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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court judge
Ellis B. Drew, Master in Equity

Opinion No: 5736 (S. Ct. App. Filed July 1, 2020)
Court of Appeals Case No.: 2015-001860
Supreme Court Case No.: 2020-001211

Polly A. Thompson, ... Respondent,

v.

Cathy J. Swicegood, ...Appellant.

RESPONDENT POLLY A. THOMPSON'S RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This appeal arises from a partition action instituted by Respondent, Polly Thompson, against Appellant, Cathy Swicegood. There are two properties subject to this partition action, one located at 505 West Sheffield Drive, Westminster, South Carolina, County of Oconee ("the Lake Hartwell Home") and the other located at 85 Folly Field Road, Hilton Head, South Carolina, County of Beaufort ("the Hilton Head Condo"). (App. p.223, lines 18-22).

Respondent filed her Petition for Partition, Ouster and Accounting on March 11, 2014, seeking partition of the properties, equitable compensation for her contributions, as well as a finding of ouster against Appellant and reimbursement for her expenditures during the period of ouster. (App. pp. 299-302). Two days later on March 13, 2014, Appellant filed a Complaint for Separate, Support and Maintenance with Greenville Family Court (App. pp. 225-230). On April 23, 2014, Appellant filed a Motion to Dismiss or In the Alternative, Motion to Stay the Partition Proceedings asserting the matter better suited for family court. (App. pp. 221-222). On May 8, 2014, the family court dismissed Appellant's complaint for lack of subject matter jurisdiction.[1] A hearing on Appellant's Motion to Dismiss the Partition was held on June 23, 2014. On October 16, 2014, the trial court issued an order denying Appellant's motion and ruling that jurisdiction over the case was properly vested in the circuit court. (App. pp. 96-97).

[1]The family court decision was upheld by the Court of Appeals in a separate opinion, *Swicegood v. Thompson*, Op. No. 5735 (S.C. Ct. App. filed July 1, 2020). Petitioner's request for rehearing was denied.

On October 23, 2014, the case was referred to the Master in Equity for Oconee County. (Mot. And Order, October 23, 2014). A two-part trial was started before the Honorable Ellis B. Drew, Jr., Master in Equity for Oconee County (the "Master"), on March 16, 2015. The second part was held before the Master on May 21, 2015. The Master issued his Order on June 26, 2015, granting Respondent, Polly Thompson, full ownership and title of both properties and attorney's fees and costs in the amount of $5,250.00. (App. pp. 101-104).

Appellant filed a Motion to Reconsider on July 9, 2015. (App. pp. 101-104.) Respondent filed a Memorandum in Opposition to Appellant's motion on July 10, 2015. (App. pp. 98-100). On August 3, 2015, the Master issued an order denying the Motion to Reconsider. (App. p. 20). Appellant filed a Notice of Appeal on September 2, 2015. (Notice of Appeal, September 2, 2015). After briefs were submitted by both parties, Appellant filed a Motion to Supplement the Record on Appeal on November 6, 2017 (Appx. pp. 644-645). On November 13, 2017, respondent filed a Return to Appellant's motion (App. pp. 649-650), and on December 8, 2017, the Court of Appeals denied Appellant's motion to supplement the record pursuant to Rule 210, SCACR (Appx. pp. 14).

The Court of Appeals heard oral arguments on September 18, 2019, and on July 1, 2020 the Court issued an opinion affirming the Master's ruling that Respondent was entitled to sole ownership, title, and interest in both properties, but modifying the Master's order by awarding Appellant $6,520.50 of the equity in the Lake Hartwell property (App. pp. 1-13). Appellant filed a Petition for Rehearing (App. pp. 21-24), and Respondent submitted a Return to Appellant's Motion (App. pp. 27-31). Appellant's Motion for Rehearing was denied on (App. p. 1). Appellant filed a petition seeking a writ of certiorari to the Court of Appeals on September 9, 2020.

ARGUMENTS

I. THIS CASE DOES NOT PRESENT THE CHARACTER OF REASONS FOR WHICH THIS COURT WILL GRANT DISCRETIONARY REVIEW PURSUANT TO RULE 242, SCACR.

This Court should deny the Petition for Writ of Certiorari because Appellant does not set forth any specific reason under Rule 242, SCACR, why this Court should review the Court of Appeals' decision. Rule 242 governs certiorari to the Court of Appeals, and provides:

> **(b) Considerations Governing Review.** A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only where there are special and important reasons.* The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: (1) Where there are novel questions of law. (2) Where there is a dissent in the decision of the Court of Appeals. (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. (4) Where substantial constitutional issues are directly involved. (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242, SCACR (emphasis added). *See also Poston v. State,* 339 S.C. 37, 528 S.E.2d 422 (2000), *overruled on other grounds*, *Douglas v. State,* 369 S.C. 213, 631 S.E.2d 542 (2006) (a petition for writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which Appellant is entitled as a matter of right).

