

FILED

03/21/2023

Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs July 1, 2022

**TINO C. SUTTON v. THE WESTMORELAND LAW FIRM, ET AL.**

**Appeal from the Circuit Court for Bedford County**  
**No. 2019-CV-13528 Robert E. Lee Davies, Judge<sup>1</sup>**

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**No. M2021-01209-COA-R3-CV**

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This action concerns the dismissal of the plaintiff's claims against his former attorney for breach of contract, malpractice, and violation of the Tennessee Consumer Protection Act. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S. and CARMA DENNIS MCGEE, J., joined.

Tino C. Sutton, Unionville, Tennessee, pro se.

Charles P. Westmoreland, Shelbyville, Tennessee, pro se, and for the appellee, The Westmoreland Law Firm.

**MEMORANDUM OPINION<sup>2</sup>**

In 2017, Tino C. Sutton ("Plaintiff") was a tenant in an apartment complex managed by Peacock Realty Group ("Peacock Realty"). Robert Allison, who owns and operates

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<sup>1</sup> Sitting by interchange.

<sup>2</sup> Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Peacock Realty, filed a detainer warrant against Plaintiff in July 2017. Following his receipt of the warrant, Plaintiff met with Attorney Charles P. Westmoreland (“Attorney”) to discuss legal representation. The parties agreed to a \$1,000 retainer; however, the agreement was never memorialized in writing. The parties did not discuss whether the fee was refundable or which party was responsible for payment of any filing fees.

Throughout their discussions, Plaintiff advised Attorney that he also sought to file a counter-complaint against Peacock Realty, claiming that his apartment was unlivable due to a water leak prior to his alleged nonpayment of rent. He provided Attorney with the pertinent facts and made an initial deposit of \$700 on the retainer. Attorney filed the answer and a counter-complaint on July 28, 2017.

On August 1, 2017, the parties appeared before the trial court and advised the court that Plaintiff had vacated the apartment on July 28. The matter was reset for hearing on damages for the detainer warrant and the counter-complaint. During the pendency of the hearing, Plaintiff met with Attorney and paid the remaining \$300 of the retainer fee.

The parties appeared before the court again on August 8. At this point, the trial court advised Plaintiff that the filing fees for his counter-complaint had not been paid. Plaintiff requested additional time in which to remit payment. The court denied the request and dismissed the counter-complaint. The hearing continued on the matter of Peacock Realty’s claimed damages.

During cross-examination, Mr. Allison ultimately conceded that his accounting contained errors, prompting the withdrawal of his claim for damages. The trial court found that Peacock Realty was entitled to possession but that it would not award damages based upon the testimony presented. At the conclusion of the trial, Plaintiff terminated Attorney’s representation, presumably based upon the trial court’s dismissal of the counter-complaint for failure to remit payment of the filing fees.

Despite the court’s pronouncement, the General Sessions Court Clerk erroneously entered a judgment against Plaintiff for damages in the amount of \$1,256.50. This was a clerical error. Plaintiff discovered the judgment when he went to the Clerk’s office to appeal the dismissal of his counter-complaint. He did not inform Attorney of the error. Instead, he filed his appeal and a counter-complaint against Peacock Realty without legal representation. The erroneous judgment against Plaintiff was extinguished. Plaintiff also entered into a settlement agreement with Peacock Realty in which he received \$1,000.

Approximately one year later, on August 8, 2018, Plaintiff filed the instant action against Attorney and his law firm, with claims for breach of contract, malpractice, and violations of the Tennessee Consumer Protection Act. The court advised Plaintiff to file an amended complaint that conformed with the Tennessee Rules of Civil Procedure. In the amended 79-page complaint, Plaintiff alleged, inter alia, that Attorney did not deposit

the \$1,000 retainer in a Federal Deposit Insurance Corporation account as required by the Tennessee Rules of Professional Conduct. Plaintiff further claimed that Attorney failed to pay the filing fees required for the proper filing of his counter-complaint, resulting in the dismissal of the action. Lastly, Plaintiff alleged that Attorney failed to advise him of the erroneous judgment entered against him.

