

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:
ESTATE OF ALEXIOUS G. FOURAS,
Deceased, Dean Fouras, Executor

: JUDGES:
:
: Hon. John W. Wise, P.J.
: Hon. Julie A. Edwards, J.
: Hon. John F. Boggins, J.
:
:
:

OPINION

: Case No. 2003CA00049
: Case No. 2003CA00052

CHARACTER OF PROCEEDING: Appeal from the Licking County Probate Court Case No. 93-0673

JUDGMENT: Affirmed in Part; Reversed in Part

DATE OF JUDGMENT ENTRY: OCTOBER 14, 2004

APPEARANCES:

For Appellant G. Rand Smith:

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Boggins, J.

{¶1} These are appeals from certain decisions of the Court of Common Pleas, Probate Division of Licking County, Ohio.

{¶2} Alexious G. Fouras died August 19, 1993. Mr. Fouras was married twice with three adult children of the first marriage, a second spouse, Evangeline Fouras, and their three minor children surviving.

{¶3} The Will contained a testamentary trust to benefit the three minor children. Cross-Appellant, Evangeline Fouras was to receive the residue of the estate.

{¶4} Appellant, Dean Fouras, a son from the first marriage, was named as executor.

{¶5} Such Appellant retained Appellant, C. William Dawson as attorney for the estate with a fee agreement filed with the probate court.

{¶6} Cross-Appellant, Evangeline Fouras, asserted charges of fraud and deceit as to the conduct of Appellants, Dean Fouras, and Attorney-Appellant Dawson, in administering the estate. Appellant Dean Fouras engaged the services of Appellant, Attorney G. Rand Smith as to these allegations.

{¶7} Appellant Smith, a trial advocate, entered into a fee contract with Appellants Dean Fouras and C. William Dawson, with such contract also filed with the probate court.

{¶8} In December, 1996, the court commenced a hearing as to Cross-Appellant, Evangeline Fouras' objections to payment of the executor's and attorney fees of Appellants Dawson and Smith and as to expert fees incurred.

{¶9} On May 6, 1997, the parties agreed as to a stipulation which contained the following paragraph:

{¶10} “G. Rand Smith, attorney has billed in the Fouras Estate the sum of \$51,589.82 for his legal services and incidental costs. The parties stipulate only as to the reasonableness of his hourly rate and as to the time spent. His billings are attached hereto and made a part hereof as Exhibits “R” through “R-6”.

{¶11} Appellant Smith has received \$30,000.00 of his fee billings from the estate per prior court order.

{¶12} This is the third appeal as to this estate being 99CA52, 99CA53, consolidated with 99CA55 and 01CA00043, with any unopposed additional facts stated therein included by reference herein.

{¶13} As to the prior appeals, the issues raised in the consolidated appeals in Case Numbers 99CA52, 99CA53 and 99CA55 were not addressed by this court as the failure of the trial court to provide sufficient findings of fact and conclusions of law resulted in the lack of a final appealable order.

{¶14} In the appeal of 01-CA-00043, as to the transcript cost payment, again this court could not review the trial court’s reasoning in denial of payment as no reasons were stated, but merely a conclusion. Pursuant to the prior mandate, the court ordered submission of proposed findings of fact and conclusions but did not adopt those nor issue its own, thereby not solving the cause of the remand and mandate of this court. Certain other matters unrelated to the present appeal were also considered.

{¶15} The Assignments of Error raised by Appellant’s, Dean Fouras and C. William Dawson, are:

{¶16} “1. THE TRIAL COURT ERRORED [SIC] DENYING APPELLANTS [SIC] DUE PROCESS WHEN IT FAILED TO FILE A NARRATIVE STATEMENT OR TO SETTLE THE RECORD PURSUANT TO TIMELY PROPERLY FILED [SIC] AN AFFIDAVIT OF INDIGENCY AND MOTION PURSUANT TO APPELLANT RULE (9). RULES OF APPELLANT PROCEDURE.

{¶17} “2. THE COURT MUST GIVE FULL CREDIBILITY TO THE PRESUMPTION OF REGULARITY OF MAILING AND DELIVERY OF A MOTION OR HOLD A HEARING FO [SIC] DETERMINE CREDIBILITY WHERE THE PROOF OF SERVICE IS EXECUTED IN ACCORDANCE WITH THE REQUIREMENTS OF CIVIL RULE 5(D) AND 11 OF THE OHIO RULES OF CIVIL PROCEDURE AND THE PARTY BEING SERVED OFFERS NO FACTS OTHER THAN HIS NAKED SWORN ASSERTION THAT HE DID NOT RECEIVE SERVICE WHERE THE MOVANT CONTROVERTS THE PRESUMPTION OF NON-SERVICE AND OFFERS EVIDENCE TENDING TO ESTABLISH SERVICE.

