

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
RALPH P. STROMAN, SPECIAL REFEREE

RECEIVED
JUL 20 2015
SC Court of Appeals

APPELLATE CASE NO. 2014-002593

Dewey Lee Small,.....Respondent,

v.

Maxine Johnson a.k.a. Maxine McQueen a.k.a. Maxcine Johnson,
Ernestine Small Bass, Rose Small a/k/a Rosemary Mary McQueen,
Kassandra D. Odom a/k/a Kassandra D. Shea, Michelle D. Odom
a/k/a Michelle D. DeLa Corte, Queenie Small a/k/a Queenie B.
Arnold a/k/a Qunnie Arnold, Lewis Filton Small, Jr. a/k/a Pete
Small, William Franklin Small a/k/a Danny Small, Patsy Ann
Small a/k/a Patsy Small Crock a/k/a Patsy Ann Small Pierick
Crock a/k/a Patsy Pierick, Donald Lee Small, Janava Small
a/k/a Janava Small Lonneux a/k/a Candy Small, Daisy Dean
Small a/k/a Dean Small, Sandra Small a/k/a Sandra Howard,
Jacqueline L. White, Jimmy Prince, Jr., Veretta Norman, Venata
Small Olivera Marcus Johnson, Jr., Dewey Jerome Johnson,
John Doe and Jane Doe, Representatives of any unknown Heirs,

In Re: The Estate of Lewis Small, Defendants,

of whom Patsy Ann Crock and Lewis Filton Small, Jr. areAppellants.

FINAL BRIEF OF RESPONDENT

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July 17, 2015
Surfside Beach, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. DOES THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014, EXCEED THE SCOPE OF THE PLEADINGS BY REQUIRING THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY "CROSS-OVER DEEDS" AS A CONDITION OF RECEIVING AN UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY SUBJECT TO THE PARTITION ACTION?

- II. IS A PORTION OF THE AWARD OF ATTORNEY FEES NOT SUPPORTED IN THE RECORD AND INEQUITABLE TO THE PARTIES, AS WELL AS MAJORITY OF THE EXPENSES AWARDED, AND IS THE CONCURRENT APPROVAL OF THE PROBATE COURT REQUIRED AS A CONDITION FOR THE DISTRIBUTION OF A PORTION OF THE ATTORNEY'S FEES AND A MAJORITY OF THE EXPENSES REFLECTED IN THE FINAL ORDER FILED OCTOBER 16, 2014?

STATEMENT OF THE CASE

The Respondent, Dewey Lee Small, individually and as personal representative of the Estate of Lewis Small commenced an action against the Defendants on December 19, 2012 for relief in his Summons and Complaint, in which the Respondent sought a Quiet Title Action to distribute property acquired as an heir of Lewis Small a/k/a Louis L. Small Estate (hereinafter known as "Estate") and a partition for an Order requiring the sale of real property and division of proceeds according to the rights of the parties. (R. pp. 119-129). The partitioned property was a 60 acre tract of land owned solely by Lewis Small at the time of his death. A consent order for appointment of a Special Referee was filed April 1, 2014. On May 9, 2014 the case was heard by Special Referee Ralph P. Stroman and a final order was issued on June 19, 2014. (R. pp. 223-325); (R. pp. 6-11). John C. Thomas served as Guardian ad Litem at the hearing for all unknown heirs. (R. pp. 229-230). The Record shows that said Guardian ad litem had not heard from or come into any communications with any unknown heirs. (R. p. 229 lines 6-11). A Motion for Reconsideration was filed and another hearing was held on October 16, 2014 in which the Special Referee Ralph P. Stroman issued another Final Order. (R. pp. 440-475) (R. pp. 17-28).

As to the initial final order the record lists the following as evidence, exhibits, and testimony that were admitted as evidence to the Special Referee for consideration and without objection by the opposing parties: a four page copy of heirs of Mattie Small, a two page copy of heirs of Lewis B. Small, a six page copy of Last Will and Testament of Lewis Small, and testimonies from witnesses Lisa Cleary, Dewey Small ("Respondent"), and Patsy Crock, among others. (R. pp. 225). The Last Will and Testament of Lewis

Small and the testimony from the witnesses presented the issues of cross deeds, additional tracts (other than the 60 acre tract being partitioned) of property within the estate, and division thereof. (R. pp. 241-242); (R. pp. 35-38). Both Final Orders address the issues of cross deeds, additional tracts of property within the estate, and their division thereof. (R. pp. 6-11); (R. pp. 17-28). Included on the record, are an Affidavit of Attorney's Fees submitted by counsel of the Respondent, and a list of expenses that were expended by the Plaintiff and certain Defendants over the last thirty (30) years while taking care of and paying taxes on the said property. (R. pp. 476-505); (R. pp. 408).

In the both the Final Orders filed June 19 and October 16, 2014 Special Referee Ralph P. Stroman awarded attorney's fees to the Plaintiff in the amount of a ten percent (10%) contingency fee of the sales price of the aforementioned partitioned property. (R. p. 9 line 7); (R. p. 18 lines 5-14). The final sales price of the 60 acre tract being partitioned totaled one million eight hundred thousand (\$1,800,000) dollars. (R. pp. 19 lines 15-20). The contingency agreement was signed and contracted between the Respondent, the duly appointed personal representative of the Estate of Lewis Small, and his attorney. (R. p. 18 lines 5-14). Additionally, in the Final Order dated October 16, 2014, the Special Referee ordered certain expenses and reimbursements to be paid at the time of the closing, stating that "these items have been pre-paid by several of the Defendants and the Plaintiff over the past thirty years." (R. p. 19 lines 23-28). The Order considered all of these expenses to be non-probate assets, having nothing to do with the administration of the Estate of Lewis Small. Finally, the Final Order filed October 16, 2014, ordered that cross deeds were to be signed by the heirs as to the other properties contained in the will. (R. p. 23 lines 14-17). This part of the Order was

grounded from the Last Will and Testament of Lewis Small, which includes clauses which states the rights of parties who refused to sign certain cross deeds. (R. pp. 35-38).

In both the Final Orders filed June 19 and October 16, 2014 Special Referee Ralph P. Stroman addressed issues of "cross deeds". The initial Pleadings of the Respondent did not contain the issue of cross deeds. (R. pp. 119-129). However, the issue of cross deeds was deliberated in detail at May 9, 2014 hearing. (R. pp. 223-409). No objections were made to this evidence or issues when presented at trial. (R. pp. 223-409).

A Notice of Appeal was filed by the Appellants, Patsy Ann Crock and Fulton Louis Small, on November 10, 2014 and served by certified mail November 7, 2014. The Appellants filed their Initial Brief and Designation of matter February 9, 2015. Respondent Filed a Motion to Dismiss February 27, 2015 and a Non-Dispositional Decision was rendered by this court April 30, 2015 denying the Motion to Dismiss.

The Respondent, in his Initial Brief, respectfully asserts that the relief granted in the Final Order filed October 16, 2014 does not exceed the scope of Pleadings and that the attorney's fees and expenses awarded were supported by the record and were equitable in nature.

STATEMENT OF THE FACTS

It is of the essence to clarify the significance of the two hearings heard by Special Referee Ralph Stroman. First, the hearing heard May 9th and filed June 19, 2014 was the initial hearing in which evidence, exhibits, and testimony were submitted before the Special Referee, in order for him to determine a final order concerning the quiet title and

partition action filed by the Respondent. The Final Order filed October 16, 2014, which Appellant asserts is subject to this appeal, is a product of a Motion for Reconsideration filed by the Appellant and heard September 29, 2014. The importance of this is that all evidence, exhibits, and testimony in this case were heard by the Special Referee on the May 9, 2014 hearing and that the latter hearing merely discussed previous matters litigated and ordered and that no new evidence was introduced. (R. pp. 440-475). *See* September 29, 2014 Hearing Transcript. Therefore, numerous important matters of the Record, which are referenced in this brief, will be discussed below as having occurred at this abovementioned earlier held hearing.

The Last Will and Testament of Lewis Small was submitted for evidence at the May 9, 2014 hearing. (R. p. 225 lines 18-19). Submission of said Last Will and Testament of Lewis Small was not objected to by any parties. (R. pp. 223-324). The Last Will and Testament of Lewis Small included written documentation of all heirs, other tracts of property not subject to partition of the 60 acre tract of land, and references of cross deeds which were to be signed by the parties in order to receive inheritance. (R. pp. 35-38) Testimony of Lisa Cleary, testimony of Dewey Small, and testimony of Patsy Crock, were all heard by the court. (R. pp. 238-243- pp. 255-273- pp. 301-310). These testimonies included the issues of cross deeds, other properties not a part of the partition action, and certain funds that were expended by parties over the last 30 years since the Estate of Lewis Small was first opened. *Id.* None of the testimony concerning these issues was objected to by any parties. *Id.* Further, the following were exhibits listed and reviewed as evidence for the hearing held May 9, 2014: a four page copy of the heirs of Mattie Small and a two page copy of the heirs of Lewis B. Small. *Id.* Neither document

was objected to at the Hearing. (R. p. 225). In the initial hearing on May 9, 2014, the Plaintiff and four defendants were represented by counsel, John C. Thomas was present as a Guardian ad litem for unknown heirs, and all other heirs appeared pro se. (R. p. 224).

