[Cite as *Abshire v. Mauger*, 2010-Ohio-787.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tommy Abshire et al.,	:	
Plaintiffs-Appellants,	:	No. 09AP-83 (C.P.C. No. 07CVE04-5820)
v.	:	(REGULAR CALENDAR)
Jud R. Mauger, Administrator,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 4, 2010

Law Offices of James P. Connors, and *James P. Connors*, for appellants.

Kinsley F. Nyce, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellants, Tommy and Thelma Abshire ("appellants"), appeal the decision of the Franklin County Court of Common Pleas granting judgment to appellee, Jud R. Mauger, Administrator of the Estate of Lowell T. Cornette ("appellee"), after a jury-waived trial. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellants owned two parcels of real property located at 541 and 551 Hilock Road in Columbus, Ohio. In April 1998, Henry Cornette ("Henry"), purchased both properties for $100,000. As payment, Henry provided a $40,000 down payment and issued a promissory note to appellants in the amount of $60,000 with interest accruing at

the rate of seven percent per annum. The parties agreed that Henry would make monthly payments on the note in the amount of $500 until August 1, 2015.

{¶3} Also in April 1998, Henry quit-claimed the properties to his brother, Lowell Cornette ("Lowell"). Henry died in December 1999. Lowell later quit-claimed the 551 property to Henry's widow, Bernadette Cornette ("Bernadette").

{¶4} The last payment Bernadette made on the note was on December 31, 2000. At that time, the balance due was $54,919.21. The next month, Bernadette approached appellants to sell the 551 property. The parties ultimately reached a deal, wherein appellants provided $40,000 in cash to Bernadette in addition to reducing the balance on the note by $10,000. Therefore, after reaching this deal, the balance due on the note was $44,919.21. In accordance with the deal, Bernadette quit-claimed the 551 property back to appellants, and appellants issued a partial release of the mortgage on the 551 property.

{¶5} On January 17, 2001, Lowell and Henry's son, James Cornette ("James"), executed an assumption agreement. In the assumption agreement, Lowell and James agreed to assume the remaining balance on the note, which the agreement specified as $4,919.21. This amount was a typo and should have said $44,919.21. The agreement also reduced the monthly payment to $300 "for _____ months or until the loan is paid in full."

{¶6} James and Lowell signed the assumption agreement. Appellants did not. Lowell died in November 2002. James made a total of 16 payments in the amount of $300. Appellants cashed these 16 checks. James then tendered the 17th check, which appellants never cashed. At the time, James indicated that the 17th check was the last

payment due under the assumption agreement. He argued that his $4,919.21 obligation had been satisfied.

{¶7} On the other side, appellants argued that there was still $40,000 due on the note. This suit ensued and solely regards the 541 Hilock Road property.

{¶8} Appellants filed their complaint to enforce the assumption agreement and foreclose upon the 541 Hilock Road property as the result of a default. They chose to only name Lowell's estate as a defendant. In response to the complaint, appellee filed a unified filing presenting a motion to dismiss, counterclaim, and answer. Although appellee's motion to dismiss was not premised upon the failure to join the necessary and indispensable parties, appellee's answer did raise the argument as an affirmative defense.

{¶9} During trial, appellee orally requested the matter be dismissed because appellant failed to name the indispensable parties. Appellee argued that the following parties should have been named: the Franklin County Treasurer, Henry Cornette, James Cornette, and Doris Cornette. The magistrate who conducted the bench trial indicated that she would take appellee's request under advisement and render a decision after hearing the evidence.

{¶10} In the magistrate's decision, she found that appellants "failed to name necessary parties to this foreclosure action, including the Franklin County Treasurer, James Cornette, and Doris Cornette." (Magistrate's Decision, at 6.) Additionally, she held that the drafting error in the assumption agreement was the result of a unilateral mistake of the appellants. She held that neither Lowell nor James knew about the error and took advantage of it. As a result, she held that reformation of the assumption

agreement was not warranted. She therefore granted judgment in favor of appellee on appellants' claims and granted judgment in favor of appellants on appellee's counterclaim. The trial court adopted the magistrate's decision as its own. Appellants now appeal and raise the following assignments of error:

> I. THE TRIAL COURT ERRED BY FAILING TO ORDER JOINDER OF NECESSARY AND INDISPENSABLE PARTIES.
>
> II. THE TRIAL COURT ERRED BY ADOPTING THE MAGISTRATE'S DECISION WITHOUT REVIEWING THE RECORD OR A TRIAL TRANSCRIPT, AND BY EFFECTIVELY DENYING THE PLAINTIFFS' REQUEST TO SUPPLEMENT THEIR OBJECTIONS ONCE THE TRIAL TRANSCRIPT WAS PREPARED.
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> III. THE TRIAL COURT ERRED BY APPLYING, CONSTRUING, AND ENFORCING AN "ASSUMPTION AGREEMENT" AGAINST THE PLAINTIFFS WHO DID NOT EXECUTE THE AGREEMENT.

{¶11} For ease and clarity, we will address appellants' assignments of error out of order. In their second assignment of error, appellants argue that the trial court erred by adopting the magistrate's decision without considering their objections or reviewing the trial transcript.