{¶18} “3. THE ‘BEST INTEREST’ OF THE ESTATE INCLUDES PAYING FOR A TRANSCRIPT OF THE PROCEEDINGS WHERE THE EXECUTOR, WHO IS NOT A BENEFICIARY OF THE ESTATE, AND THE ATTORNEY ARE CHALLENGED REGARDING THEIR HANDLING OF ESTATE MATTERS BY A BENEFICIARY OF THE ESTATE.

{¶19} “4. THE TRIAL COURT ERRORED [SIC] IN ADOPTING WITHOUT REVIEW OR SHOWING A BASIS FOR AGREEMENT THE FINDING OF FACT AND CONCLUSIONS OF LAW SUBMITTED BY OBJECTOR.

{¶20} “5. THE TRIAL COURT ERRORED [SIC] IN FINDING ANY CONTRACTUAL OR LEGAL OBLIGATION [SIC] EXISTS BETWEEN SMITH AND DAWSON REGARDING SMITHS [SIC] APPEARANCE IN THE PROCEEDINGS AND LIABILITY FOR HIS LEGAL FEES.

{¶21} “6. THE TRIAL COURT COMMITTED ERROR IN AWARDING PARTIAL FEES FOR THE SERVICES OF G. RAND SMITH.

{¶22} “7. THE TRIAL COURT COMMITTED ERROR WHEN IT FAILED TO SERVE DEAN FOURAS OR HIS COUNSEL WITH THE JUDGMENT DATE MAY 5, 2003.

{¶23} “8. THE TRIAL COURT COMMITTED ERROR WHEN IT FAILED TO ATTACH THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IT ADOPTED TO ITS [SIC] JUDGMENT FILED JANUARY 13, 2003.

{¶24} “9. THE TRIAL COURT ERRORED [SIC] IN DENYING ALL THE FEES TO EXECUTOR AND HIS ATTORNEY FOR SERVICES RENDERED TO THE ESTATE.”

{¶25} The Assignments of Error asserted by Appellant, G. Rand Smith are:

{¶26} “1. WHEN A CASE IS TRIED TO A COURT, WITHOUT A JURY, AND A PARTY REQUESTS FINDINGS OF FACT SEPARATE AND APART FROM CONCLUSIONS OF LAW, IT IS ERROR BY THE TRIAL COURT NOT TO ENTER SAID FINDINGS AND CONCLUSIONS.

{¶27} “2. A TRIAL COURT MAY NOT *CART BLANCHE* ADOPT A PARTIES’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH ARE

INCONSISTENT WITH THE RECORD, WITHOUT REVIEW OF THE RECORD AND WITHOUT EXERCISING ITS OWN JUDGMENT INPUT INTO THE DECISION ITSELF.

{¶28} “3”. WHEN A TRIAL COURT REFUSES TO FOLLOW THE MANDATE OF A COURT OF APPEALS OF OHIO, THE APPELLATE COURT HAS AUTHORITY TO CARRY OUT ITS OWN MANDATE WITHOUT FURTHER REMAND TO THE TRIAL COURT.

{¶29} “4. WHEN AN ATTORNEY HAS BEEN RETAINED, APPOINTED AND RECOGNIZED AS LITIGATION COUNSEL FOR AN ESTATE, AND FULLY CARRIES OUT HIS LEGAL RESPONSIBILITY, IT IS ERROR, AS A MATTER OF LAW, FOR A TRIAL COURT NOT TO AWARD SAID ATTORNEY FULL COMPENSATION FOR THE WORK HE HAS PERFORMED.

{¶30} “5. WHEN A TRIAL COURT’S DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AN APPELLATE COURT, PURSUANT TO APP. R. 12(B) AND (C), HAS FULL AUTHORITY TO ENTER THE JUDGMENT WHICH THE TRIAL COURT SHOULD HAVE ENTERED.

{¶31} “6. A TRIAL COURT HAS BOTH DISCRETION AND AUTHORITY TO AWARD ATTORNEY FEES OF A CREDITOR OF AN ESTATE IF THE CREDITOR HAS A VALID CLAIM AND THE COURT AND ESTATE REFUSE TO PAY AND HONOR THE SAME.”

{¶32} The Assignments of Error of Cross-Appellant, Evangeline Fouras, are:

{¶33} “1. TRIAL COURT ERRED IN AWARDING \$30,000.00 TO ATTORNEY G. RAND SMITH FROM ESTATE FUNDS FOR LEGAL SERVICES RENDERED.

