IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE ex rel FINKELSTEIN, KERN, STEINBERG and CUNNINHAM,

Plaintiff-Appellant,

Vs.

Shelby Chancery No. 98-0221-1
C.A. No. 02A01-9807-CH-00203

JOHN A. DONALD,

Defendant-Appellee.

FROM THE SHELBY COUNTY CHANCERY COURT
THE HONORABLE JOE C. MORRIS, CHANCELLOR

Ron E. Cunningham of Knoxville
For Plaintiff-Appellant

Donnie E. Wilson, Shelby County Attorney
Robert B. Rolwing, Assistant County Attorney
For Defendant-Appellee

REVERSED AND REMANDED

Opinion filed:

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This appeal involves a mandamus action. Plaintiff, State of Tennessee ex rel Finkelstein, Kern, Steinberg and Cunningham, (hereinafter referred to as plaintiff or Finkelstein) appeals the order of the trial court dismissing its complaint against defendant, John A. Donald (hereinafter

referred to as defendant or Donald), for failure to state a claim upon which relief can be granted.

The complaint alleges that plaintiff is a practicing law firm in Knoxville, Tennessee[1], and that defendant is a Shelby County General Sessions Judge in Division III. The complaint alleges that on January 6, 1998, plaintiff had several cases on behalf of different clients set for trial in defendant's court. In each of the cases plaintiff sought to call the adverse parties as witnesses, and defendant refused to allow plaintiff to do so and then dismissed the cases for failure to prosecute. The complaint further alleges that subsequently defendant wrote a letter to plaintiff, shown as Exhibit A, in which he threatened to hold the plaintiff in contempt of court "if in the future the plaintiff attempts to prove its clients' cases with adverse party testimony, although it is plaintiffs and it's clients' legal right to offer such proof." Plaintiff seeks a writ of mandamus to compel defendant to comply with and follow Tennessee Rules of Evidence and to recuse himself for all of plaintiff's cases.

In Count II of the complaint, plaintiff alleges that defendant has exhibited bias and prejudice against plaintiff in several particulars and as indicated by the statements to plaintiff in Exhibit A. Exhibit A, as part of the complaint, states:

GENERAL SESSIONS COURT
County of Shelby, State of Tennessee
Courthouse, 140 Adams Avenue, Memphis, Tennessee 38103

John A. Donald
Judge of Division III

TO: Finkelstein, Kern, Steinberg & Cunningham
Attorneys at Law
P. O. Box I
Knoxville, TN 37901

FROM: Judge John A. Donald

RE: Your Debt Collection Practices

DATE: January 9, 1998

On January 6, 1998, you had seven (7) cases scheduled for trial,

[1] This allegation is not specifically set out, but the complaint refers to Exhibit A which is a letter from the defendant to the plaintiff which shows plaintiff's address. To further compound the problem, however, Exhibit A is not included in the record from the trial court, although a copy is in the appendix to appellant's brief. The transcript of the proceeding in the trial court indicates that defendant referred to quoted portions of the letter to the trial court. Accordingly, in the interest of judicial economy, we will consider the record supplemented by the inclusion of Exhibit A to the complaint.

but failed to produce one witness for either of these cases (see, Attachment "A"). In light of you[r] action, I have made an *affirmative* finding that at the time lawsuits filed by your firm are announced and scheduled for trial, you have no intention to produce the client you ostensibly represent. A check with my colleagues and during the eleven plus years that I have been on the bench reveals that you have *never* produced a client but have asserted your right to demand the presence of the defendant and the defendant's testimony to validate your "client's" entitlements to a judgment. Indeed, this concern was first expressed to the young attorney from your firm in November 1997.

I can only surmise that you do this because either *you are unable to prove your claim or because of a perceived economic hardship to your client in coming to Shelby County.* You obviously failed to consider the economic hardship to the defendant, nor the spirit of the Fair Debt Collection Practices Act.

This finding leads me to one conclusion: You are guilty of abusing our Judiciary, attempting to use it as a means to facilitate *your commercial enterprise.*

As a remedy to the aforesaid "abuse", you are hereby notified that (1) Trial settings, hereafter, shall be designated at a time determined by the Court. No longer will my court accommodate *your* schedule. Instead, in light of my findings, it will be the consumer's accommodation that I will give *greater* weight to. (2) All cases dismissed for lack of prosecution which are refiled will be returned to my court so as to avoid *forum shopping.* (3) Further, I shall consider it contemptuous and unethical of you as attorneys to hereafter announce a trial, requiring consumer litigants to miss work, and fail to produce your client at trial without good cause shown. Indeed, when a sworn denial has been filed, you know that testimony is required. On January 6, 1998, Patricia Odell indicated that a sworn denial had been filed on December 3, 1997, and that she had made certain requests to you for documents to validate the debt, but she never heard from you until trial on January 6, 1998, where you indicated your intent to still pursue your claim by using her client as *your* witness.

If you believe that I do not have the power to do what I am doing, you know the proper recourse. That recourse shall never be what the young attorney from your office did in my court on January 6, 1998, arrogantly shoving a recorder in my face as if to intimidate me.

