AUSTIN P. NEAL,	)	
	)	
Plaintiff,	)	
	)	Sumner Circuit
	)	No. 10599-C
VS.	)	
	)	Appeal No.
	)	01-A-01-9601-CV-00020
MICHAEL E. ALLEN and HAROLD ALLEN,	)	
	)	
	)	
Defendants.	)	

NOTE: Appellant is Allen Barnes, Attorney for Plaintiff. Appellee is the Sumner County Circuit Court Clerk. Case has not been appealed; only the issue of Surety for costs is appealed.

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT OF SUMNER COUNTY

AT GALLATIN, TENNESSEE

HONORABLE THOMAS GOODALL, JUDGE

ALLEN BARNES
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FOR APPELLANT/PRO SE

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ATTORNEYS FOR APPELLEE
SUMNER COUNTY CIRCUIT COURT CLERK

REVERSED, VACATED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE
WILLIAM C. KOCH, JR., JUDGE

AUSTIN P. NEAL,	)	
	)	
Plaintiff,	)	
	)	Sumner Circuit
	)	No. 10599-C
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	)	
	)	
Defendants.	)	

O P I N I O N

The captioned parties are not participating in this appeal. The appellant is the attorney for the plaintiff, who appealed from a judgment against him as surety for the costs of the captioned cause in Trial Court. The appellee is the Trial Clerk.

The record contains the following documents:

1. An order entered on August 26, 1992, reading as follows:

> On Motion of John Wesley Jones to withdraw as plaintiff's attorney of record, and good cause being shown therefor, the Court is please to grant said Motion.
>
> It is therefore ordered that John Wesley Jones is permitted to withdraw as attorney of record for plaintiff, Austin P. Neal, including any responsibility as surety for costs, and that Allen Barnes, Attorney at Law, shall be substituted as plaintiff's attorney of record *and surety. (G)*
>
> Entered this 26 day of Aug., 1992.
>
> /s/ Thomas Goodall, Judge
>
> APPROVED FOR ENTRY:
>
> /s/ JOHN WESLEY JONES, #3184
> Attorney for Plaintiff
> 113 West Main Street
> Gallatin, TN 37066
> Telephone (615) 452-4771

. . . .

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing order has been placed in the U.S. Mail, postage prepaid, addressed to Allen Barnes, Attorney at Law, 207 Third Avenue, North, Third Floor, Nashville, TN 37201 and to C.L. Rogers, 119 Court Square, Gallatin, TN 37066, on this ___ day of August, 1992.

/s/ JOHN WESLEY JONES

The emphasized concluding words, "and surety" are of a type different from that of the remainder of the order, and the letter, "G", indicates that the Trial Judge approved the alteration.

2. An order entered on June 26, 1995, containing the following:

> This cause was filed in the Circuit Court for Sumner County, Tennessee on April 10, 1992 by Attorney John W. Jones, and on July 22, 1992 a Motion for Trial Management Conference was filed by Attorney for Defendants at which time a notice of said motion was forwarded to Mr. John Wesley Jones and Mr. Allen Barnes. On August 26, 1992 the record reflects that an order was filed allowing John W. Jones to withdraw as attorney of record for the plaintiff including any responsibility as surety for costs and that Allan Barnes, Attorney be substituted as plaintiff's attorney of record and the Court added the word "and surety" to said order and initialed the same. The record reflects a copy of this order was forwarded to Mr. Allen Barnes and Mr. Barnes took over the representation of the plaintiff and represented him through the trial of this cause.
>
> . . . .
>
> The Court finds that Mr. Barnes knew or should have known that he was surety on the complaint after he was listed as attorney for the plaintiff and proceeded for several months to represent the plaintiff, filing many documents of record in the file. Every attorney knows a lawsuit must have surety before it can proceed and the Court feels that Mr. Barnes knew he was surety on this suit.
>
> It is therefore, ordered by the Court, that a judgment is rendered against Allen Barnes, surety, in the amount of $500.00, for the cost in this cause, which was the amount of the original bond filed in this cause, for which execution may, if necessary, issue. (Emphasis supplied.)