{¶34} “2. TRIAL COURT ERRED IN AWARDING ANY FEE TO ATTORNEY SMITH PRIOR TO EVEN RENDERING ITS OPINION HEREIN.”

APPELLANTS DEAN FOURAS AND C. WILLIAM DAWSON

ASSIGNMENT OF ERROR

I.

{¶35} The first Assignment of Error of Appellants Dean Fouras and Dawson references the failure of the trial judge to file a narrative statement or to settle the record pursuant to their App. Rule 9(c) and (e) statement in lieu of a transcript and motion to strike filed by Cross-Appellant Evangeline Fouras.

{¶36} Appellate Rule 9(c) and (e) provide:

{¶37} “(C) STATEMENT OF THE EVIDENCE OR PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE.

{¶38} “If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App. R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App. R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

{¶39} “(E) CORRECTION OR MODIFICATION OF THE RECORD.

{¶40} “If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.”

{¶41} As a transcript in this cause could have been prepared but at a considerable cost (11-21-00 transcript, p. 1920), an affidavit of indigency has been filed by Appellant Dean Fouras with a narrative statement.

{¶42} The Ohio Supreme Court in *State, ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56 has held:

{¶43} “Transcript is ‘unavailable’ for purposes of rule [Rules App.Proc., Rule 9(C)] allowing use of narrative statements when indigent appellant is unable to bear cost of providing transcript.”

{¶44} One of the bases of the Motion to Strike is that a mandamus action was not filed to require compliance by the trial judge with such appellate rules.

{¶45} While *State ex rel. Motley*, supra, did originate as a mandamus action, the requirement that an indigent appellant must resort to such action as a condition precedent to filing a narrative statement lacks logic in that the indigency would obviously often be a bar to taking such approach.

{¶46} In addressing the first Assignment of Error, we must first review the objection to the late filing of the narrative statement of facts. While Appellee Cross-Appellant is correct in that an additional leave to extend our prior granting of an extension was not requested, in the interest of justice as this is the third appeal, the objection is denied. By this denial and the trial court's submission of its judgment entry pursuant to our directive, issued on our own initiative pursuant to Appellate Rule 9(E) and the ruling that the statement of facts of these Appellants did not conform to the record, thereby warranting sustaining the motion to strike such statement of facts, the first Assignment has become moot and is denied.

APPELLANTS DEAN FOURAS AND C. WILLIAM DAWSON

ASSIGNMENTS OF ERROR IV. & VIII.

APPELLANT G. RAND SMITH ASSIGNMENTS OF ERROR I., II.

{¶47} Assignments of Error Four and Eight of Appellants Dean Fouras and C. William Dawson and Assignments of Error One and Two of Appellant G. Rand Smith also relate to the Findings of Fact and Conclusions of Law which the trial court has clarified and settled the record pursuant to our directive. As a result of the judgment entry in compliance therewith, we find these Assignments not well taken and are rejected.

{¶48} Also, without a transcript, except as to Exhibit G of Appellant Smith and the 9(C) statement of facts having been stricken, we must accept the factual determinations by the judge as correct except as to any unopposed deviations indicated by such Appellant Smith's Exhibit G.

{¶49} When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court=s proceedings. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶50} The acceptance of Cross-Appellant Evangeline Fouras' Statement of Facts and Conclusions of Law is subject to an abuse of discretion standard. The Court is not required to accept or reject any or all conclusions presented but may accept some or all based upon the judge's knowledge of the testimony and acceptance thereof.

{¶51} In those cases cited by Appellants Dean Fouras and C. William Dawson, to-wit: *Adkins v. Adkins* (1988), 43 Ohio App.3d 95 and *Clark v. Clark* (1998), 130 Ohio App.3d 648, the Courts held, respectively:

{¶52} "Trial court was entitled to adopt wife's proposed findings and conclusions of law in divorce action; there were no apparent inaccuracies in wife's proposed findings and conclusions nor were they against manifest weight of evidence.

{¶53} "A trial court may adopt as its own a party's proposed findings of fact and conclusions of law if it has thoroughly read the document to ensure that it is completely accurate in fact and law. (Civ. R. 52, applied).

{¶54} "Trial court may adopt a party's findings of fact and conclusions of law as long as the trial court judge has reviewed the document thoroughly and ensures that it is accurate."

{¶55} There is nothing before this court whereby we can determine if the court's acceptance of the Findings of Fact and Conclusions of Law submitted by Cross-Appellant, Evangeline Fouras, were not in accordance with the accepted testimony

even though such may be the product of the court's recollection and perhaps his notes thereof. An Appellate Court will assume regularity rather than irregularity in the trial court's findings. *State v. Asman* (1989), 63 Ohio App.3d 535. The statement of the applicable law as to the absence of a transcript is at paragraph 49 hereof.

{¶56} We therefore reject Appellants, Dean Fouras' and C. William Dawson's, Fourth Assignment of Error and Appellant, G. Rand Smith's, Second Assignment of Error.

CROSS-APPELLANT EVANGELINE FOURAS' ASSIGNMENT OF ERROR

I.

{¶57} In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case *sub judice* and determine whether the trial court acted unreasonably, arbitrarily or unconscionably. We fail to find an abuse of discretion in the court's acceptance in totality of the Findings of Fact and Conclusions presented by Cross-Appellant Evangeline Fouras.

{¶58} We also note that the Conclusion of Law of Cross-Appellant Evangeline Fouras' submitted Findings of Fact and Conclusions of Law to the effect that Appellant Smith was required to repay the \$30,000.00 in fees previously ordered paid is not a conclusion of law but an opinion, as to which the court was required to rule based upon the facts and testimony accepted.

{¶59} We do find, however, that the court's decision, issued pursuant to our Appellate Rule 9(E) request which re-affirmed prior findings, conclusions and rulings

and adopting in total the findings of fact and conclusions of law of Cross-Appellant Evangeline Fouras, created an inconsistency relative to the \$30,000.00 fees paid to Appellant Smith, to which Cross-Appellant Evangeline Fouras raises an objection by her First Assignment of Error. Also, by this action, the court has failed to respond to the remand of this court in its entry in Appellate Case Numbers 99CA52, 53, 55 wherein we stated:

{¶60} “On November 2, 1998, the trial court responded by issuing a Judgment Entry in which the court ordered the Executor to immediately pay “the partial bill of G. Rand Smith, Attorney, litigation counsel, the sum of \$30,000.00 for fees and expenses, on services rendered as litigation counsel for the executor and estate of Alexious Fouras.” The trial court authorized the use of estate funds for these fees. The Judgment Entry did not identify the means or reasons by which the trial court arrived at the \$30,000.00 figure for Attorney Smith’s attorney fees.”

{¶61} Therefore, we sustain Cross-Appellant Evangeline Fouras’ First Assignment of Error and again remand this cause requesting a consistent determination as to the payment of the prior \$30,000.00 to Appellant Smith. As yet, we do not know if the court determined that that portion of fees was beneficial to the estate rather than being solely a representation of Appellants Dawson and Dean Fouras, as opposed to the fee balance. Her second assignment of error cannot be decided by this Court without the explanation of the rationale as to such fees being provided as previously requested by this Court but this Second Assignment of Error will be answered, or become moot depending on the trial court’s response and therefore we decline to rule on her Second Assignment of Error.

APPELLANTS DEAN FOURAS AND C. WILLIAM DAWSON

ASSIGNMENTS OF ERROR

II., III.

{¶62} As to the Second and Third Assignments of Error of Appellants Dean Fouras and C. William Dawson, the allegations as to service or lack thereof of the motion to obtain a transcript at the Estate's expense has become moot and the only question remaining is whether an abuse of discretion occurred in the lack of granting such motion. We must, of course, presume denial in the absence of a ruling on a motion.

{¶63} However, as the Court has settled the record pursuant to our request as to the record, which satisfies Appellate Rule 9(C) as to a factual statement with the absence of a transcript, we find that no abuse of discretion occurred relative to obligating the Estate to expend over Nine Thousand (\$9,000.00) Dollars for the transcript. While Dean Fouras has indicated indigency, the same is lacking as to C. William Dawson and G. Rand Smith, who therefore could have obtained the transcript if either concluded such to be essential to their appellate arguments. Appellate Rule 9(C) provides the option to file a narrative statement if indigency prevents a transcript's preparation. It does not grant the right to a transcript to a civil participant. It may be argued that a narrative statement was not filed by Appellants Dawson and Smith, but we conclude that the proposed findings of fact submitted by the respective parties was equivalent thereto. If we concluded that such were not the case, then the failure to file a narrative statement would preclude consideration. *Robinson v. Custom Sport Cycles* (1999), 1999 WL 254504 (Ohio App. 5th Dist).

{¶64} The Court's settlement of the record and acceptance of the statement of facts by Cross-Appellant Evangeline Fouras is determined to constitute a narrative statement.

{¶65} The standard of review as to abuse of discretion is stated previously in this opinion.

{¶66} We therefore reject the Second and Third Assignments of Error of Appellants Dean Fouras and C. William Dawson.

APPELLANTS DEAN FOURAS AND C. WILLIAM DAWSON

ASSIGNMENTS OF ERROR

V., VI., IX.

APPELLANT G. RAND SMITH ASSIGNMENT OF ERROR

IV.

{¶67} With respect to the Fifth and Sixth Assignments of Error of Appellants D. Fouras and Dawson and Appellant Smith's Fourth Assignment of Error, we must examine the background of the hiring of Attorney Smith as litigation counsel.

{¶68} The apparent need for litigation counsel arose due to cross-appellant Evangeline Fouras' complaints as to improper handling of the Estate by the Executor and Attorney for the Estate. This, obviously, was not primarily to represent the Estate, but to establish proper conduct of the Executor and Attorney Dawson.

{¶69} While the fee contract was filed with the court, this of itself does not establish court approval even though the Executor and Attorney Dawson signed in their capacities on behalf of the Estate.

{¶70} The court's extensive findings in its decision of April 12, 1999, relative to the services of the Executor and Attorney Dawson and the acceptance of the facts and conclusions of Cross-Appellant Evangeline Fouras sufficiently support the conclusions drawn by the court. Of course, the credibility of the testimony of the witnesses is one for the trial court, not this court.

{¶71} The awarding of attorney fees is within the discretion of the court in considering the quality thereof and the benefit or detriment to the Estate.

{¶72} As to the Executor's fees, R.C. 2113.35 clearly provides for a method of payment but:

{¶73} "If the probate court finds, after hearing, that an executor or administrator, in any respect, has not faithfully discharged his duties as executor or administrator, the court may deny the executor or administrator any compensation whatsoever or may allow the executor or administrator the reduced compensation that the court thinks proper."

{¶74} *Whitaker v. Estate of Whitaker* 1995, 105 Ohio App.3d 46, 663 N.E.2d 681, has stated the standard of this court.

{¶75} "Probate court's reduction or denial of requested executor's commission will not be reversed on appeal absent abuse of discretion."

{¶76} The standard of review of abuse of discretion has been previously stated.

{¶77} We find no abuse of discretion and therefore reject Appellants' Dawson and D. Fouras' Fifth and Ninth Assignments of Error and Appellant Smith's Fourth Assignment of Error.

{¶78} While we have previously in this opinion found that the court's reasonings of benefit to the Estate is lacking as to the \$30,000.00 paid to Appellant Smith, the court

was warranted in drawing the conclusions it did as to the balance claimed. No abuse of discretion in this regard is found. We, therefore, also reject Appellants' D. Fouras and Dawson's Sixth Assignment of Error.

{¶179} The Fifth Assignment of Appellant Smith argues manifest weight of the evidence.

{¶180} The standard of review for manifest weight and sufficiency of the evidence challenges is set forth in *State v. Jenks* (1981), 61 Ohio St.3d 259, syllabus two:

{¶181} The weight to be given the evidence introduced at trial and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. Further, it is not the function of an appellate court to substitute its judgment for that of the fact finder. *Jenks, supra*, at 279.

{¶182} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

{¶183} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and draw all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Martin* (1983), 20 Ohio App.3d 172. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶84} Based upon the facts noted *supra*, and the entire record, we do not find the decision was against the manifest weight of the evidence. The Magistrate, as approved by the Judge, was free to accept or reject any or all of the testimony of the witnesses and assess the credibility of those witnesses. There was a sufficient, competent finding.

{¶85} We fail to find merit in this argument and reject such Fifth Assignment of Appellant Smith.

{¶86} Likewise, Appellant Smith's Sixth Assignment tries to change his contractual arrangement, as found by the court, with Appellant's D. Fouras and Dawson to that of a creditor of the Estate. He did not become a creditor because of non-payment. This position is spurious and thus his Sixth Assignment is rejected.

{¶87} While Appellant Smith is correct in that under some circumstances, this Court can enter judgment on a non-followed prior order, the one involved here as to the payment of the \$30,000.00 requires the explanation of the court's rationale in payment thereof rather than our determination of uncontroverted facts or law and therefore his Fourth Assignment is rejected.

{¶188} We, therefore, affirm the court as to all Assignments of Error except as to that of Cross-Appellant Evangeline Fouras questioning the \$30,000.00 paid to Attorney Smith, which has still not been answered notwithstanding our prior decision thereon and this cause is reversed as to such and again remanded on that issue.

By: Boggins, J.

Wise, P.J and

Edwards, J. concur.

JUDGES

