

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT JACKSON

**FILED**

**September 13, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**CHARLES W. MCDONALD,**

Plaintiff-Appellant,

Vs.

**JOYCE L. COTTON,**

Defendant-Appellee.

Shelby Chancery No. 104918-1  
C.A. No. 02A01-9508-CH-00164

FROM THE CHANCERY COURT OF SHELBY COUNTY  
THE HONORABLE NEAL SMALL, CHANCELLOR

Charles W. McDonald of Memphis  
Pro Se

William L. Hagan  
Friedman, Sissman and Heaton, P.C. of Memphis  
For Defendant-Appellee

***VACATED IN PART, AFFIRMED IN PART AND REMANDED***

Opinion filed:

**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

**ALAN E. HIGHERS, JUDGE**

**HOLLY KIRBY LILLARD, JUDGE**

This appeal involves a suit by an attorney against his former client for attorney's fees due pursuant to a contract and for a statutory attorney's lien. The complaint of plaintiff, Charles W. McDonald, filed November 22, 1994, alleges that he is a duly licensed attorney in the State of

Tennessee, and that he had a written contract of employment with defendant, Joyce LaFaye Cotton, to represent her in connection with her wrongful termination by the State of Tennessee Department of Youth Development. The contract of employment was attached as Exhibit A to the complaint. The complaint avers that as a result of plaintiff's legal services, the defendant was reinstated to her position as a state employee and awarded back pay from the date of her termination. Plaintiff avers that the fees due for legal services is \$14,981.00. The complaint further avers that the state is about to disburse the back pay award, and plaintiff claims an attorney's lien on said funds pursuant to T.C.A. § 23-2-102 and also seeks to enjoin defendant from disposing of the funds pending further orders of the court.

Although an answer had not been filed by defendant, the case was originally set for trial on January 9, 1995, but by consent order entered January 5, 1995, the case was reset for trial to March 6, 1995, a temporary injunction previously entered enjoining defendant from disposing of any of the back pay funds was continued in effect through March 6, 1995, and plaintiff was to provide to defendant's counsel a copy of the signed attorney's fee contract and an itemized billing statement. On January 26, 1995, defendant filed a "Motion to Compel, for Sanctions, and for Expedited Discovery," in which she alleges that plaintiff has failed to furnish the copy of the contract and the itemized billing statement. On January 27, 1995, defendant filed a first set of interrogatories to plaintiff with the court and also filed a first request for production of documents.

Plaintiff's answers to interrogatories and responses to request for production were filed on February 13, 1995, and a consent order was entered February 14, 1995, on defendant's "Motion to Compel, for Sanctions, and for Expedited Recovery." The order provides in pertinent part:

1. That the parties hereto acknowledge hand-delivery by Plaintiff to Defendant's counsel on February 1, 1995, at 3:28 p.m. the itemized billing statement reflecting the services alleged by Plaintiff as being performed on behalf of the Defendant In the matter of: Department of Youth Development v. Joyce LaFaye Cotton, before the Tennessee Civil Service Commission, Docket No. 26:15-23-08153, and the Defendant's instant Motion shall not be pursued as to allegations of this issue.

2. By agreement, the Plaintiff shall provide to counsel for Defendant all responses to outstanding discovery requests no later

than February 13, 1995, thereby allowing the parties to proceed with the hearing set in this cause on March 6, 1995, at 10:00 a.m. In the event Plaintiff fails to timely provide all such discovery responses to Defendant's counsel by February 13, 1995, or in the event Defendant's counsel deems such responses to be incomplete as submitted by Plaintiff, the hearing date of March 6, 1995, shall be continued to a later date. Further, in the event Plaintiff does timely provide all discovery responses to Defendant's counsel by February 13, 1995, Defendant's request for the imposition of sanctions in said Motion to Compel shall be stricken.

The case apparently was reset for trial to April 26, 1995, and on April 21, 1995, defendant filed an answer to the complaint. The answer admits that she entered into a written contract with the plaintiff. She further admits that she was reinstated to her position as a state employee and awarded some back pay but denies that this resulted from plaintiff's legal services. The answer further affirmatively avers that the court is without subject matter jurisdiction to consider the plaintiff's suit based on the attorney's lien statute.

