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**Jul 03 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
Timothy H. Pogue, Family Court Judge

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Appellate Case No.: 2021-000030

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Kathleen S. Carter.....Respondent,

v.

Joseph R. Carter.....Appellant.

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PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING *EN BANC*

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Appellant (“Husband”) moves the Court of Appeals for rehearing pursuant to Rule 221(a), SCACR and suggests that this matter be reheard *en banc* pursuant to Rule 219(b), SCACR.

#### STATEMENT OF THE CASE

This is a divorce case. The family court conducted a two-day trial in June 2020, issued a final order on August 13, 2020, and denied Husband’s motion to reconsider on December 18, 2020. On appeal, Husband argued that the family court erred in apportioning his nonmarital property, using the wrong date to value certain marital property and debt, improperly valuing certain marital property, awarding Respondent (“Wife”) an excessive amount of alimony and requiring Husband to pay fees. This Court heard oral argument on February 6, 2024, and issued an opinion on June 20, 2024, reversing the family court’s order awarding Wife a portion of Husband’s nonmarital retirement account and otherwise affirming the family court.

**I. The Court’s reliance on *Barrow v. Barrow* to value the marital home mortgage on the date of trial is inconsistent with established case law.**

The facts relevant to this issue are not contested. Throughout the pendency of the action, Husband lived in the marital home and paid the first and second mortgages. R. p. 136, line 23-p. 138, line 11; p. 179, lines 9-14; p. 238, lines 4-24. Between the date of filing and the date of trial Husband reduced the first mortgage principal balance by \$45,243.19. R. p. 179, line 9-14; p. 180, lines 4-19; p. 671; p. 677. Wife lived in rented housing after leaving the marital home and she did not contribute to the marital home mortgage payments during the pendency of the action. R. p. 238, lines 12-18; p. 112, line 25-p. 114, line 11.

In the nineteen months between the filing of the case and the temporary hearing, Husband voluntarily paid Wife \$1,300.00 per month in spousal support along with various other expenses for Wife’s. R. p. 116, line 17-p. 118, line 20; pp. 757-779. Husband also continued to pay for

Wife's health insurance, car insurance and cell phone through his business as he had done during the marriage. R. p. 200, line 23-p. 201, line 24. At the December 2019 temporary hearing, the parties agreed that Husband would continue paying Wife \$1,300.00 per month in spousal support, along with additional expenses he paid through his chiropractic practice for Wife's benefit. R. pp. 36-39. The family court required Husband to also pay \$500.00 per month, *pendente lite*, toward Wife's IHG credit card. *Id.*

The parties' twenty-two-year-old daughter, ZZ, suffered from bi-polar disorder and the parties agreed from the outset that Wife was entitled to retain sole use of ZZ's social security benefit of \$670.00 per month in lieu of a direct payment of child support.<sup>1</sup> R. p. 736; p. 114, lines 12-21; p. 50, line 18-p. 51, line 15; p. 65, lines 20-24. At all times, Husband paid ZZ's health insurance and uncovered medical expenses. R. pp. 3-5; pp. 36-37.

Wife initially paid rent of \$1,800 per month when she and ZZ left the marital home, but Wife's housing expense decreased to \$1,600.00 per month, which included utilities, two months before the December 2019 temporary hearing when she moved into a home owned by her mother. R. p. 112, line 25-p. 114, line 11; p. 388-398.<sup>2</sup> Throughout the case, the spousal support Husband paid to Wife substantially covered Wife's and daughter's housing expenses.

The family court valued the marital home mortgage at the date of trial, thereby denying Husband credit for reducing the marital home first mortgage by \$45,243.19 during the pendency of the action. R. pp. 13-15. In denying Husband credit for the mortgage principal reduction, the family court reasoned that, as the breadwinner throughout the marriage, Husband's continued payment of the marital home mortgage after Wife left the home reflected the *status quo*

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<sup>1</sup> ZZ is also referred to in the Record by her initials, "E.A.C." R. p. 4.

<sup>2</sup> On cross-examination, Wife admitted that she sometimes paid her mother less than \$1,600 per month in rent. R. p. 161, line 18-p. 162, line 4.

established in the marriage. R. p. 14. The family court also assumed, without evidence, that if Husband had not been living in the marital home during the case, “he would have had to pay rent somewhere else for which he would have received no equity.” *Id.*

The Court of Appeals affirmed the trial court’s reasoning citing *Barrow v. Barrow*, 394 S.C. 603, 716 S.E.2d 302 (Ct.App.2011), a case decided by the Court two months prior to the South Carolina Supreme Court’s decision in *Burch v. Burch*, 395 S.C. 318, 717 S.E.2d 757 (2011). In *Barrow*, the Court of Appeals held,

“[W]e affirm the family court’s decision not to credit Husband with his ongoing mortgage payments since Wife vacated the marital home. Husband and Wife were living separate and apart and paying approximately \$1,600 per month in mortgage payments and rent respectively. These were the parties’ living expenses post-separation and do not entitle Husband to any special credit.” *Barrow v. Barrow*, 394 S.C. at 617, 716 S.E.2d at 309.

Equality in the parties’ post-separation housing expenses was the only reason the Court provided for affirming the family court. *Id.*

By affirming the trial court based on the *Barrow* case, the Court of Appeals endorsed an analysis that is inconsistent with more than twenty-five years of legal precedent awarding the increase in a value’s asset to the spouse whose efforts caused the increase. See *McDavid v. McDavid*, 333 S.C. 490, 497 n.7, 511 S.E.2d 365, 369 n. 7 (1999) (wife entitled to the increase in home equity resulting from her payment of the mortgage after the case was filed); *Burch v. Burch*, 395 S.C. at 327, 717 S.E.2d at 762 (2011) (distinguishing between a spouse’s active efforts to increase an asset’s value from passive appreciation furthers equity and public policy); *Abbas-Ghaleb v. Ghaleb*, 2024 WL 1854458 (Ct.App.2024) (applying the active/passive appreciation distinction and citing supporting cases dating from 1996 through 2011).

*Barrow* is an outlier in the line of cases addressing the valuation date of a marital asset that increases in value during the pendency of an action due solely to the actions of one spouse.

As early as 1999, the Supreme Court overturned the Court of Appeals and awarded a spouse credit for making marital home mortgage payments between the time the parties separated and the date of trial. *McDavid v. McDavid*, 333 S.C. 490, 497 n.7, 511 S.E.2d 365, 369 n. 7 (1999). The Supreme Court held that wife, as the spouse who paid the mortgage from money she earned after the case was filed, was entitled to the appreciation in value that her efforts and resources generated. *Id.* On October 31, 2011, two months after the Court of Appeals issued its opinion in *Barrow*, the Supreme Court formally adopted the active/passive distinction. *Burch v. Burch*, 395 S.C. at 328, 717 S.E.2d at 762-763. Just two months ago, this Court again applied the active/passive distinction to myriad marital assets apportioned by the family court. *Abbas-Ghaleb v. Ghaleb*, 2024 WL 1854458 (Ct.App.2024).

Marital property is, by default, valued as of the date of filing. *Burch*, 395 S.C. at 329, 717 S.E.2d at 763 (citing S.C. Code Ann. §20-3-630 (Supp.2010)). A spouse seeking to use the value of an appreciated asset on the date of trial must show that the increase in the asset's value is due to passive, or market, forces. *Teeter v. Teeter*, 408 S.C. 485, 499, 759 S.E.2d 144, 151 (Ct.App.2014). The only activities relevant to the passive/active analysis are those which occur after the date of filing. *Burch*, 395 S.C. at 327-328, 717 S.E.2d at 762. *See also Moore v. Moore*, 414 S.C. at 522-523, 779 S.E.2d at 550 (affirming that husband's contributions to the company during the marriage were accounted for in the value of the company at the date of filing and further finding that wife's active management of the company after the date of filing was the primary factor in the company's growth during the pendency of the action).

Distinguishing between active appreciation and passive appreciation furthers equity and public policy. *Burch*, 395 S.C. at 326-327, 717 S.E.2d at 762. The Court here inaccurately

reasoned that the only way to achieve an equitable result for Wife was to deny Husband \$45,243.19 of value he created in the marital home during the pendency of the action.

The factual differences between *Barrow* and this case are substantial and these differences alone support rehearing. Here, the Court affirmed the family court's reasoning for valuing the mortgage balance at the date of trial based on Wife acquiring new housing expense while Husband "was not burdened by additional housing expenses." Opinion, II(A). This ignores the fact that Husband paid alimony to Wife to support her and ZZ's new housing expenses. In *Barrow*, husband did not pay alimony to wife. Here, the amount of direct cash support Husband paid Wife voluntarily, and later by court-approved temporary agreement, was nearly equal to the rent Wife claimed she paid to her landlord, and later to her mother. The direct support Husband paid Wife during the pendency of the case helped Wife pay hers and ZZ's housing expenses. Husband's alimony payments supported Wife's housing expenses while he also paid his own housing expenses, for which he should receive credit. Wife, not Husband, selected rental housing for which she accrued no equity. Had Wife purchased a home, or rented-to-own a home after leaving Husband, Wife would undoubtedly be entitled to all of the equity she generated during the pendency of the action.

The second significant factual difference between *Barrow* and this case is that Mr. Barrow knowingly diminished the equity in the marital home by not filing state or federal income tax returns which resulted in a lien on the home. Though not explicit in the ruling, the *Barrow* Court appeared uncomfortable allowing husband to benefit from the mortgage principal reduction while he contemporaneously encumbered the home by not paying or filing tax returns. Here, Husband not only reduced the debt on the marital home solely through his efforts, he

serviced the home equity line of credit during the pendency of the case so the debt did not increase. R. p. 178, line 13-p. 181, line 16; pp. 667-678.

If this decision stands, the public policy encouraging parties to engage in productive activity and to discourage waste during the pendency of an action will be eroded. *Burch v. Burch*, 395 S.C. at 326, 717 S.E.2d at 761.

Husband craves reference to his Final Brief regarding the parties' direct and indirect contributions during the marriage. Final Brief of Appellant, pp. 19-22.

## **II. Evidence supported valuing the IHG Credit Card on the date of filing.**

In affirming the family court, the Court of Appeals did not fully appreciate the fact that Wife charged personal expenses to this credit account after the date of filing for which she should be responsible. R. p. 297-386. Husband also craves reference to argument presented in the Final Brief. Final Brief of Appellant, pp. 24-28.

## **III. The alimony award to Wife was excessive.**

The Court affirmed the family court's excessive alimony order requiring Husband pay Wife non-taxable/non-deductible alimony equal to more than 40% of Husband's gross monthly income. The amount of this alimony award is not equitable, fit or just.

In *Myers v. Myers*, this Court reduced by \$1,000 a \$3,000 per month alimony award equal to 36% of Husband's imputed income after finding that this amount of alimony "would effectively penalize husband and reward wife."<sup>3</sup> *Myers v. Myers*, 391 S.C. 308, 315, 705 S.E.2d 86, 90 (Ct.App.2011). While the *Myers* court made clear that a \$3,000 per month permanent alimony award was not necessarily always excessive, the statutory factors here are similar. Although Wife does not work, she has a stream of income from social security and the child's

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<sup>3</sup> In 2011, alimony was taxable income to the recipient spouse and tax deductible to the payor spouse.

disability benefit totaling \$1,544.60 per month. R. p. 736. Mrs. Myers earned approximately \$2,455 per month in her job as a part-time bank teller. *Myers v. Myers*, 391 S.C. at 311, 705 S.E.2d at 88. Mr. Myers earned approximately \$7,116 per month, but the Court imputed income of \$100,000 to him because his business paid some of husband's expenses. *Id.* at 312. Here, Husband claimed income of \$5,157.57 per month, but the trial court imputed income to him of \$6,666 per month. R. p. 742; pp. 33-34.

The clearest and most compelling evidence of the excessive nature of the award is the resulting disposable income. As a result of this award, Wife, despite not working outside the home at the time of trial, has the benefit of \$4,244 in income per month while Husband, who works full time running his own chiropractic practice at age sixty-five, only has income of \$3,966 per month.<sup>4</sup>

#### CONCLUSION

It is incumbent on the Court to rehear this matter *en banc* to ensure consistency and uniformity of decisions determining the date on which marital property is valued. The Court ignored years of precedent by endorsing the use of the date of filing to value a marital asset that appreciates during the pendency of the action due to one spouse's efforts. Instead, the Court improperly relied on *Barrow v. Barrow*, a case that is inconsistent in its application of the law and incongruent to the facts at hand, to affirm the family court's decision to value the mortgage balance as of the date of trial. The Court did not accurately evaluate the facts in evidence

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<sup>4</sup> Wife receives \$874.60 per month in social security benefits and \$670 per month from ZZ's disability benefit.  $\$874.60 + \$670 + \text{untaxed alimony of } \$2,700 = \$4244.60$  per month in disposable income. R. p. 736. Assume *arguendo* that Husband actually earns the income imputed to him of \$6,666 per month - \$2,700 in alimony that is not tax deductible = \$3,966 per month in disposable income. Husband's stated income is only \$5,157 per month. R. p. 742.

reflecting Wife's personal use of the IHG credit card. Finally, the Court affirmed the family court's excessive alimony award that punishes Husband and rewards Wife.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING *EN BANC* on Respondent’s attorneys by email on the  
3<sup>rd</sup> day of July 2024.

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**Subject:** Carter v. Carter (2021-000030)  
**Attachments:** Petition for Rehearing.pdf

Brendan and Missy-

Attached is the Petition for Rehearing that I will efile with the Clerk today.

**Rebecca West, Esquire**  
*Fellow, American Academy of Matrimonial Lawyers*

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