

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Ellis B. Drew, Master in Equity

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

RECEIVED
JUL 31 2020
SC Court of Appeals

Polly A. Thompson, Respondent,

v.

Cathy J. Swicegood,Appellant.

**RESPONDENT POLLY A. THOMPSON'S RETURN IN OPPOSITION
TO APPELLANT'S PETITION FOR REHEARING**

Respondent, Polly A. Thompson, hereby submits this Return in Opposition of Appellant's Petition for Rehearing pursuant to the Court's request under Rule 219(b) and 221(a), South Carolina Appellate Court Rules ("SCACR").

ARGUMENTS

I. APPELLANT'S PETITION FOR REHEARING DOES NOT STATE ANY POINT THIS COURT OVERLOOKED OR MISAPPREHENDED.

A Petition for Rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR (emphases added); *see Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011). "In order to prevail on a petition for rehearing, [Appellant] must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001)(emphasis added). The purpose of a Petition for Rehearing is not "to present points a lawyer did not present to the court in his briefs, nor is the purpose of the petition for rehearing to have the case tried in the appellate court

a second time.” *Kennedy*, 349 SC 531, 564 S.E.2d 322; *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

Appellant’s Petition for Rehearing fails to state with particularity any point this Court supposedly overlooked or misapprehended. A thorough examination of the Petition reveals that the Appellant simply disagrees with this Court’s ruling. Beyond that disagreement, it is unclear as to what the Appellant contends this Court either overlooked or misapprehended in its opinion because the Petition merely repeats arguments Appellant previously made. Because Appellant fails to demonstrate with particularity that this Court has overlooked or misapprehended any points warranting rehearing, the Petition must be denied. This Court’s opinion reaches the correct result for the correct reasons and does not overlook or misapprehend the issues and arguments presented by the parties. Respondent asserts this Court, through a unanimous panel, properly affirmed (with modification) the master’s ruling.

II. THIS COURT CORRECTLY DENIED APPELLANT’S MOTION TO SUPPLEMENT THE RECORD ON APPEAL.

In her Petition, Appellant contends 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 underlying the case.” However, the Appellant did not file a “motion to consolidate the records,” but rather filed a motion requesting to supplement the record on appeal in the partition action with an affidavit of service from the separate action in Family Court. (Motion, November 6, 2017). Appellant argues that granting the motion would have allowed Appellant to show the circuit court’s lack of subject matter jurisdiction. Appellant’s Petition largely repeats the arguments previously made in the motion without addressing the actual basis for the Court’s denial of the motion to supplement the record on appeal.

In its Order, this Court properly denied Appellant’s motion based on Rule 210(c), SCACR stating, “Because the affidavit of service was not presented to the lower court, it may not be included in the record on appeal of this case.” (Order, December 8, 2017). The record is clear, not only did Appellant fail to present the document to the Circuit Court with her Motion to Dismiss or in the Alternative Stay the Proceedings, she also failed to present it to the Master in Equity for consideration during two days of trial. (R. Vol. I, pp. 78; 132-133; 215-373). Appellant’s failure to

present the affidavit of service to the lower court constituted a waiver of her right to submit the document to this Court and to have this Court give it, or any reference to it, consideration. Thus, the supplementation of the record was properly denied based on Rule 210(c), SCACR.

Consequently, Appellant has failed to show this Court overlooked or misapprehended Appellant's arguments in her motion to supplement the record. Appellant completely ignores the underlying basis of the Court's denial of the motion (Appellant's own failure to present the Affidavit of Service to the lower court) and instead attempts to have the motion tried for a second time.

III. THIS COURT CORRECTLY RULED THE MASTER DID NOT ABUSE HIS DISCRETION IN EXCLUDING EVIDENCE OF APPELLANT'S CONTRIBUTIONS TO PRIOR PROPERTIES.