Mr. DuRant (counsel for the Respondent), filed an Affidavit of Attorney's with the court on August 27, 2014. (R. pp. 476-505). This Affidavit was submitted as evidence and was considered by the court in the award of the attorney's fees in this matter. Id. The Affidavit of Attorney's Fees states that Mr. DuRant was admitted to South Carolina Bar in 1983, has appeared before the Municipal Court, Family Court, Probate Court, Magistrate Court, Court of Common Pleas, General Sessions, Administrative Law Court, Worker's Compensation Claims Court, South Carolina Court of Appeals, South Carolina Supreme Court, and United States Bankruptcy Court and has represented the Town of Surfside for twenty-two years and is currently the attorney for the Town of Pawleys Island and has been since 1996. (R. pp. 476-477). Attached to the Affidavit of Attorney's Fees is a reflection of the time expended on the case, totaling one hundred ninety-two (192) hours. (R. pp. 479-488).

Moreover, Dewey Small, the Respondent and Personal Representative of the Estate, having full authority, signed a contingency agreement with Mr. DuRant. (R. p. 491- p. 506). The contingency agreement was to be calculated from ten percent (10%) of the sale proceeds of the partitioned tract. The nature, extent, and difficulty of the legal services are evident by the agreement itself and the facts surrounding the matter. The Estate, which was opened 30 years ago, has gone through a plethora of attorneys, none of which were able to quiet title and sell the property as Mr. DuRant has done.

ARGUMENT

I. THE RELIEF GRANTED IN THE FINAL ORDER FILED OCTOBER 16, 2014 DOES NOT EXCEED THE SCOPE OF THE PLEADINGS WHEN THEY REQUIRED THE CONVEYANCE OF PROPERTIES NOT SUBJECT TO THE PARTITION ACTION BY "CROSS-OVER DEEDS" AS A CONDITION OF RECEIVING AND UNDETERMINED PORTION OF THE PROCEEDS GENERATED BY THE SALE OF THE PROPERTY.

The relief granted in the final order filed October 16, 2014 did not exceed the scope of the pleadings because issues that were not raised by the Respondent in his initial pleadings were subsequently tried by implied consent of the parties and thereafter were treated in all respects as if they had been raised in the pleadings.

South Carolina Code 1976 § 62-1-302(a) states that the circuit court "has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court." South Carolina Rules of Civil Procedure 15(b) states that "(w)hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." "If a party does not object to the evidence when presented at trial, the issue is considered tried by consent." Upchurch v. Upchurch, 624 S.E.2d 643, 648 (2006); citing Simmons v. Tuomey Reg'l Med. Ctr., 498 S.E.2d 408, 410 (Ct.App.1998).

In his Initial Brief, the Appellant first argues that the Special Referee is without the requisite subject matter jurisdiction to interpret the Last Will and Testament of Lewis Small based on the Pleadings filed in the Quiet Title and Partition Action. As stated above, South Carolina Code 1976 § 62-1-302(a) gives the circuit court concurrent jurisdiction to determine heirs and successors as necessary to resolve real estate matters,

including partitions and quiet title actions. Therefore, the Special Referee had the proper subject matter jurisdiction to interpret the Last Will and Testament of Lewis Small in the determining the heirs of the necessary properties of this action, thus negating the Appellants assertion of lack of jurisdiction.

The Appellant continues with the assertion that not all parties alive or deceased were fully represented, however no such objections were made during the hearing on May 9, 2014. In the initial hearing on May 9, 2014, the Plaintiff and four defendants were represented by counsel, John C. Thomas was present as a Guardian ad litem for unknown heirs, and all other heirs appeared pro se. Further, a four page copy of the heirs of Mattie Small and a two page copy of the heirs of Lewis B. Small were submitted as evidence and no objections were made as to the heirs listed. (R. pp. 224-225); (R. pp. 227-406); *See* May 9, 2014 Hearing Transcript. Therefore, all heirs were represented and given the right to be heard and no such objections were made at the time of the hearing. Within this same argument (the structure is somewhat unclear), the Appellant continues by stating that where several tracts of land within this estate owned by the same persons as tenants in common, then no separate action shall be brought for partition without consent of cotenants. However, the Appellant fails to address the issue of tracts of property owned by the same persons, in that each tract of land addressed in this case are all to be owned by separate distinct groups of cotenants, and thus does not fall within the quoted South Carolina Rule of Civil Procedure 71(d)(2).