The Court of Appeals correctly applied relevant and settled precedent in affirming this case. Appellant has not demonstrated any "special and important reasons" to grant the Petition in this matter and no such "special and important reasons" exists. Furthermore, the case as decided: (1) does not involve a novel question of law; (2) does not contain a dissent in the decision of the Court of Appeals; (App. pp. 1-13); (3) does not involve a decision of the Court of Appeals that conflicts with a prior decision of this Court; (4) does not involve substantial constitutional issues that are directly involved; and (5) does not include a federal question or a decision of the Court of Appeals that conflicts with a decision of the United States Supreme Court.

Accordingly, this Court should deny the Petition and instruct the Court of Appeals to remit the matter for further proceedings consistent with the Court of Appeals' decision.

II. THIS COURT SHOULD SUSTAIN THE COURT OF APPEALS' DENIAL OF APPELLANT'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL.

In her Petition, Appellant incorrectly states that she sought to have a portion of the records on appeal consolidated for the purpose of considering evidence as to the date of service underlying the case. No such motion was filed.

The Appellant did, however, file a motion requesting to "supplement the record" on appeal in the partition action with an affidavit of service from the family court case. (App. pp. 644-645).[2] The appellate court denied the motion to supplement the record 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." (App. pp. 14). Appellant now argues that granting the motion would have allowed her to show the circuit court's lack of subject matter jurisdiction.

Appellant's argument lacks merit for two reasons: First, it confuses circuit court's subject matter jurisdiction with personal jurisdiction. Second, it attempts to introduce arguments and evidence regarding service of the affidavit that were not previously presented or ruled on by the trial court.

Appellant's argument simply ignores the fact that there are two distinct kinds of jurisdiction: 1) jurisdiction of the subject or subject matter, and (2) jurisdiction of the person. *State v. Douglas*, 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964).

"Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Pierce v. State*, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000). This Court has explained the foundations of subject matter jurisdiction as follows:

> [T]he question of [subject matter] jurisdiction cannot be waived by any act or admission of the parties, for the very obvious reason that the parties have no power to invest any tribunal with jurisdiction of *a subject* over which the law has not conferred jurisdiction upon such tribunal.

State v. Langford, 223 S.C. 20, 27, 73 S.E.2d 854, 857 (1953) (emphasis added).

"Generally, jurisdiction of the *subject matter* is satisfied when appropriate [pleadings] are *filed* in a competent court. *State v. Douglas,* 245 S.C. 83, 87, 138 S.E.2d 845, 847 (1964)(emphasis added). "The general rule is that jurisdiction of a court depends upon the state of affairs existing at the time it is invoked." *Gilley v. Gilley*, 327 S.C. at 1, 488 S.E.2d at 311 (*quoting Gardner v. Gardner*, 253 S.C. 296, 170 S.E.2d 372 (1969)). Thus, jurisdiction of the

[2] The partition action and family court matter were consolidated only for purposes of oral arguments. They did not arise from the same judgment or order, involved different questions, and the Court of Appeals issued separate opinions for each.

court is "based on the status of the case *at the time of filing*." *Gilley*, 327 S.C. at 11, 488 S.E.2d at 311 (emphasis added).

On the other hand, a court generally obtains *personal jurisdiction* by the *service* of a summons. *Ex Parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) (Citing *State v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920)(emphasis added). Further, "[j]urisdiction of the person is acquired when the party ... voluntarily appears in court, answers, and submits himself to its jurisdiction." *Douglas,* 245 S.C. at 87, 138 S.E.2d at 847.

Subject matter jurisdiction cannot be waived, the rule for personal jurisdiction, however, is different. This Court has stated:

> The party may, by consent, confer jurisdiction over his person, or may waive the right to raise the question, whether the proper steps prescribed by law for obtaining such jurisdiction have been taken, as is illustrated by the familiar instance of a party who, though not served with a summons, appears and answers, and is thereby precluded from afterwards raising the question as to whether the court had acquired jurisdiction of *his person.*

Langford, 223 S.C. at 27, 73 S.E.2d at 857 (quoting *City of Florence v. Berry*, 61 .C. 237, 240, 39 S.E. 389, 390 (1901))(emphasis added).

In this case, the Court of Appeals correctly held the circuit court had subject matter jurisdiction to hear the partition action. Respondent filed her Petition for Partition, Ouster and Accounting with the circuit court on March 11, 2014. (App. pp. 299-302). Under South Carolina Law, "the court of common pleas has jurisdiction in *all* cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment . . . ." *Eichor v. Eichor*, 290 S.C. 484, 487, 351 S.E.2d 353, 354 (Ct. App. 1986)(emphasis added). A partition action "is not marital litigation, and thus is not within the jurisdiction of the family court." *Gilley v. Gilley*, 327 S.C. 8, 11, 488 S.E.2d 310, 311 (S.C. 1996) (*quoting Eichor v. Eichor,* 290 S.C. 484, 351 S.E.2d 353 (S.C. App., 1986)). As such, subject matter jurisdiction was properly vested with the circuit court when Respondent filed the partition action on March 11, 2014. *Douglas,* 245 S.C. at 87, 138 S.E.2d at 847.