3. The motion of Allen Barnes to alter or amend supported by his affidavit that:

> . . . 3. I never agreed to be a surety for the plaintiff in this case. The words "and surety" were added, without my consent or knowledge, to a document which substituted me as attorney of record for the plaintiff in place of John Wesley Jones. Mr. Jones prepared the document and mailed me a copy, and nowhere in the document I received did the words "and surety" appear. The words "and surety" were inserted into the order after the original order was prepared and mailed to me. I was not made aware of the altered document until after the case was tried.
>
> 4. I have never consented to be a surety for the plaintiff in this case and I never signed any writing which would purport to make me such surety.

4. Order overruling the motion to alter or amend.

It is obvious from the above that the certificate of counsel, dated August 25, 1992, was not a certificate of service of the altered order which was signed by the Trial Judge, filed and entered on the minutes by the Trial Clerk on August 26, 1992. Rather, it is a certificate of service of a draft copy of a proposed order which did not contain the words, "and surety" which were added after the August 25, 1992, certificate. The record contains no certificate or other evidence that the altered order containing the words, "and surety," was ever served upon the appellant.

T.R.C.P. Rule 58 provides in pertinent part as follows:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
> (1) the signatures of the judge and all parties or counsel, or
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Provision No. (2) of the quoted rule is not interpreted to mean that the certificate of counsel on a proposed order will render effective a differently worded order. This method of

service satisfies the requirement of the rule only if the order signed by the judge and entered by the Clerk is identical to the copy served on counsel.

Absent a compliance with Rule 58, the order signed on August 26, 1992, was not and is not effective.

As a consequence, the judgment entered on June 26, 1995, based upon the June 26, 1995, order is without foundation, and must be vacated.

The foregoing is dispositive of this appeal. However, certain aspects of the case deserve brief discussion.

Appellant relies upon T.C.A. §29-2-101(a)(2) which states:

> Tenn. Code Ann. §29-2-101: No action shall be brought:
> (a)(2) Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another . . . unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

In general, this statute requires that an undertaking to guarantee the payment of costs assessed against another is unenforceable unless in writing and signed by or on behalf of the guarantor.

There may be special circumstances in judicial proceedings whereby consent in open court memorialized by the minute entry, a person may effectively bind himself to a particular obligation. Such exceptional circumstances are not shown in the present case.

Appellee relies upon Section 4.02 of the Local Rules of Practice of the Eighteenth Judicial District which provides:

> No attorney may be allowed to withdraw except for good cause shown and by leave of Court upon written motion and after giving five (5) days written notice to the party at their last known address of residence or employment, and may not withdraw as surety for cost until new surety has been entered. If and when new counsel of record is entered, they must provide new surety for cost or they will be considered by the Court to be surety for cost in the case.

It is customary for plaintiff's counsel to sign as surety for costs adjudged against plaintiff. Even though such a counsel is granted leave to withdraw, this action does not relieve him as surety for costs. His obligation as surety should not be discharged until new and acceptable security is provided and accepted. The local rules therefore should not provide for release of the original surety for costs unless and until satisfactory substitute security is in place and effective.

Appellee argues that appellant is estopped to deny his obligation to secure costs by his continued representation of plaintiff in the case. This Court cannot agree that continued representation of a client necessarily obligates a lawyer for costs.

It is true that discretionary costs may be assessed against an attorney for negligent or ill advised pleading resulting in unnecessary costs. *See* T.R.C.P. Rule 54.04. However, no ground for such an assessment are shown by the present record.

It is respectfully recommended that the Trial Judges of the Eighteenth Judicial District reconsider and appropriately revise Rule 4.02.

The judgment of the Trial Court against the appellant is reversed and vacated. Costs of this appeal are taxed against the appellee. The cause is remanded for enforcement of other provisions of the judgment against the plaintiff.

Reversed, Vacated, and Remanded.

HENRY F. TODD

PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

_____

BEN H. CANTRELL, JUDGE

_____

WILLIAM C. KOCH, JR., JUDGE