

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS  
Ellis B. Drew, Master in Equity

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**RECEIVED**  
**Jul 13 2020**  
**SC Court of Appeals**

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Case No. 2014-CP-37-00143  
Appellate Case No.: 2015-001860

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Polly Thompson, ..... Respondent,  
v.  
Cathy Swicegood, ..... Appellant.

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PETITION FOR REHEARING

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J. Falkner Wilkes, 12893  
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Counsel for Appellant

## PETITION

Pursuant to Rule 221 the Respondent hereby moves this Court to reconsider its opinion and grant the Respondent a rehearing based on the following.

This Court denied Appellant's motion to consolidate the records of two appeals pending between the parties offered for the purpose of considering evidence as to the date of service of each underlying case. Proof of service of the family court summons and complaint involving the parties was part of this Court's record in the family court appeal (2018-000008). Both appeals involved the same parties and had overlapping issues. The cases were heard and opinions issued on the same day. When compared the proofs of service show that the family court action was filed *and served* first. Granting Appellant's motion would have allowed the Court to address the circuit court's lack of jurisdiction. This would have changed the outcome of the case as the circuit court never had subject matter jurisdiction. "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. Fielden v. Fielden, 274 S.C. 219, 262 S.E. (2d) 43 (1980); Harden v. South Carolina State Highway Dept., 266 S.C. 119, 221 S.E. (2d) 851 (1976); State v. Gorie, 256 S.C. 539, 183 S.E. (2d) 334 (1971)." Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989).

The circuit court does not obtain jurisdiction until proper service of the initial pleadings. "Under Rule 3(a), SCRPC, a civil action is commenced by the filing and service of a summons and complaint. "Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct.App.1997). "Service of the summons brings the defendant within the court's jurisdiction and gives the court

the power to render a personal judgment against the person served." *Id.* (citing James F. Flanagan, South Carolina Civil Procedure 7 (2d ed.1996)). The circuit court's jurisdiction could not attach prior to service of the petition for partition, which occurred on March 17, 2016. By that time, the family court's jurisdiction had already attached by way of both filing and service of the Appellant's summons and complaint seeking separate maintenance and equitable division. Once jurisdiction attaches, the family court's jurisdiction is exclusive. *See* S.C. Code Section 63-3-530 (A)(2). Granting the Appellant's motion would have allowed the Appellant to show the circuit court's lack of subject matter jurisdiction. The Court should therefore reconsider its decision and grant a rehearing in this case.

In affirming the circuit court this Court misperceived the nature of the evidence offered by the Appellant, as well as its purpose. The issue of each party's interest in the subject property is a factual determination. The family court erred in excluding relevant evidence of value contributed by the Appellant to the subject properties. Here the evidence was necessary to understanding and valuing the Appellant's interest in the properties. Exclusion of the evidence made a accurate determination of the Appellant's interest impossible. The "flipping" of prior properties was an essential part of the value that was added to the properties in question. "In the absence of consent . . . the amount of compensation is estimated by and limited to the amount by which the value of the common property has been enhanced." Ackerman v. Heard, 287 S.C. 626, 629, 340 S.E.2d 560, 562 (Ct. App. 1986). An accurate determination of the amount of enhancement could not be made without evidence of the gains that were achieved in flipping prior properties and rolled over in the subject properties.

The of purchasing and selling of real properties culminated in the purchase of the Hilton

Head property. There was evidence to show that the gains realized from the sequential property sales was attributable directly the efforts of the Appellant in renovating and refurbishing each property. That gain was then funneled into the purchase money used by the Respondent to purchase each of the subject properties. The excluded evidence as to the series of sales and resulting build up of equity was necessary to show the full extent of value the Appellant contributed to the ultimate purchase of the two properties. Its exclusion prevented a fair analysis of the Appellant's interest in the property. Based on the foregoing the Court should reconsider its decision and grant a rehearing in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that on the 13th day of July, 2020, I served the Appellant's Petition for Rehearing on the Respondent by delivering a copy of same via AIS email only as follows:

Ms. Margaret A. Chamberlain  
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Respectfully submitted,

s/J. Falkner Wilkes

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