph one is there was a Will but
18 you're challenging it, and number two is that the probate
19 court found there was intestacy and their provisions for
20 what, you know, ---
21 MR. FOSTER - I would not -- I can only say I
22 don't think that's the intent of saying, quote, another
23 Will. In this case, of course, there was another one the
24 sense that we had a copy in round (sic) of the original.
25 The copy was thrown out; now we have the original, but I

1 would only say this, sir, reading the statute in that
2 fashion means that one can never bring forth the question
3 of a lost Will, that one -- this statute has no effect
4 upon that whatsoever, and I don't believe that was the
5 intent of the Uniform Probate Code.
6 If I may continue, briefly?
7 THE COURT - Yes, sir, yeah, absolutely.
8 MR. FOSTER - The other argument, as I say, that
9 has to do with this matter is the language of the Court in
10 its order where it essentially said, were I to rule -- I
11 want to be sure I'm reading this correctly ---
12 THE COURT - The probate court order? Is that
13 what you're ---
14 MR. FOSTER - Beg your pardon, sir?
15 THE COURT - The probate court order?
16 MR. FOSTER - Probate court order.
17 THE COURT - Yes, sir. Okay, I'm there.
18 MR. FOSTER - And this is going back to the first
19 order, and I want to read exactly. In the first order,
20 the Court in its paragraph (H) -- this is September, 2017
21 -- even if the Court were to rule on the amended spouse
22 issue, there was no credible evidence presented to the
23 Court the decedent provided for his spouse outside the
24 Will or in lieu of a testamentary disposition, which, of
25 course, is what we're presuming now. Our argument comes

1 to this, sir. First of all, is that a ruling; is it a
2 judgment. To go to the basic thing, we've cited among our
3 brief language of the restatement on -- second -- on
4 judgment, section 27, which says that when your judgment
5 is not dependent on a particular issue, that determination
6 is akin to dicta, and its re-litigation is not precluded.
7 Beyond that, we've cited a great many cases to the effect
8 of what is the effect, if any, of a Court saying, here is
9 a ruling or a supposed ruling or a comment in the
10 subjective sense, we maintain, simply speaking, is not
11 binding. It is a dicta; it is the Court saying, this is
12 what I think, but it has nothing to do with anything can
13 bind at the Court. It has nothing to do with binding the
14 client. It is simply words. Beyond this there's some
15 language, as I understand it, at least in -- I'm sorry,
16 sir. Okay. I thought I was interrupting.
17 THE COURT - No, no, sir. I'm just -- I've got
18 the order here.
19 MR. FOSTER - There is some language in the
20 defendant -- respondent's brief to the effect of generally
21 refusing the matter on the basis of general, equitable
22 principles. Here is the situation as we understand it.
23 Ms. Lisa Mattox was left unquestionably outside the Will a
24 piece of property worth -- by tax value -- three hundred
25 and ninety-five thousand dollars. It may be that if this

1 Court allows us to go forward with the case, she will
2 still be determined to be the heir, that the language of
3 the statute in which an heir provided for before the --
4 before the marriage will have no effect. It is possible,
5 however, that that will not be the case. This comes down
6 to where the equities lie. I refer back to the language
7 in Lanier, which I quoted to the Court.
8 THE COURT - Yes, sir.
9 MR. FOSTER - We have here a situation where
10 there's no hint of bad faith, I understand it. The most
11 that we're able -- that defendants -- pardon --
12 respondents are able to say is, well, she should've acted
13 sooner. Well, sooner is interesting, because there's no
14 indication or affidavit of when she found this. That is
15 specific, because, if I may allow to say so, I helped
16 write that affidavit, and we omitted any statement because
17 she could not say when she found it, except that it was
18 after October of 2017. Relying upon what we understand to
19 be both 62-3-412 and Rule 60(B), we believe we've shown a
20 reasonable, equitable case to be allowed to proceed on
21 this case to full discovery and decision by the probate
22 court.
23 That's, basically, where we're at, Your Honor.
24 Barring any questions, that's what I had.