The issue is simple gentlemen, who runs Division III, Judge John Donald or you? I am positive that each of the litigants identified in Attachment "A," who had to miss work and/or hire an attorney to represent them do not hold lawyers such as you in high esteem. The right thing to do is to apologize to them! For the Courts are theirs, not attorney, nor Judges.

Very truly yours,

John A. Donald

cc: Fellow General Sessions Court Judges

Defendant did not file an answer to the complaint but filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. After hearing arguments of counsel, the trial court dismissed the complaint, and plaintiff has appealed. The only issue for review is whether the trial court erred in dismissing the complaint for failure to state a claim upon which relief can be granted.

Obviously, in considering a motion to dismiss a complaint for failure to state a claim, we are limited to a consideration of the allegations of the complaint only. In ***Humphries v. West End Terrace, Inc.***, 795 S.W.2d 128 (Tenn. App. 1990), this Court said:

> A motion to dismiss pursuant to Rule 12.02(6), Tenn. R. Civ. P., for failure to state a claim upon which relief can be granted is the equivalent of a demurrer under our former common law procedure and, thus, is a test of the sufficiency of the leading pleading. ***Cornpropst v. Sloan***, 528 S.W.2d 188, 190, 93 A.L.R.3d 979 (Tenn. 1975). Such a motion admits the truth of all relevant and material averments contained in the complaint but asserts that such facts do not constitute a cause of action. ***Cornpropst***, 528 S.W.2d at 190. A complaint should not be dismissed upon such motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." ***Fuerst v. Methodist Hosp. South***, 566 S.W.2d 847, 848 (Tenn. 1978). In considering whether to dismiss a complaint for failure to state a claim upon which relief can be granted, the court should construe the complaint liberally in favor of the plaintiff taking all of the allegations of fact therein as true. ***Huckeby v. Spangler***, 521 S.W.2d 568, 571 (Tenn. 1975).

Id. at 130. ***See also Riggs v. Burson***, 941 S.W.2d 44 (Tenn. 1997).

In ***Hackett v. Smith County***, 807 S.W.2d 695 (Tenn. App. 1990), this Court said:

> For an act to be enforced by a writ of mandamus, the act must be purely "ministerial." ***Peerless Construction Co. v. Bass***, 158 Tenn. 518, 520, 14 S.W.2d 732 (1929). If the right to have the act performed is doubtful, the right must be first established in some other form of action. Mandamus is a summary remedy, extraordinary in its nature, and to be applied only when a right has been clearly established. ***Peerless***, 14 S.W.2d at 733. The writ of mandamus will not lie to control official judgment or discretion, but it is the proper remedy where the proven facts show a clear and specific legal right to be enforced, or a duty which ought to be and can be performed. ***State ex rel. Weaver v. Ayers***, 756 S.W.2d 217, 221 (Tenn. 1988), citing ***State ex rel. Ragsdale v. Sandefur***, 215 Tenn. 690, 696, 389 S.W.2d 266, 269 (1965).

Id. at 698.

In ***Meighan v. U.S. Spring Communications Co.***, 942 S.W.2d 476 (Tenn. 1997), our

Supreme Court stated:

> Mandamus generally will not be issued if the petitioner has a legal remedy that is equally convenient, complete, beneficial, and effective, but the remedy which would preclude mandamus must be equally as convenient, complete, beneficial, and effective as mandamus, and must also be sufficiently speedy to prevent material injury. 52 Am.Jur.2d *Mandamus* §§ 46, 49 (1970). Although the writ is more often addressed to ministerial acts, rather than discretionary acts, the writ may be addressed to discretionary acts when the act is done in an "arbitrary and oppressive manner" or where there has been a "plainly palpable" abuse of discretion. ***Peerless Const. Co. v. Bass***, 158 Tenn. 518, 524, 14 S.W.2d 732, 733 (1929).

Id. at 479.

In ***Lamb v. State***, 207 Tenn. 159, 338 S.W.2d 584 (1960), our Supreme Court, commenting on the differences between ministerial and discretionary acts:

> When we come to distinguish a ministerial act from a discretionary act the question is not always easy of solution. One involves the exercise of judgment and the other merely the carrying out the command of law. The best answer to the question of distinguishing between a discretionary and a ministerial duty that we have found in our study of the matter is contained in 55 C.J.S. Mandamus § 63, page 101, where it is said:
>
> > '* * * where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment it is discretionary and is not to be deemed merely ministerial.'

Id. at 586.

Plaintiff's complaint alleges that defendant has stated that in the future plaintiff cannot proceed to trial of its cases without the plaintiff's client being present at the risk of plaintiff being held in contempt of court, and that plaintiff cannot call the defendants as adverse witnesses as evidence in the case. The complaint further alleges that the defendant has stated, among other things, that plaintiff would not be accommodated in the scheduling of cases, but that the defendant will be so accommodated. We must consider these allegations true for the purposes of the motion granted by the trial court and thus determine if such stated intention concerning future conduct of cases would warrant the issuance of the writ of mandamus.