Appellant's filing of her complaint with family court two days later on March 13, 2014, did not confer subject matter jurisdiction over the properties to family court (Appx. pp. 136-141). Under the Equitable Apportionment Act, "marital property as such does not exist until the date when marital litigation is *filed or commenced.*" *Prosser v. Pee Dee State Bank*, 295 S.C. 212,

214, 367 S.E.2d 698, 700 (1988) (interpreting S.C. Code § 20-3-630(A)(2014)(formerly § 20-7-473))(emphasis added). Appellant had not commenced family-court litigation at the time Respondent filed her partition action on March 11, 2014. Therefore, at the time the partition was filed the two properties were not and could not have been deemed "marital property" under the law and were not subject to family court's jurisdiction. Thus, the circuit court properly asserted jurisdiction based on the status of the case and the properties at the time of filing.[3]

Appellant's argument that granting her motion to supplement the record with the affidavit of service from the family court action would allow her to prove the circuit court lacked "subject matter jurisdiction" is without merit. Even if the Court of Appeals granted her motion to supplement the record with the affidavit, it would not have changed the outcome. Service of the family court complaint does not deprive circuit court of its subject matter jurisdiction, nor does it confer subject matter jurisdiction over the properties to family court. Service of the family court complaint relates only to personal jurisdiction.

Nevertheless, at no time during the six years of litigation in this case, has Appellant attempted to present the affidavit of service to the trial court nor has she raised any argument regarding personal jurisdiction. In fact, she has forever waived the right to raise the question of service or personal jurisdiction by "voluntarily appearing in court, answering, and submitting herself to the [circuit court's] jurisdiction." *Douglas*, 245 S.C. at 87, 138 S.E.2d at 847.

Subject matter jurisdiction in this partition action rest squarely with the circuit court, and Appellant is forever precluded from raising the question of service and personal jurisdiction as she has voluntarily submitted herself to the jurisdiction of circuit court. Likewise, the Court of Appeals properly denied Appellant's motion to supplement the record with the family court affidavit of service under Rule 210(c), SCACR based on Appellant's failure to present the document to the lower court.

Accordingly, this Court should deny review of the Court of Appeals Order Denying Appellant's Motion to Supplement the Record on Appeal and any jurisdictional arguments that Appellant alleges flows from it.

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[3] Further, at the time the circuit court denied Petitioner's motion to dismiss and the Master ruled on the partition merits, family court had already dismissed Petitioner's complaint for lack of subject matter jurisdiction finding that as a matter of law the parties could not be married under then existing laws. Thus, family court never had subject matter jurisdiction, a finding upheld by unanimous decision of the Court of Appeals in the separate opinion, *Swicegood v. Thompson*, Op. No. 5735 (S.C. Ct. App. filed July 1, 2020).

III. THE COURT OF APPEALS DID NOT MISPERECEIVE THE NATURE OF THE EVIDENCE OFFERED BY APPELLANT IN AFFIRMING THE MASTER'S EXCLUSION OF EVIDENCE OF APPELLANT'S CONTRIBUTIONS TO PROPERTIES OTHER THAN THE COMMON PROPERTIES.

Appellant argues the appellate court "misperceived the nature of the evidence offered by the Appellant and its purpose." (Petition for Writ of Certiorari). However, the Petition simply rehashes the argument set forth in Appellant's appellate brief and Petition for Rehearing that the exclusion of evidence of her renovation and refurbishing of properties other than the common properties prevented a fair analysis of her interest in those properties. Appellant's mere restatement of arguments previously presented clearly fails to demonstrate any "special and important reasons" to grant review of this issue. Rule 242, SCACR.

Even assuming arguendo Appellant had demonstrated such "special and important reasons" under Rule 242, SCACR, this Court has 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. 553, 558, 808 S.E.2d 626, 628 (Ct.App. 2017) (quoting *State v. Commander*, 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).

The Court of Appeals 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. (App. pp. 1-13). The common properties at issue were the Lake Hartwell Home and the Hilton Head Condo. (App. p. 10). The appellate 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. *Id.* The court further considered Respondent's testimony that the entire down payment on the Hilton Head Home 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 Respondent's checking account. *Id.* 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. (Appx. pp. 406-606).

Based on the foregoing, the Court of Appeals 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. Therefore, this Court should deny review of the Court of Appeal's decision affirming the Master's exclusion of evidence of Appellant's contributions to properties other than the common properties.

CONCLUSION

This Court should deny the petition for writ of certiorari to the Court of Appeals and should instruct the Court of Appeals to remit the matter for the circuit court to enter an appropriate judgment.

Respectfully submitted,

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