The record contains a transcript of the hearing held April 26, 1995. The first part of the transcript contains arguments of counsel in regard to the affirmative defense, lack of subject matter jurisdiction to hear the claim for an attorney's lien. The court ruled from the bench that the court did not have subject matter jurisdiction, because the proceeding before the administrative body was not a proceeding before a court of record and therefore there could be no attorney's lien. The remainder of the transcript consists of colloquy between McDonald, acting pro se, the chancellor, and counsel for the defendant. McDonald, in addressing the court, indicated that he intended to introduce into evidence some letters and other items to substantiate his claim for attorney's fees at which time defendant's attorney stated that they objected to the introduction of such evidence because items were not furnished in response to their requests for production of documents. After much discussion among the lawyers and the chancellor, the chancellor concluded that McDonald had failed to comply with the discovery requests and therefore could not produce the proffered items into evidence. Although McDonald suggested that the chancellor view the items, he did not in specific language seek to make an offer of proof for the record. Moreover, McDonald was ready to testify, but the chancellor indicated that the case would be dismissed and no proof was ever taken from anyone including the plaintiff. The chancellor ruled that there was not sufficient evidence to prove the amount of his fees.

On May 3, 1995, the court entered judgment for defendant on a finding that the evidence “does not preponderate in favor of the contentions of the Plaintiff,” and that the court lacks subject matter jurisdiction “to entertain the Attorney Lien allegations contained in this Complaint.” On the same day the judgment was entered, McDonald filed a motion for leave to file an amended and supplemental complaint to seek recovery alternatively for *quantum meruit*. On May 19, 1995, plaintiff filed a motion to alter or amend the judgment or for a new trial. Both motions were denied, and McDonald has appealed and presents two issues for review:

I. Whether the Chancery Court abused its judicial discretion when it refused to consider, as a sanction for resolving a dispute over discovery, any of plaintiff attorney’s proof in a cause of action for breach of employment contract.

II. Whether the Chancery Court erred when it held that it lacked subject matter jurisdiction to entertain plaintiff attorney’s lien because T.C.A. § 23-2-102 [Attorney Lien on Right of Action] did not extend to contested cases conducted before the Tennessee Civil Service Commission.

Defendant-appellee, Cotton, presents two issues for review:

I. Whether the Appellant made a proper offer of proof in order to preserve his objection to the Trial Court’s ruling on the exclusion of evidence, which Appellant attempted to introduce in support of his claims for relief?

II. Whether the appeal of the trial court’s decision by the Appellant is a frivolous appeal?

We will first address appellant’s second issue regarding the subject matter jurisdiction of the chancery court to entertain the appellant’s claim for an attorney’s lien in the underlying representation of Cotton. The appellant contends that the chancellor should have enforced his attorney’s lien over the back pay which was awarded to Cotton by the Administrative Law Judge in the Civil Service Commission proceeding. The appellee, on the other hand, contends that the chancellor correctly concluded that T.C.A. § 23-2-102 did not provide McDonald an attorney’s lien on the back pay award, because T.C.A. § 23-2-102 only creates an attorney’s lien over rights of action in courts of record. The appellee argues that since the Tennessee Civil Service Commission is not a court of record, the chancellor correctly held that no attorney’s lien attached to Cotton’s award of back pay. T.C.A. § 23-2-102 provides:

**Lien on right of action.**--Attorneys and solicitors of record who

begin a suit shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit.

We need not reach the parties' arguments with respect to whether T.C.A. § 23-2-102 extends to actions in courts not of record, because it is clear that McDonald has no attorney's lien because the final order of the Civil Service Commission made no provision for an attorney's lien. Plaintiff is attempting to establish the lien for services rendered in a previous case. In order for an attorney to have a lien upon the client's recovery, the order or judgment in the case in which the services were rendered must expressly provide for the lien. "In order for a solicitor to have the benefit of his lien, we think it necessary that it should be set up in the decree in which the services are rendered; otherwise there would be no notice to the public or a subsequent purchaser." *Chumbley v. Thomas*, 184 Tenn. 258, 261, 198 S.W.2d 551, 552 (1947). In *Cobb v. Hallmark Studios, Inc.*, 704 S.W.2d 724 (Tenn. App. 1985) this Court stated:

The statute simply gives an attorney a lien pending the litigation on anything involved, i.e., land or money paid in Court. The attorney may continue the lien after judgment by so providing in the order of the judgment. Failure to do so results in the loss of the lien.