The cases to which Judge Donald is referring are apparently cases involving sworn account. T.C.A. § 24-5-107 (1998 Supp.) provides:

> **Sworn accounts** - (a) An account on which action is brought, coming from another state or another county of this state, or from the county where suit is brought, with the affidavit of the plaintiff or its correctness, and the certificate of a state commissioner annexed thereto, or the certificate of a notary public with such notary public's official seal annexed thereto . . . is conclusive against the party sought to be charged, unless that party on oath denies the account or except as allowed under subsection (b).
>
> (b) The court shall allow the defendant orally to deny the account under oath and assert any defense or objection the defendant may have. Upon such denial, on the plaintiff's motion, or in the interest of justice, the judge shall continue the action to a date certain for trial.

Our courts have noted that the statute was intended to furnish an easy and inexpensive mode for collecting debts when they are justly due and no real defense exists, unless the account is denied on oath, and thus the plaintiff is put on notice to make the necessary proof. ***Foster & Webb v. Scott County***, 107 Tenn. 693, 65 S.W. 22 (1901). The statute is quite clear that in the absence of a sworn denial the plaintiff is entitled to judgment on the sworn account. However, where an action is brought on a sworn account, a denial under oath makes an issue and puts the plaintiff to the proof of the account, and the probated account is not evidence. ***Cumberland Grocery Co. v. York***, 9 Tenn. App. 316 (1929). We construe plaintiff's complaint to allege that in this situation plaintiff is entitled to proceed with witnesses pursuant to the Tennessee Rules of Evidence. The Tennessee Rules of Evidence are applicable to cases tried in General Sessions Court, unless specifically provided otherwise. T.C.A. § 16-15-721 (1994).

Rule 601, Tenn.R.Evid. provides:

> **Rule 601. General rule of competency.** Every person is presumed competent to be a witness except as otherwise provided in these rules or by statute.

Rule 602, Tenn.R.Evid. provides:

> **Lack of personal knowledge.** - A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses.

Rule 611, Tenn.R.Evid. provides:

> **Mode and order of interrogation and presentation.** - (a) **Control by Court**. - The court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.

> (b) **Scope of Cross-Examination**. - A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule.
>
> (c) **Leading Questions**. - Leading questions should not be used on the direct examination of a witness except as may be necessary to develop testimony. Leading questions should be permitted on cross-examination. When a party calls a witness determined by the court to be a hostile witness, interrogation may be by leading questions.
>
> (d) **Calling Adverse Party**. - When a party in a civil action calls an adverse party (or an officer, director, or managing agent of a public or private corporation of a partnership, association, or individual proprietorship which is an adverse party), interrogation on direct examination may be by leading questions. The scope of cross-examination under this paragraph shall be limited to the subject matter of direct examination, and cross-examination may be by leading questions.

The above statutes establish that an adverse party may be called as a witness and does not vest in the trial court a discretion to allow or disallow the profert of such a person as a witness. The trial court also ruled that Finkelstein had other adequate remedies at law, and therefore mandamus was not a proper remedy. Finkelstein contends that there is no other adequate remedy because Judge Donald threatened to hold plaintiff in contempt if they sought to call a witness as allowed by the rules. Plaintiff also asserts that for the judge to deny plaintiff the rights under the established rules would require an appeal of every case which would be prohibitively expensive and would delay relief which is afforded to other litigants.

Although, generally, mandamus does not lie where there is another plain, adequate, and complete remedy, the alternative remedy must be "equally convenient, complete, beneficial, and effective as mandamus, and must also be sufficiently speedy to prevent material injury." ***Meighan v. U.S. Sprint Communications Co.***, 942 S.W.2d 476, 479 (Tenn. 1997).

Taking the allegations of plaintiff's complaint as true, which we are required to do on consideration of a motion such as the one in the case at bar, we must respectfully disagree with the chancellor and hold that the complaint states a claim upon which relief may be granted.

We next address plaintiff's allegations concerning the defendant's recusal in cases in which plaintiff appears as counsel. It is not debatable that a judge must avoid the appearance of impropriety and must be completely impartial in dealing with a controversy before the court. Rule 10, Canon 2 and 3, Rules of the Supreme Court. Canon 3 E. of these rules specifically

provides in pertinent part:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, ...

Although normally a judge should be given an opportunity in the first instance to consider recusal upon motion by a party litigant, in the case at bar the allegations of the complaint and the exhibit could be considered to indicate that the judge has refused to consider recusal. In any event, giving the complaint a liberal construction, we feel that this part of the complaint states a cause of action upon which relief can be granted.

Finally, we should comment on the allegation that plaintiff would be required to have its clients present before being allowed to proceed to trial. We know of no requirement in the law to this effect, nor has either party cited any law dealing with this issue. A litigant can take his chances, of course, by being absent at the trial of his case, but there is no absolute requirement that a litigant be present except for the effect his absence might have upon the ruling by the court.

For the foregoing reasons, we reverse the order of the trial court dismissing the complaint for failure to state a claim upon which relief can be granted and remand the case for further proceedings. Defendant should be allowed to file an answer pursuant to T.C.A. § 29-25-106 (1980), and the case can then be conducted to a conclusion.

Costs of the appeal are assessed against the appellee.

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE