FILED

June 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

REBECCA ELLIOTT	:	KNOX CIRCUIT
	:	CA No. 03A01-9601-CV-00004
Plaintiff-Appellant	:	
	:	
	:	
vs.	:	HON. DALE C. WORKMAN
	:	JUDGE
	:	
PERRY H. WINDLE, III and	:	
BURKHALTER & WINDLE, P.C.	:	
	:	
Defendants-Appellees	:	AFFIRMED AND REMANDED

THERESA COLLINS WILLOCKS, OF KNOXVILLE, TENNESSEE, FOR APPELLANT

R. FRANKLIN NORTON and GEOFFREY D. KRESSIN, WITH NORTON AND LUHN, OF KNOXVILLE, TENNESSEE, FOR APPELLEES

MEMORANDUM OPINION

Sanders, Sp.J.

The Plaintiff has appealed from a summary judgment for the Defendants in her suit for legal malpractice. We affirm.

In April, 1993, the Plaintiff-Appellant retained the law firm of Burkhalter & Windle, P.C., including Mr. Perry H. Windle,

III, as a member of the firm, to represent her in an employment dispute with her former employer, Southern Skillet Corporation. In May, 1993, Defendants filed suit on behalf of the Plaintiff against Southern Skillet alleging violation of the overtime pay provisions of the Fair Labor Standards Act, violation of the Equal Pay Act, and retaliating against Plaintiff for filing or instituting a proceeding under the Fair Labor Standards Act.

The case was set for trial in February, 1994. It appears that sometime prior to November 5, 1993, the Defendant offered a settlement of the case for $7,500. On November 5, 1993, Mr. Windle wrote Ms. Elliott a long, detailed letter informing her of the offer of settlement. He explained to her in detail the ramifications of the lawsuit, the strong points and the weak points in their lawsuit, and an estimate of expenses for taking discovery depositions, etc. As pertinent, he said: "It is my feeling that we should make a counter offer to the Defendant to see if they will increase their offer." The record fails to show the amount the case was settled for but prior to trial Ms. Elliott executed releases for her claims and the case was settled.

In May, 1995, Ms. Elliott, acting pro se, filed suit against the Defendants, alleging legal malpractice in handling her case. The complaint is a long, convoluted argument, saying the Defendant, Mr. Windle, negligently handled her case and brought undue pressure to bear on her to settle her case. She asked for "$160,000 from the firm of Burkhalter & Windle, P.C., for the negligence of the partners to exercise their joint responsibilities to the clients and their profession and an additional $20,000 from Mr. Windle personally for his specific acts of negligence, fraud/misrepresentation, incompetence, and unprofessionalism."

The Defendants did not file a timely answer to the complaint and on July 25, 1995, the Plaintiff filed a motion for sanctions and summary judgment against the Defendants and their attorneys, Geoffrey D. Kressin and Franklin Norton of Norton & Luhn, Attorneys, "for the unnecessary and harassing delay in answering the complaint filed in Circuit Court by the plaintiff on May 17, 1995."

On July 28, Defendants filed a Rule 12, TRCP, motion to dismiss the complaint or, in the alternative, a Rule 56, TRCP, motion for summary judgment. Defendants alleged the complaint failed to state a cause of action upon which relief could be granted and that there was no genuine issue as to any material fact and the Defendants are entitled to a judgment as a matter of law. They also alleged the course of action was barred by the applicable one-year statute of limitations, TCA § 28-3-104, in that Plaintiff executed a settlement agreement of her lawsuit on December 15, 1993, and her complaint was filed May 16, 1995. Defendants also alleged they did not fall below the applicable standard of practice for attorneys practicing law in Knoxville, Tennessee, and similar communities and did not deviate from or fall below the legally accepted standard of practice or care for attorneys in Knoxville and similar communities. In support of the motion, the Defendants relied upon the affidavits of Defendant Perry H. Windle, III, and attorney Joe B. Bagwell and the entire record.

The affidavits of both Bagwell and Windle stated they received law degrees from the University of Tennessee, were admitted to practice law in the State of Tennessee, were familiar with the legally accepted standards for attorneys practicing in Knoxville and similar communities, were familiar with the facts in

the case, and the Defendants did not deviate from or fall below the legally accepted standards.

The Plaintiff did not respond to the motion to dismiss or for summary judgment. She did, however, file a motion for default judgment some 10 days after the motion to dismiss or for summary judgment was filed by the Defendants.

Upon the hearing of the motions, the court sustained the motion of the Defendants for summary judgment, finding there was no genuine issue of material fact and Defendants were entitled to a judgment as a matter of law. He found the Plaintiff's motion for default judgment was without merit and it was denied. The complaint was dismissed and the Plaintiff has appealed and presents the following issues for review: "1. The trial court erred by failing to consider a pro se Plaintiff's motion, titled as summary judgment, as a motion for a default judgment because the pro se Plaintiff sought a final judgment based on the Defendants-Appellees' failure to respond to the complaint exceeded sixty-eight (68) days" and "2. Alternatively, the trial court committed reversible error by failing to give the pro se Plaintiff, Rebecca Elliott, an opportunity to obtain an expert affidavit inasmuch as the Defendants failed to file any responsive pleading until sixty-eight (68) days beyond service of the complaint."

We cannot agree, and affirm in accordance with Court of Appeals Rule 10(a).[1]

---

[1] AFFIRMANCE WITHOUT OPINION.--The Court, with the concurrence of all judges participating in the case, may affirm the action of the trial court by order without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

The cost of this appeal is taxed to the Appellant and the case is remanded to the trial court for any further necessary proceedings.

____
Clifford E. Sanders, Sp.J.

CONCUR:

____
Herschel P. Franks, J.

____
Don T. McMurray, J.

---

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court.
(2) there is material evidence to support the verdict of the jury.
(3) no reversible error of law appears.
Such cases may be affirmed as follows: "Affirmed in accordance with Court of Appeals Rule 10(a)."