Absentmindedly, none of the Appellant's arguments of jurisdiction, lack of representation, and improper civil procedure, address the issue in which the Appellant has presented to the court. The issue of whether the Final Order filed October 16, 2014

exceeds the scope of the pleadings filed by the Respondent. The Respondents asserts that it has not, in that all the evidence admitted at the initial hearing heard May 9, 2014, was not objected to, and therefore the issues should be considered tried by consent.

The Last Will and Testament of Lewis Small was submitted for evidence in the above mentioned hearing and was not objected to. The Last Will and Testament of Lewis Small includes all parties, and other tracts not attached to the 60 acre tract of land, but subject to the cross deeds which were ordered to be signed by the parties in order to receive their funds. Testimony of Lisa Cleary, testimony of Dewey Small, and testimony of Patsy Crock, none of which were objected to by opposing counsel, testified to these other properties (not the partitioned 60 acre tract), the heirs, and costs and expenses incurred while caring for such properties. (R. pp. 238-243- pp. 255-273- pp. 301-310). Further, the following were exhibits listed and reviewed as evidence for the hearing held May 9, 2014: four page copy of the heirs of Mattie Small and two page copy of the heirs of Lewis B. Small. Neither document was objected to. These lack of objections to issues put before the circuit court by parties, demonstrates the implied consent of the parties and therefore as a consequence these issues should be treated as if they had been raised in the pleadings.

The Respondent concludes that the relief granted in the Final Order filed October 16, 2014 does not exceed the scope of the pleadings, by requiring the conveyance of properties not subject to the partition action by "cross-over deeds", because even if certain issues were not raised in the pleadings, the implied consent of the parties through their lack of objections, enabled these certain issues to be included as if they had been

raised in the pleadings. And thus the Final Order filed October 16, 2014 should be affirmed for the forgoing reasons.

II. ALL PORTIONS OF THE AWARD OF ATTORNEY'S FEES IS SUPPORTED WITHIN THE RECORD, AND ARE EQUITABLE TO THE PARTIES, AS ARE ALL THE REIMBURSEABLE EXPENSES AWARDED AND CONCURRENT APPROVAL OF THE PROBATE COURT WAS NOT REQUIRED AS CONDITION PRECEDENT FOR THE DISTRIBUTION OF THE ATTORNEY'S FEES AND THE EXPENSES REFLECTED IN THE FINAL ORDER FILED OCTOBER 16, 2014.

All portions of the award of attorney's fees and expenses are supported on the record, are equitable, and are within the jurisdiction of the Circuit Court for distribution because the six factors were met and pointed to in the record, and the court has statutory authority to award attorney fees and costs.

Rule 71(d)(3) of the South Carolina Rules of Civil Procedure states:

Attorneys fees and costs may be awarded the attorney for any party(s) from any common fund generated by the partition to the extent that attorney's efforts benefited all parties; otherwise, his fee shall be paid by the party(s) he represents or from the party(s) share(s) only. The court may order the payment of costs from the proceeds of sale of the common property or may equitably assess the costs against shares of the parties.

The six (6) factors to consider in awarding attorneys fees are as follows: (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. Blumberg v. Nealco Inc., 427 S.E.2d 659, 660 (1993). The allowance of attorneys' fees is within the discretion of the trial judge. Smith v. Hawkins, 175 S.E.2d 824 (1970). The allowance of fees is discretionary with the trial judge, and his decision in such matters will not be disturbed unless an abuse of discretion is shown. Watson v.

Little, 229 S.C. 486, 93 S.E.2d 645 (1956). The court of common pleas may fix attorneys' fees in all partition proceedings and, as may be equitable, assess such fees against any or all of the parties in interest. S.C. Code of Laws § 15-61-110.

The Final Order filed October 16, 2014 states:

“(i)t appears from the facts and evidence of this case that Mr. Small, (Respondent) as Personal Representative of the Estate of Lewis Small had on multiple occasions tried to use different attorneys to resolve the title issues associated with this property over the course of the past approximately thirty (30) years. Despite all his efforts, he was unable to get any resolution of the issues associated with clearing the title so that the parties could move forward with the sale of real property. Despite the fact that Mr. Small had no funds in which to work with to advance all of the costs in this case, Mr. DuRant (attorney to Respondent) agreed to take on the case on a ten percent (10%) contingency fee with the parties to be paid all costs, expenses and attorney's fees at the time that closing took place.”

