

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000147-MR

CONNIE MARSHALL

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 03-CI-000550

ARTHUR SAMUEL

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: BUCKINGHAM, HENRY, AND VANMETER, JUDGES.

VANMETER, JUDGE: Connie Marshall appeals pro se from a summary judgment entered by the Jefferson Circuit Court in an attorney malpractice action against appellee Arthur Samuel. For the reasons stated hereafter, we affirm.

It is undisputed that Marshall's daughter was unable to consistently provide proper care for her three young children, and that the children moved back and forth between their mother's home, Marshall's home and foster care over a period of several years. The children were committed to the

custody of the Cabinet for Families and Children (the Cabinet) in September 1997, and parental rights eventually were terminated. Meanwhile, Marshall's petition seeking permanent custody was dismissed in January 2002 on the ground that she lacked standing because she was not the children's de facto custodian. Samuel then withdrew from his representation of Marshall.

Marshall filed this action in January 2003, asserting that Samuel committed legal malpractice while representing her. Samuel filed an answer denying the allegations and raising the defense of limitations, and he subsequently sought a judgment on the pleadings. Marshall in turn sought a default judgment and damages against Samuel. After finding that Marshall's complaint was not timely filed, the trial court granted a judgment on the pleadings for Samuel. On appeal, this court disagreed as to the issue of timeliness, and the matter was vacated and remanded to the trial court for further proceedings.

On remand, Marshall sought summary judgment, default judgment, and damages against Samuel based on the following allegations:

1. The Defendant, Arthur Samuels¹ did not file an answer to the Plaintiff's Complaint. To merely state that he denies the allegations is not a sufficient answer to the Complaint filed

¹ Throughout the proceedings, Samuel's surname was misspelled by Marshall as "Samuels."

January 21, 2003. Arthur's 20 days to file an answer to the complaint ended on February 12, 2003, therefore the Plaintiff is entitled to Default Judgment.

2. Arthur did not abide by rule KRS 413.40 [sic] which is a rule that he has cited as a defense.
3. Violation of SCR.130-1.3 Failure to act with reasonable diligence and promptness in representing a client.
4. Violation of SCR3.130-1.4(a) Failure to keep a client reasonably informed about the status of a matter. Arthur Samuels did not inform Connie Marshall that he would not be in court to represent her until the day after the date we were suppose[d] to be in court, when Connie Marshall went to court Arthur Samuels was no where to be found.
5. Conduct involving dishonesty, fraud, deceit, dual representation and misrepresentation. Arthur Samuel represented Connie Marshall and her daughter at the same time and we were in opposition of one another at this time[] (see exhibits in the case regarding dishonesty, fraud, deceit, dual representation and misrepresentation).
6. Violation SCR3.130-1.5(a) accepting a fee from a client and thereafter failing to render legal services justifying the fee. Arthur Samuels did not provide an itemized list of his charges and did not immediately file for custody of Connie Marshall's grandchildren.
7. Arthur Samuels did not respond to the Motion for Summary Judgment in the Court of Appeals.

8. Arthur Samuels did not respond to the Motion to Supplement the Record in the Court of Appeals.

Samuel in turn filed his own motion for summary judgment, responding to Marshall's motion as follows:

1. The Plaintiff states in her Motion for Summary Judgment that no Answer was filed. An Answer was filed as the record will show.
2. The Plaintiff states KRS 413.40 [sic] was not followed. KRS 413.40 [sic] deals with continual claim of land after fifteen years of adverse possession.
3. The Plaintiff states that reasonable diligence and promptness of representation did not occur in the custody case After the Petition for Permanent Custody was filed, the Cabinet . . . filed a Motion to Dismiss on or about August 14, 2001. (See Affidavit, Ex. M) In the latter part of September, 2001 an Affidavit was filed in support of the Petition and a request for visitation. On or about October 17, 2001 a Witness and Exhibit List was filed on behalf of the Petitioner. (See Affidavit, Ex. M.) On or about November 7, 2001 a Memorandum in support of the Petition was filed. On or about November 15, 2001 the Cabinet filed its Memorandum in support of its Motion to Dismiss. (See Affidavit, Ex. M) On Motion Hour, January 14, 2002 a motion was presented to the Court for visitation. The Court at that time indicated it did not wish to make any rulings in the case until it had addressed the Cabinet's Motion to Dismiss. (See Affidavit, Ex. M) The Court entered an Order dismissing the Petition for Permanent Custody on January 18, 2002. The Plaintiff was notified by

certified mail on January 23, 2002. (See Affidavit, Ex. M)

4. On the Motion Hour for visitation, the Court informed me that it would not consider any motions until it ruled on the Cabinet's Motion to Dismiss. Because of a hearing in Federal Court before the Motion Hour, I went to the court about fifteen minutes before Motion Hour to tell the clerk to hold my motion until the end of the docket because of the Federal Court hearing. Judge Bowles was on the bench and he told me he was not going to rule on the Motion for the reason stated above and it was not necessary to come back. The Motion was to set a date for a hearing on visitation. (See Affidavit, pp 4-5)
5. At one time the Cabinet brought a non-support action against Plaintiff's daughter in the Plaintiff's name since at that time Plaintiff had custody of her daughter's children. At no time does the record indicate that I represented Plaintiff and her daughter at the same time. (See Affidavit, pp. 4-7 and Exs. A-L)
6. Legal services were provided as indicated by the record. As to the fees, receipts were always given and the fee was stated before services were rendered. (See Affidavit, p. 5)
7. The Motion for Summary Judgment in the Court of Appeals was inappropriate and required no response.
8. The Motion to Supplement The Record in the Court of Appeals did not require a response.