{¶12} When reviewing a trial court's adoption of a magistrate's decision, the standard of review is an abuse of discretion. *DeFrank-Jenne v. Pruitt*, 11th Dist. No. 2008-L-156, 2009-Ohio-1438, ¶9, citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419; see also *Levine v. Brown*, 8th Dist. No. 92862, 2009-Ohio-5012, ¶16. Indeed, this court has previously held that "the civil rules vest trial courts with broad discretion concerning magisterial procedures." *Yoder v. Hurst*, 10th Dist. No. 07AP-121, 2007-Ohio-4861, ¶3, citing Civ.R. 53(D)(4)(b). Therefore, when presented with issues

regarding magisterial procedures, we will not reverse a trial court's decision absent an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, citing *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85; *Chester Twp. v. Geauga Co. Budget Comm*. (1976), 48 Ohio St.2d 372.

{¶13} Appellants consistently argue that the trial transcript had not yet been filed at the time the trial court adopted the magistrate's decision. As a result, appellants argue the trial court simply provided a rubber stamp of approval to the magistrate's decision. A mere reference to the record illustrates the fallacy of appellants' argument.

{¶14} The magistrate issued her decision on November 25, 2008. Appellants filed timely objections to the magistrate's decision on December 9, 2008. The trial transcript was filed on December 11, 2008. Appellee filed its response to appellants' objections on December 17, 2008. The trial court issued its decision overruling appellants' objections and adopting the magistrate's decision on December 24, 2008.

{¶15} We therefore reject appellants' argument that the trial transcript was not filed before the trial court reached its decision. The trial transcript was filed nearly two weeks before the trial court's decision. As a result, appellants' argument that the trial court failed to review the transcript is mere speculation. Without more, we must presume the regularity of the trial court's proceedings. *McCarty v. Hayner* (Aug. 25, 2009), 4th Dist. No. 08CA8, 2009-Ohio-4540, ¶21.

{¶16} Appellants also argue that they should have been afforded an opportunity to supplement their objections after the trial transcript was filed. In their December 9, 2008 objections, appellants requested leave to supplement their objections. By adopting the magistrate's decision on December 24, 2008, appellants argue that the trial court implicitly denied appellants' request.

{¶17} It is true that Civ.R. 53(D)(3)(b)(iii) allows a party to seek leave to supplement objections. However, a court has no obligation to grant such leave:

> [N]either Civ.R. 53 nor statutory law permits a party to submit a memorandum supplementing her timely objections to a magistrate's decision, as of right, after the time for filing objections has passed. Civ.R. 53(E)(3)(a) only permits a party to file objections to a magistrate's decision within fourteen days of the filing of the decision. Courts may grant a party leave to supplement [her] objections upon request.

Beasley v. Beasley, 4th Dist. No. 06CA821, 2006-Ohio-5000, ¶13, citing *Zartman v. Swad*, 5th Dist. No. 02CA86, 2003-Ohio-4140.

{¶18} Appellants fail to provide any argument as to how their alleged inability to file a supplement amounts to an abuse of discretion by the trial court. Indeed, we find no abuse of discretion in these circumstances. Additionally, we find no abuse of discretion in the trial court's decision to adopt the magistrate's decision. We therefore overrule appellants' second assignment of error.

{¶19} In appellants' first assignment of error, they argue the trial court erred in failing to order joinder. They argue Henry's estate, Bernadette, James and Dorris should have been parties to this suit.

{¶20} It is well-settled that an appellant cannot change the theory of his case and present new arguments for the first time on appeal. *Havely v. Franklin Cty*. *Ohio*, 10th

Dist. No. 07AP-1077, 2008-Ohio-4889, fn 3, quoting *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177; see also *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, syllabus; *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St.3d 76, 78. This is precisely what appellants seek to do in this appeal.

{¶21} Again, during the trial court's proceedings, appellee argued that appellants failed to name the necessary and indispensable parties. Appellants consistently argued against this position. Appellants even went so far as to object to the magistrate's conclusion that appellants failed to name the necessary parties. (Objection 10, at 5.) On appeal, however, appellants present the new argument that the trial court erred in failing to order joinder of the necessary parties.

{¶22} We find that appellants have waived this assignment of error. Not only is it a new argument raised for the first time on appeal, but it is also the diametrically opposite position appellants consistently advanced through the entire trial court proceedings. Because this argument has been waived, we overrule appellants' first assignment of error.

{¶23} In appellants' third assignment of error, they argue the trial court erred by applying, construing, and enforcing the assumption agreement against appellants who did not sign the agreement. The precise extent of this argument is unclear because appellants failed entirely to cite any legal authority supporting this assignment of error.

{¶24} However, the absence of signatures becomes relevant in determining whether there is an enforceable contract evidenced by mutual assent. *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶27-28. We note,

however, that appellants filed this lawsuit to enforce the assumption agreement, not to rescind it. Nor did appellants plead or argue in the alternative for rescission. Therefore, this appeal presents the unique scenario where appellants filed suit to enforce an agreement they now argue is unenforceable. We find that appellants' position is irreconcilable with the act of filing this lawsuit. As a result, we find that appellants have waived this assignment of error. We therefore overrule appellants' third assignment of error.

{¶25} Based upon the foregoing, we overrule all of appellants' assignments of error. Having overruled all three assignments of error, we affirm the judgment rendered by the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.