

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

Sep 09 2020

SC Court of Appeals

Circuit Court Case No. 2014-CP-37-00143
Court of Appeals Appellate Case No.: 2015-001860

Polly Thompson, Respondent,

v.

Cathy Swicegood, Petitioner/Appellant.

PETITION FOR WRIT OF CERTIORARI

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Greenville, SC 29601
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Counsel for Petitioner/Appellant

PETITION

The parties assumed marital roles and cohabitated from August 22, 2000 to November 7, 2013. In 2011 they participated in a ceremony in Nevada in which they were declared married. App. 215. After the parties' separation the Respondent initiated this action seeking a partition of jointly owned real property. App. 299. Appellant filed an action in family court seeking a declaration as to validity of their marriage and the Appellant subsequently moved to dismiss or in the alternative to stay the proceedings on the ground that the property at issue was subject to the family court's exclusive jurisdiction. App. 221. The trial court denied the motion and proceeded with the partition action. App. 96-97. In deciding the partition action the trial court failed to consider numerous direct and indirect contributions to the acquisition and value of the property. An appeal followed.

Circuit Court's Lack of Jurisdiction

The Appellant raised the issue of subject matter jurisdiction in the court of appeals and sought to have a portion of the records on appeal from the parties' two pending appeals consolidated for the purpose of having the court review the proofs of service from each case. App. 644. On appeal Appellant argued that the family court case had been filed and served first and as a result that the family court had obtained exclusive jurisdiction over the property at issue in the present action. Consolidation of a portion of the records, in particular the proofs of service, was necessary to allow the court of appeals to compare the dates of filing and service in both cases, and thus effectively address the issue of subject matter jurisdiction. Since subject matter jurisdiction in the appeal flows from the circuit court's subject matter jurisdiction it was necessary for the court of appeals to review the proofs of service from each case to determine the

dates of filing and service in each case. Despite having the proofs of service for both cases in the records, albeit different files, the court denied the Appellant's motion based on a finding that the proof of service from the family court case had not been introduced in the circuit court case. App. 14.

Proof of service of the family court summons and complaint involving the parties was part of the record in the parties' family court appeal (2018-000008). Both appeals involved the same parties and have overlapping issues. Both cases were argued on the same day and opinions were issued in both cases on the same day. When compared, the proofs of service show that the family court action was filed *and* served first. Consolidation of the records would have allowed the court of appeals to address the circuit court's lack of jurisdiction. This would have changed the outcome of the present 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). Wherefore, this Court should consolidate the records on appeal and consider the issue of subject matter jurisdiction in the present case.

The circuit court does not obtain jurisdiction until proper service of the initial pleadings. "Under Rule 3(a), SCRCPP, 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* (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. This Court should therefore consider the issue of circuit court's lack of subject matter jurisdiction in light of the record in parties' family court case which is also under appeal.

Petitioner's Interest in the Property

In affirming the circuit court the court of appeals 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 circuit 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. The exclusion of evidence showing how the property at issue was acquired and improved made it impossible for the circuit court to accurately determination the Appellant's interest in the subject properties. The record shows that 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 parties’ purchasing, improving, and selling of real properties culminated in the purchase of the properties at issue. 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 purchases, improvements, sales, and resulting build up of equity was necessary to show the full extent of value the Appellant contributed to the properties at issue. Its exclusion prevented a fair analysis of the Appellant’s interest in the property.

CONCLUSION

Based on the foregoing the Court should reconsider its decision and grant a rehearing in this case.

Respectfully submitted,

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September 9, 2020.

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CERTIFICATE OF COUNSEL

I certify that a petition for rehearing was filed and ruled upon by the Court of Appeals.

Respectfully submitted,

s/J. Falkner Wilkes
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CERTIFICATE OF COUNSEL

I certify that the Appendix has been redacted in accordance with this Court's Order on the redaction of appellate records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th day of September, 2020, I served the Appellant's Petition for Certiorari and Certificates 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,

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September 9, 2020.