Appellant argues this Court "misperceived the nature of the evidence, offered by the Appellant, and its purpose." (Appellant's Petition for Rehearing). Appellant's Petition, however, simply rehashes the argument set forth in Appellant's brief that the exclusion of evidence of Appellant's renovation and refurbishing of properties other than the common properties prevented a fair analysis of Appellant's interest in the common properties. This argument misses the mark and fails to state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 219(a), SCACR.

South Carolina courts have consistently held, "the admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke v. Republic Parking Sys., Inc.*, 421 S.C. at 558, 808 S.E.2d at 628 (quoting *State v. Commandēr*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

In fashioning an award in a partition action, a court may consider the amount of any down payment and any mortgage payments, as well as the reasonable value of repairs and improvements made to the property. *See Shumaker v. Shumaker*, 234 S.C. 421, 426, 108 S.E.2d 682, 685 (1959) (holding that "The general rule is that a joint tenant who, at his own expense, places permanent

improvements upon the common property, is entitled in a partition suit to compensation for the improvements whether cotenants assented thereto or not.” *Shumaker v. Shumaker*, 234 S.C. 421, 426, 108 S.E.2d 682,685 (1959)(emphasis added). Likewise, the amount of compensation to be awarded in a partition and accounting action for improvements is “estimated by and limited to the amount by which the value of the common property has been enhanced.” *Ackerman v. Ackerman*, 287 S.C. 626, 629, 340 S.E.2d 560, 562 (1986)(emphasis added).

This Court quoted *Burke* and *Shumaker* in support of its conclusion that the master did not abuse his discretion in excluding the evidence of Appellant’s renovations to the previously owned properties. The common properties at issue were the Lake Hartwell home and the Hilton Head condo. This Court fully considered Appellant’s hearing testimony that she and Respondent flipped several other properties prior to purchasing the Lake Hartwell home and Hilton Head Condo, but duly notes Appellant proffered no evidence as to any specific value realized from her work on the previously owned properties and no evidence that any proceeds from the sales of the flipped properties were used to purchase the Lake Hartwell or Hilton Head properties. This Court further considered Respondent’s testimony that the entire down payment on the Hilton Head property came from inheritance from her parents, and the payments of \$10,209.98 and \$6,678.43 for the purchase of Lake Hartwell home came from her checking account. Respondent presented proof of her contributions by way of canceled checks and proof of electronic transfers that were admitted into evidence without objection from Appellant. Therefore, this Court considered, addressed, and properly interpreted the law and evidence in concluding the master did not err by excluding evidence of any indirect contributions Appellant made to properties other than the two common properties at issue in this case.

IV. CONCLUSION

A rehearing in this case is unwarranted. Appellant’s Petition for Rehearing merely regurgitates arguments Appellant previously put forth in her motion to supplement the record and in her brief. It not only fails to state with particularity any point this Court supposedly overlooked or misapprehended, it attempts to have these matters tried a second time by the Court of Appeals. The Opinion of this Court affirming (with modification) the master’s Order of Partition is legally and factually correct. Appellant’s Petition for Rehearing should be denied.

Respectfully submitted,

s/Margaret A. Chamberlain

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July 28, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Ellis B. Drew, Master in Equity

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

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PROOF OF SERVICE

I certify that I have served Return in Opposition of Appellant's Petition for Rehearing on the attorneys for the Appellant by AIS e-mail on July 28, 2020. A copy of the sent email is attached.

Respectfully submitted,

s/Margaret A. Chamberlain
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July 28, 2020

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July 28, 2020

*Sent by U.S. Mail and email to
ctappfilings@sccourts.org*

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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JUL 31 2020

SC Court of Appeals

Re: *Polly Thompson v. Cathy Swicegood*
Appellate Case No.: 2015-001860

Dear Ms. Kitchings:

With this letter, I am enclosing the original copy of *Respondent, Polly Thompson's, Return in Opposition to Appellant's Petition for Rehearing and Proof of Service* in this case. If you need anything further, please do not hesitate to contact me. I appreciate your assistance.

Sincerely yours,



Margaret A. Chamberlain

cc: Other Counsel of Record by e-mail only :

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