*Id.* at 725. The trial court's dismissal of plaintiff's claim for attorney's lien was based on its determination that the underlying action was not filed in a court of record and, therefore, not within the purview of the statute. The trial court correctly dismissed that part of the complaint claiming an attorney's lien, but for the wrong reason. Where a trial court rules correctly but upon an erroneous reason, the appellate court will sustain the ruling upon what it conceives to be the correct theory. *Duck v. Howell*, 729 S.W.2d 110, 113 (Tenn. App. 1986).

We next address the appellant's issue relating to the discovery sanctions imposed by the chancellor. As stated above, the chancellor refused to allow McDonald to introduce letters from McDonald to Cotton, a notebook containing notes on Cotton's case, some case research, and other material supporting McDonald's claim for breach of contract damages. McDonald contended at trial that he withheld at least part of these items from discovery, because he believed them to be attorney work product. The chancellor refused to allow McDonald to introduce these items as a sanction for McDonald's failure to provide the items to opposing counsel during discovery. The chancellor then dismissed McDonald's lawsuit based on lack of

sufficient proof.

The trial court has wide discretion in its enforcement of discovery rules provided for in Tennessee Rules of Civil Procedure. *See Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. App. 1981). In *Strickland*, a party “knowingly and deliberately refused to reveal the name of a person who had knowledge of discoverable matter and then presented that person as a witness at the trial.” *Id.* at 501. The trial court did not allow the witness to testify. On appeal, this Court, noting that ordinarily sanctions can be applied under Rule 37 only for a failure to comply with a court order, affirmed the trial court. The Court said:

What recourse then is available where Tennessee rule 26.02(1) has been violated as herein noted? To ask the question is to suggest the answer -- the only source of corrective action lies within the inherent power of the trial judge. Rule 26.02(1) is designed for the discovery of facts which will enable litigants to prepare for trial free from the element of surprise, which, prior to the adoption of the rules, frequently led to a result based more upon the legal maneuvering of counsel than upon the merits of the case. When the rules do not provide a sanction for those violations which defeat the purpose of rule 26.02(1), it is mandatory that the trial judge have the authority to take such action as necessary to achieve that purpose.

The trial court must have wide discretion in these matters. The fact that the court can impose the sanction of not permitting the unnamed witness to testify, does not mean that it must do so. Generally, where a party has not given the name of a person with knowledge of discoverable matter, the court should consider the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance. In the light of these considerations the court may permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may taken the deposition of the witness or otherwise prepare to meet the testimony.

*Id.* at 501 (citations omitted).

From the comments in the record, it is apparent that plaintiff was mistaken in his decision to withhold some of the material. However, it also appears that plaintiff was not trying to “sandbag” defendant but was acting in good faith. The record reveals that absolutely no proof was introduced, and in reading the entire transcript, it seems that this came about by a misunderstanding on the part of the plaintiff that he was prevented from testifying by the chancellor. While we do not feel this is the case, the colloquy between the parties and the

chancellor became somewhat confused and could justifiably lead plaintiff to such a conclusion. The court should have considered plaintiff's proof without the excluded material, and then if plaintiff did not carry the burden of proof, judgment for the defendant would have been properly entered.

Considering all of the circumstances reflected in the transcript, an evidentiary hearing should have been held and plaintiff allowed to testify and put on any other proof properly admissible.

Defendant presents an issue regarding plaintiff's failure to make an offer of proof on the excluded items of evidence and asserts that since he failed to make an offer of proof, this Court may not review the propriety of the exclusion of the evidence. Normally, when evidence is excluded, there must be an offer of proof. Tenn.R.Evid. 103(a)(2). However, an offer of proof is not necessary when a trial judge excludes "an entire line of competent evidence, or refuses to hear an examination thereon." *City of Nashville v. Drake*, 281 S.W.2d 681, 684 (Tenn. 1955). It appears from the record in this case that an entire line of evidence was excluded concerning the back-up material to support the reasonableness of the attorney's fees sought.

In any event, plaintiff's complaint states a cause of action for breach of his contract for attorney's fees, and he should have an evidentiary hearing to determine if he can prove his case. Plaintiff's complaint does not state a cause of action for an attorney's lien, and the trial court correctly dismissed that claim.

Accordingly, the judgment of the trial court dismissing plaintiff's complaint seeking damages for breach of contract for attorney's fees is vacated, and the judgment in all other respects is affirmed. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs of the appeal are assessed one-half to plaintiff and one-half to defendant.

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**W. FRANK CRAWFORD,  
PRESIDING JUDGE, W.S.**

**CONCUR:**

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**ALAN E. HIGHERS, JUDGE**

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**HOLLY KIRBY LILLARD, JUDGE**