Samuel also filed a lengthy affidavit which addressed Marshall's complaints in specific detail. Marshall responded but did not

disclose any additional substantive facts for the court's consideration. The trial court denied Marshall's motion and granted Samuel's motion for summary judgment. This appeal followed.

On appeal, Marshall attempts to provide the court with additional reasons that Samuel's motion for summary judgment should have been denied. In her one-page Statement of Points and Authorities, she cites to six subsections of the Kentucky Rules of Professional Conduct,² and she alleges that Samuel failed to timely answer her original complaint against him. Marshall then summarizes the underlying events in her two-page statement of the case, asserting: that Samuel failed to timely file a custody petition; that he failed to timely act regarding abuse, visitation or custody issues; that he failed to attend or to inform her that he would not attend a scheduled court appearance regarding the pending visitation motion; that he incurred a conflict of interest by representing both Marshall and her daughter; and that he demonstrated willful negligence by failing to timely reply to various court filings. Next, Marshall asserts in her one-page argument that:

The voice mail message (exhibit A³)
left the day after court by Arthur Samuels

² SCR 3.130.

³ Marshall's transcript of the alleged recorded message, which was not included in the record below.

on January 15, 2002, exhibit A is proof that Arthur Samuels did not keep Connie Marshall informed of the status of her case, as it was left on her voice mail January 15, 2002, the day after court. Exhibit E^[4] proves that dual representation was committed by Arthur Samuels. The Statement of Points and Authorities shows evidence that Arthur Samuels did not follow the rule that he is sworn to follow by the Kentucky Bar.

Arthur Samuels represented the Appellant, Connie Marshall and did not mail any information regarding the Court Order to dismiss the Case to the Appellant, Connie Marshall Until January 23, 2002 and withdrew from the case the same day (see exhibit J^[5]). Also, this court agreed in their Order Entered October 1, 2004 that Connie Marshall's Complaint was timely filed. The Appellant states that Arthur Samuels did not file an answer within the twenty days allotted by the court and did not ask for any additional time to file, therefore, the Appellant filed a Default Judgment.

The Jefferson Circuit Court, Div. 12 granted Arthur Samuels Judgment on the Pleadings and this Kentucky Court of Appeals cited that the court erred and on October 1, 2004 remanded this case back to the Jefferson Circuit Court, Div. 12 (Case No. 2003-CA-001412-MR) stating the following:

"The basis of a motion for a judgment on the pleadings is to test the legal sufficiency of a claim or defense. City of Pioneer Village v. Bullitt Co., Ky., 104 S.W.3d 757 (2003). When a party moves for a judgment on the pleadings, he admits for the purposes of his motion the truth of the nonmovants' allegations of fact and all

⁴ A Calendar Court Order from a prior proceeding.

⁵ Samuel's letter to Marshall, which informed her of his withdrawal from her case and provided information regarding further steps which she could take in the custody proceeding.

fair inferences that can flow from those facts.

Finally, Marshall's one-page conclusion describes her determination to continue fighting for her right to go to court and to seek custody of her grandchildren. She requests this court to award her a judgment and damages against Samuel, as well as court costs and interest.

Although Marshall's arguments throughout these proceedings have been intertwined with her recitation of facts and arguments regarding her efforts to obtain custody of her grandchildren, the fact is that the matter now before us pertains only to whether the trial court properly granted summary judgment as to the malpractice claim against Samuel. CR 56.03 provides that summary judgment shall be granted only if

the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

All doubts must be resolved against the movant.⁶ However, if the movant's uncontroverted affidavits clearly disclose facts showing the absence of a genuine issue of material fact, the

⁶ *Gullett v. McCormick*, 421 S.W.2d 352 (Ky. 1967).

opposing party must, by affidavit or otherwise, show that evidence does in fact exist to justify a trial on the issues.⁷

After carefully reviewing the record of the matter now before us, we are unable to find that there is any genuine issue of material fact as to whether Samuel breached any duty owed to Marshall. First, we note that there is no merit to Marshall's claim that Samuel did not file a timely response below, as pages 4-5 of the circuit court record plainly show that within twenty days⁸ of Marshall's complaint, Samuel filed an answer denying the allegations and seeking dismissal of the complaint.

Next, the record shows that Samuel's responses to Marshall's claims below clearly refute the existence of any genuine issues of material fact, and Marshall failed to counter those responses with additional evidence to support her claims. Samuel made specific references to the record and to his actions to demonstrate that he filed Marshall's complaint as soon as she authorized him to do so, and that she remained informed of the proceedings through personal contacts and her own appearances in court. Although Marshall complains that she timely appeared in court for a scheduled visitation hearing only to learn that the matter already had been resolved, Samuel satisfactorily explained that the hearing in fact was intended only for

⁷ *Continental Casualty Co. v. Belknap Hardware and Manufacturing Co.*, 281 S.W.2d 914 (Ky. 1955).

⁸ CR 12.01.

scheduling purposes rather than as a visitation hearing, and that the court earlier that day had advised him that no visitation hearing would be scheduled at that time since a custody proceeding currently was pending. Moreover, Samuel's one-day delay in notifying Marshall of the court's action clearly did not amount to a failure to promptly communicate with her. Further, Samuel's failure to respond to unauthorized pleadings, such as Marshall's motion requesting this court to grant summary judgment on appeal, does not in any way justify sanctions against him. Finally, we are not persuaded by the claim that Samuel improperly engaged in dual representation of Marshall and her daughter. Although Samuel has represented both women at various times, Marshall has provided nothing to contradict his showing that the various proceedings were unrelated to one another and not violative of his ethical and professional responsibilities.

The court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Connie Marshall, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

Arthur R. Samuel
Louisville, Kentucky