1 THE COURT - Mr. Foster, one question on Lanier.
2 I'm looking at page five, and the Court says, when
3 evidence is misplaced, a party must make a, specifically,
4 targeted search to find missing evidence.
5 MR. FOSTER - No question. The question is who
6 has to do it.
7 THE COURT - Well, I mean I would assume that the
8 party in this case -- right? -- I mean Mr. Mattox, David
9 Mattox.
10 MR. FOSTER - That's Mr. -- David, and he could
11 not find it. That's in the first order. The first order
12 ---
13 THE COURT - Right, but where ---
14 MR. FOSTER - --- says he made every effort to
15 find it.
16 (WHEREUPON, BRIEF PAUSE)
17 MR. FOSTER - If I'm not interrupting the Court,
18 just to go on and ---
19 THE COURT - No, I'm just -- I'm looking at the
20 order. You said -- so the order makes a factual finding
21 that you did everything possible to find ---
22 MR. FOSTER - That's my recollection of the
23 reading of it, sir, that, basically, said yes, they made
24 all this attempt and, uh -- and his attorney made all this

1 attempt, and they couldn't find it. That's the first
2 order.
3 THE COURT - Okay, I'm looking -- I'm looking at.
4 I'm just ---
5 MR. FOSTER - This is on record on appeal page
6 19.
7 THE COURT - I'm looking at 89.
8 MR. FOSTER - Well, this is 19, and it speaks to
9 paragraphs 10 through 11.
10 (WHEREUPON, BRIEF PAUSE)
11 THE COURT - I don't see anything about the
12 petitioner saying -- it says the petitioner testified he
13 had no knowledge of where the decedent kept the Will and
14 had not seen or discussed it.
15 MR. FOSTER - Yes, sir.
16 THE COURT - Where does it state that he searched
17 everywhere?
18 MR. FOSTER - Well, I presume I need to go back
19 to number nine where it says the petitioner's attorney has
20 made all this effort, but, of course, that's attributable
21 to the petitioner.
22 THE COURT - Okay. I -- well, I think I
23 understand your argument. Let me hear from the other
24 side.

1 MR. PIERCE - Thank you, Your Honor, and before I
2 start, I mean I -- I understand this procedure to be in
3 the nature of an appellate oral argument, and I've
4 withheld some objections in that vein, and I'm going to
5 raise those now, um, and I -- the understanding, or
6 hopefully the understanding that these are not waived
7 because we -- this is an oral argument setting.
8 THE COURT - Okay.
9 MR. PIERCE - Okay. First, Your Honor, the issue
10 of judicial notice, the issue of 62-3-412 and the issue of
11 proceeding on equitable grounds I do not believe were
12 raised in the defendant's appellate brief. I believe
13 those issues have been waived for the purpose of our
14 argument today. Those were raised at the underlying
15 hearing, and they were available as arguments to be
16 brought before the Court today, but they were not pled and
17 they were not recited in the respondent -- or the
18 appellant's brief. I do not believe they're appropriate
19 grounds to be considered today.
20 THE COURT - I mean -- that's not an issue I had
21 -- I really thought about, but I -- is it the same
22 standard as in appellate court? Am I -- is it waived if
23 it's not briefed?
24 MR. PIERCE - I believe that's the case, Your
25 Honor. I cannot quote you chapter and verse on the

1 appellate court rules on that, but -- and regardless, Your
2 Honor, I mean -- the standard of review today has not been
3 discussed thus far, and -- and I believe the standard of
4 review will clean some of these ---
5 THE COURT - Okay.
6 MR. PIERCE - --- will clean some of these issues
7 up in and of itself, Your Honor.
8 THE COURT - Okay. Well, why don't we start with
9 that, Mr. Pierce, because I ---
10 MR. PIERCE - Sure.
11 THE COURT - I mean I'm not sure what the
12 standard of review is in a ---
13 MR. PIERCE - Yes, Your Honor, and ---
14 THE COURT - --- my first probate appeal.
15 MR. PIERCE - I do -- I do have all of our case
16 law that we've cited in our brief. May I approach with
17 that, Your Honor?
18 THE COURT - You may.
19 (WHEREUPON, DOCUMENT HANDED UP TO THE COURT)
20 THE COURT - Thank you, sir.
21 MR. PIERCE - Your Honor, the standard of appeal
22 -- an appeal from the probate court is governed by the
23 probate code. That is cited in Golini v. Bolton, cited at
24 326 SC 333.
25 THE COURT - Yes, sir.

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

1 the issues that were recorded on appeal in the appellant's
2 brief. We did discuss further issues at the underlying
3 hearing, and those have all been fully addressed in our
4 brief as well for the Court's edification, and if the
5 Court has any questions about those grounds, I'll be more
6 than happy to answer them today, but I am restricting my
7 oral argument to the issues that were raised on appeal in
8 the appellant's brief.
9 THE COURT - Why -- unless -- I mean if you don't
10 want to argue the other one for some other reason, that's
11 okay, but I'd rather you just address everything.
12 MR. PIERCE - Yes, Your Honor.
13 THE COURT - Okay. I just feel like -- you only
14 get one chance at oral argument from the Court's
15 prospective. This is my chance to ask questions. I
16 understand your arguments and I prefer if you'd addressed
17 it all.
18 MR. PIERCE - Yes, Your Honor.
19 Your Honor, starting with the first issue that
20 was raised on appeal in the appellant's brief, we consent
21 that there is, in fact, evidence establishing a lack of
22 due diligence in discovering and filing the original Last
23 Will and Testament of Jonathan Ray Mattox. That's
24 statement of issue on appeal number one as provided by the
25 appellant. Rule 62(B)(2) of the South Carolina Civil

1 Procedure allows the Court to relieve a party from final
2 judgment on the basis of newly discovered evidence, and
3 the operative phrase, Your Honor, is which by due
4 diligence could not have been discovered in time to move
5 for a new trial. Your Honor, we have also cited the
6 Lanier case. Lanier case provides that due diligence is
7 defined as not when a litigant actually discovers or
8 finds, but what they could have discovered or found by
9 putting in the time and effort to do so. Appellant,
10 specifically, argues that Judge Roger's finding of Rule 60
11 does not apply because of a lack of due diligence is
12 without evidentiary support. At the October 5th, 2018
13 hearing where we argued the motion on the Rule 60 --
14 argued the Rule 60(B) motion, respondent through Mr.
15 Gettys and I, specifically, addressed the issue of due
16 diligence repeatedly relying largely on the affidavit of
17 Peggy Ann Mattox who's the mother of the appellant and the
18 decedent and we ---
19 THE COURT - Is that affidavit in the record?
20 MR. PIERCE - It is in the record, Your honor,
21 and it starts at page 27.
22 THE COURT - Hold on one moment. Okay, I'm
23 there.
24 MR. PIERCE - Okay. The pertinent points in that
25 affidavit, Your Honor, are that, one, Peggy -- and we're

1 going to refer to Peggy Ann Mattox as Peggy -- knew the
2 decedent had executed a Will, and while we do not agree
3 that 62- -- 62-3-412 is necessarily a proper issue on
4 appeal here today, I do believe that flies in the face of
5 the lack of knowledge of a Will requirement from that
6 statute. So Peggy knew the decedent had executed a Will.
7 Peggy was named as the PR of the decedent's estate in that
8 Will. Peggy found the Will in a safe in her home on or
9 after October of 2017, and the decedent, appellant and
10 Peggy all knew the location and combination to the safe.
11 We argued these points as well as the fact that a safe is
12 a natural and obvious place to keep important documents at
13 the October 5th, 2018 hearing. So that was the evidence
14 that we offered against the due diligence put in by the
15 appellant. I hope that was clear, Your Honor, but that
16 was our argument that due diligence had not been -- had
17 not been put in in this case.
18 THE COURT - Is Mr. Foster right that the person
19 whose due diligence is in question is David Mattox?
20 MR. PIERCE - I believe it'd be the party, Your
21 Honor, who was seeking -- who was seeking relief from the
22 judgment.
23 THE COURT - Right, but that would be David --
24 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.