“(t)hat through Mr. DuRant's effort, not only has the title now been quieted by this action, but a contract for the purchase of the approximately sixty (60) acre tract has not be secured for ONE MILLION EIGHT HUNDRED THOUSAND DOLLARS UNITED STATES DOLLARS AND NO/100 (\$1,800,000) with no contingencies. These funds of money would not be available to the Defendants in this case had Mr. DuRant not agreed to take this case on a contingency fee.”

In addition, Mr. DuRant (counsel for the Respondent), filed an Affidavit of Attorney's with the court on August 27, 2014. (R. pp. 476-505). This Affidavit was submitted as evidence for the above listed Six Factors and was considered by the court in the award of the attorney's fees in this matter. The Affidavit of Attorney's Fees states that Mr. DuRant was admitted to South Carolina Bar in 1983, has appeared before the Municipal Court, Family Court, Probate Court, Magistrate Court, Court of Common Pleas, General Sessions, Administrative Law Court, Worker's Compensation Claims Court, South Carolina Court of Appeals, South Carolina Supreme Court, and United States Bankruptcy Court and has represented the Town of Surfside for twenty-two years

and is currently the attorney for the Town of Pawleys Island and has been since 1996. Attached to the Affidavit of Attorney's Fees is a reflection of the time expended on the case, totaling one hundred ninety-two (192) hours.

Moreover, Dewey Small, the Respondent and Personal Representative of the Estate, having full authority, signed a contingency agreement with Mr. DuRant. The contingency agreement was to be calculated from ten percent (10%) of the sale proceeds of the partitioned tract. The nature, extent, and difficulty of the legal services are evident by the agreement itself and the facts surrounding the matter. The Estate which was opened 30 years ago has gone through a plethora of attorneys, none of which were able to quiet title and sell the property as Mr. DuRant accomplished.

In his initial brief, the Appellant does not address any of these matters listed above, all of which are on the record with court. Furthermore, the Appellant fails to state any case law or statute which addresses the "inequitable" award of "reimbursable expenses" awarded to the Respondent. Appellant merely states that the award is inequitable and lists the expenses that are a part of the final order filed June 19, 2014

Therefore, the Special Referee, under his full discretion and taking into account the six factors provided by Blumberg v. Nealco, properly and equitably portioned the award of attorney's fees and expenses, which are supported by facts within the record. And thus the Final Order filed October 16, 2014 should be affirmed for the forgoing reasons.

CONCLUSION

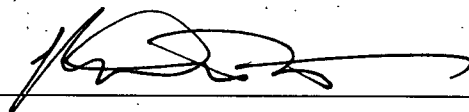
For the abovementioned reasons the Respondent respectfully asks this court to affirm the Special Referee's decision filed October 16, 2014. The Respondent believes the relief granted in the final order filed October 16, 2014 did not exceed the scope of the pleadings because issues that were not raised by the Respondent in his initial pleadings were subsequently tried by implied consent of the parties and thereafter were treated in all respects as if they had been raised in the pleadings. Further, the Respondent believes all portions of the award of attorney's fees and expenses are supported on the record, are equitable, and are within the jurisdiction of the Circuit Court for distribution because the six factors were met and pointed to in the record and the circuit court has statutory authority to award attorney fees, costs, and expenses. Therefore the Respondent respectfully requests this Court to affirm these matters on appeal.

Respectfully submitted,

Dated at Surfside Beach, South Carolina, this 16 day of July, 2015.

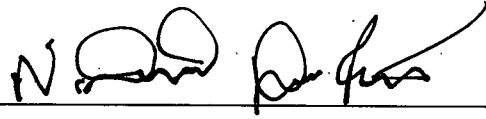
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By: _____



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By:

A handwritten signature in black ink, appearing to read "N. David DuRant, Sr.", written over a horizontal line.

N. David DuRant, Sr., Esquire

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Ralph P. Stroman, Special Referee

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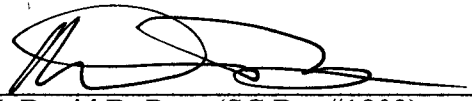
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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondent by depositing a copy in the United States Mail, postage prepaid, on July 17, 2015, addressed to Charles O. Nation, Esquire, Post Office Drawer 1657, Georgetown, South Carolina 29442.



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July 17, 2015