THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case File No. 2019-001827

DAVID J. MATTOX, Appellant,

vs.

LISA JO BARE MATTOX, Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT:

AS TO RULE 60(b)(1)

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

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

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

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

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

ARGUMENT:

AS TO RULE 60(b)(2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

October 2, 2020

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

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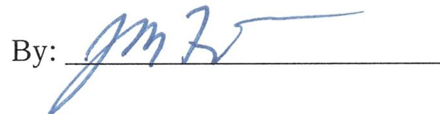
By: 

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