Attorney denied Plaintiff's allegations and claimed that Plaintiff was barred from recovery when he suffered no actual damages for which relief can be granted. Attorney moved for summary judgment dismissal of the action. The court granted the motion, in part, dismissing all claims for legal malpractice that necessitated expert witness testimony.

The case proceeded to a final hearing on May 13, 2021. No transcript or statement of the hearing was provided for this court's review. At the conclusion of the hearing, the court made the following credibility findings:

For the most part, the outcome of this trial turns upon the credibility of the witnesses. The Court finds the testimony of [Attorney], Deputy Clerk Holder, and Judge Rich to be credible. On the other hand, the Court finds the testimony of [Plaintiff] to be not credible. The Court listened and observed the witnesses in this case very closely. In doing so, it finds that [Plaintiff] changed his testimony during the trial; that [Plaintiff's] testimony was contradicted by what he said at another time and by the testimony of the other witnesses; that [Plaintiff] attempted to evade questions; and that at times, [Plaintiff's] testimony bordered on the absurd.

The court found that Plaintiff failed to prove any unfair or deceptive act and that Attorney's representation resulted in the dismissal of damages. The court further found that Attorney had no obligation to obtain a copy of the erroneous judgment when his representation was terminated. The court noted that the parties did not reach an agreement concerning the payment of court costs and that the counter-complaint was re-filed and resulted in a successful agreement. The court dismissed all remaining claims of legal malpractice based upon Plaintiff's lack of credibility. This appeal followed.

In non-jury cases such as this one, we review the trial court's factual findings de novo upon the record, affording them a presumption of correctness unless the evidence preponderates otherwise. *See* Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We review questions of law de novo, affording the trial court's decision no presumption of correctness. *Armbrister*, 414 S.W.3d at 692 (citing *Mills v. Fulmarque*, 360 S.W.3d 362, 366 (Tenn. 2012)). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011).

We, like the trial court, fail to see any unfair or deceptive act perpetuated by Attorney in his representation of Plaintiff when said representation resulted in the dismissal of the claim for damages. While the counter-complaint was initially dismissed, Plaintiff's re-filing of the claim ultimately resulted in a settlement. The erroneous judgment was also dismissed once the clerk's clerical error was discovered by the court. The record before this court is simply devoid of any theory through which Plaintiff was harmed by Attorney's legal representation.

Moreover, no transcript or statement of the evidence relating to the trial was provided in the appellate record.<sup>3</sup> This significantly hinders our ability to determine whether Plaintiff, who was found not credible by the trial court, is entitled to any relief. "The absence of either a transcript or a statement of the evidence significantly ties the hands of the appellate court." *Chandler v. Chandler*, No. W2010-01503-COA-R3-CV, 2012 WL 2393698, at \*6 (Tenn. Ct. App. June 26, 2012). It is Plaintiff's duty as the appellant "to prepare the record which conveys a fair, accurate, and complete account of what transpired in the trial court regarding the issues which form the basis of the appeal." *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005); *see also* Tenn. R. App. P. 24(b), (c) ("[T]he appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal."). As noted in previous cases, the lack of a transcript or statement of the evidence is generally fatal to the party having the burden on appeal. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). It is well settled that, "in the absence of a transcript or statement of the evidence, there is a conclusive presumption that there was sufficient evidence before the Trial Court to support its judgment and this Court must therefore affirm the judgment." *Brown v. Christian Bros. Univ.*, 428 S.W.3d 38, 48 (Tenn. Ct. App. 2013) (quoting *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007)); *see also Word v. Word*, 937 S.W.2d 931, 932 (Tenn. Ct. App. 1996).

For the reasons stated above, we affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Tino C. Sutton.

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JOHN W. MCCLARTY, JUDGE

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<sup>3</sup> Any intelligible facts alleged in the initial or reply brief are not evidence and cannot be considered.