

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Richard E. Smallwood,
Plaintiff Below, Petitioner**

vs.) No. 101602 (Marion County 07-C-429)

**Patrick Smallwood,
Defendant Below, Respondent**

FILED

January 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Richard E. Smallwood appeals the circuit court's final order granting summary judgment to Respondent Patrick Smallwood, the administrator of their deceased mother's estate, in an action in which petitioner alleged that respondent was wasting the estate. The instant appeal was timely filed by the *pro se* petitioner with the entire record being designated on appeal. The Court has carefully reviewed the written arguments contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present either a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Ivy Jo Ann Kendall, who is now deceased, had six children including petitioner and respondent. Respondent, a medical doctor living in Massachusetts, qualified as the Administrator of her estate. Petitioner and another brother, Michael, have filed three separate actions against respondent in regard to his administration of the estate. In the case *sub judice*, petitioner alleged that respondent, as administrator, was wasting their mother's estate. Petitioner did not demand a jury in his complaint.

However, on September 7, 2010, petitioner made a motion for a jury trial. He had also recently filed a "Motion for Default Judgment," which the circuit court heard on June 14, 2010. Petitioner argued that respondent "has not turned over true and correct finance copies." The circuit court directed respondent to send all six children an accounting of the

estate's finances within thirty days. Respondent completed the court-ordered accounting on July 26, 2010, and the circuit court received its copy on July 30, 2010. At a follow-up hearing on August 2, 2010, respondent orally moved for petitioner's instant action against him to be dismissed. The court took petitioner's motion under advisement.

In its Final Order entered on October 19, 2010, the circuit court denied petitioner's motions for a jury trial and for "default judgment." The circuit court construed respondent's oral motion to have the action dismissed as a motion for summary judgment. The court ruled on respondent's motion as follows:

In further consideration of the parties' statements and all of the documents contained in the court file, including the July 26, 2010, accounting by defendant Patrick Smallwood to the plaintiff and the other heirs of the estate of Ivy Joann Kendall, this Court is of the opinion that there is no genuine issue as to any material fact and that the defendant, Patrick Smallwood, is entitled to a judgment as a matter of law. Accordingly, it is hereby ORDERED that summary judgment shall be, and the same is, hereby ENTERED in favor of defendant Patrick Smallwood and that the plaintiff's complaint against him shall be dismissed, with prejudice. . . .

Petitioner filed a motion to have the circuit court reconsider its final order granting respondent summary judgment, which the court denied on November 16, 2010.

Petitioner argues that the circuit court erred in granting summary judgment in favor of respondent. Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In Syllabus Point One, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), this Court held that "[a] circuit court's entry of summary judgment is reviewed *de novo*." On appeal, petitioner argues that he is entitled to "default judgment" because respondent never filed an adequate accounting of the estate's finances. Petitioner further argues that he is entitled to a jury trial despite the fact that he did not make a jury demand in his Complaint. Petitioner also alleges that respondent had some of the estate's money transferred to his personal account. As to that factual allegation, the record reflects that the decedent's shares of MetLife were transferred to "Patrick Smallwood (Administrator)" so that the shares could be sold. After careful review of the record and the arguments of petitioner, this Court concludes that summary judgment was properly entered.

For the foregoing reasons, we find no error in the decision of the circuit court and the summary judgment in respondent's favor is affirmed.

Affirmed.

ISSUED: January 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh