[Cite as *Crawford v. Hawes*, 2010-Ohio-952.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

RYAN CRAWFORD	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23209
v.	:	T.C. NO. 2008 CV 7261
ADRIAN HAWES	:	(Civil appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 12th day of March, 2010.

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RYAN CRAWFORD, 101 Bedford Farm Circle, Union, Ohio 45322
Plaintiff-Appellee

MICHAEL C. THOMPSON, Atty. Reg. No. 0041420, 5 N. Williams Street, Wright-Dunbar Business Village, Dayton, Ohio 45407
Attorney for Defendant-Appellant

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Adrian Hawes appeals from a judgment of the Montgomery County Court of Common Pleas, General Division, which adopted the decision of the magistrate which sustained Plaintiff-appellee Ryan Crawford's motion to appoint a receiver pursuant to R.C. § 2735.01 and Montgomery County Common Peas Court Local

Rule 2.29. Crawford filed his motion to appoint a receiver on August 8, 2008. The magistrate sustained said motion on September 23, 2008, and on September 26, 2008, a receiver was subsequently appointed to operate and oversee the management of Leo's II club located at 4155 Salem Avenue in Dayton, Ohio. The judgment entry adopting the magistrate's decision was issued by the trial court on December 16, 2008. On January 14, 2009, Hawes filed a timely notice of appeal with this Court.

I

{¶ 2} The record establishes that in late 2007, Hawes and Crawford began discussing the possibility of opening a bar together. They decided to name the bar "Leo's II" in honor of another bar Crawford had operated named "Leo's." Although no written partnership agreement existed between them, Hawes and Crawford apparently agreed to enter into a 50/50 agreement regarding ownership and operation of the bar. Because they both had felony convictions, Hawes and Crawford asked Hawes' mother, Patricia Douglas, to apply for the liquor license and sign the lease for the commercial space where the bar was to be located.

{¶ 3} "Leo's II" opened on June 1, 2008. On June 28, 2008, Hawes and Crawford had an argument regarding inventory purchases for the bar which resulted in a physical confrontation. Hawes subsequently terminated Crawford's employment and enjoined him from entering the bar.

{¶ 4} On August 7, 2008, Crawford filed a complaint against Hawes and Douglas in which he alleged breach of fiduciary duty, fraud, conspiracy, breach of contract, promissory estoppel, unjust enrichment, and conversion. Crawford also requested that a

receiver be appointed by the court in order to protect his interests in the bar. One day later, on August 8, 2008, Crawford filed a motion to appoint a receiver pursuant to R.C. § 2735.01 and Montgomery County Common Peas Court Local Rule 2.29. The trial court filed an entry on the same day in which it ordered that a hearing be held on Crawford's motion on August 14, 2008.

{¶ 5} On August 13, 2008, after securing legal representation, Hawes and Douglas filed a motion to continue the receivership hearing. At the receivership hearing on August 14, 2008, the magistrate orally denied Hawes' motion to continue the hearing. Hawes' counsel objected to the denial of the motion to continue, stating that he did not have sufficient time to prepare for the hearing having only just been retained by Hawes on August 12, 2008. The magistrate overruled counsel's objection and the parties proceeded with the hearing. At the close of the hearing, the magistrate took the matter under advisement. On September 23, 2008, the magistrate issued a written decision in which he sustained Crawford's motion to appoint a receiver. Hawes filed objections to the magistrate's decision on September 26, 2008. The trial court adopted and affirmed the magistrate's decision in a judgment and entry filed on December 16, 2008.

{¶ 6} It is from this judgment that Hawes now appeals.[1]

II

{¶ 7} Hawes' first assignment of error is as follows:

[1]Crawford did not file any response to Hawes' merit brief in the instant appeal.

{¶ 8} "THE TRIAL COURT ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR A CONTINUANCE."

{¶ 9} In his first assignment, Hawes contends that the trial court abused its discretion when it overruled his motion to continue the receivership hearing.

{¶ 10} "The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *State v. Unger* (1981), 67 Ohio St.2d 65, 67. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} In evaluating a motion for a continuance, a court should consider the following factors: 1) the length of the delay requested; 2) whether other continuances have been requested and received; 3) the inconvenience to the litigants, witnesses, opposing counsel, and the court; 4) whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; 5) whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and 6) other relevant factors, depending on the unique facts of each case. *State v. Unger*, 67 Ohio St.2d at 67, 68.

{¶ 12} The record establishes that Crawford filed his complaint on Thursday, August 7, 2008. On Friday, August 8, 2008, Crawford filed a motion to appoint a receiver. On the same day, the trial court scheduled the hearing for Thursday, August 14, 2008. Hawes' counsel informed the magistrate that Hawes did not receive notice of the hearing until Saturday, August 9, 2008. On Monday, August 11, 2008, Hawes attempted to make

arrangements to meet with counsel, but was unable to get an appointment until the afternoon of Tuesday, August 12, 2008. On Wednesday, August 13, 2008, Hawes' newly retained counsel promptly filed an answer to Crawford's complaint, as well as a motion to continue the receivership hearing to a later date.

{¶ 13} The magistrate orally denied Hawes' motion for continuance at the receivership hearing during the following exchange:

{¶ 14} "Mr. Thompson: Your Honor, if I might before we do it. I'd like to place on the record that, in fact, my client indicates they only received notice of the hearing on Saturday [August 9, 2008].

{¶ 15} "They attempted to schedule an appointment with me on Monday. I was unable to accommodate them and, in fact, did not meet with them until Tuesday after five o' clock which was the earliest time that I could meet with them. And so we've only really had a small opportunity to talk about the case before we – this hearing.

{¶ 16} "And I have to state for the record – that although I'm here and will go forward if the Court, you know, forces me to – that I am – do feel that I have not had sufficient time to prepare or contact any of the witnesses that my clients have told me that I feel would have important information on this matter. And so I feel it's my obligation to at least place that on the record.

{¶ 17} "The Court: Okay. And Mr. Thompson, as I understand, I mean we're not here to deal with the merits of the case per se, as to whether or not, you know, there's been breaches of contracts or misrepresentations or whatever. We're not here on the merits of either the plaintiff's verified complaint nor on your claims set forth in your counsterclaim.

{¶ 18} "We're here, basically today, for the Court to determine whether or not the Court believes that, in view of the allegations and the factual circumstances surrounding this business, it would be in the best interest of the parties to have a receiver appointed so –

{¶ 19} "Mr. Thompson: I understand.

{¶ 20} "The Court: I recognize your objection and I recognize that you may not be overly prepared for this but it seems to me, from the Court's standpoint, that we need to at least have a hearing and then the Court will make a determination as to whether we'll appoint a receiver. Okay?"

{¶ 21} In its decision adopting the judgment of the magistrate, the trial court stated that "the magistrate did not abuse his discretion by denying the motion for continuance [since] the Defendants received prior notice of the hearing." With respect to the appropriate standard to be employed by the trial court when reviewing a magistrate's decision, we stated the following in *Quick v. Kwiatkowski*, Montgomery App. No. 18620, 2001-Ohio-1498:

{¶ 22} "Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court. Therefore, magistrates do not constitute a judicial tribunal independent of the court that appoints them. Instead, they are adjuncts of their appointing courts, which remain responsible to critically review and verify the work of the magistrates they appoint. *** Civ.R. 53(E)(4)(b) contemplates a *de novo* review of any issue of fact or law that a magistrate has determined when an appropriate objection is timely filed. The trial court may not properly defer to the magistrate in the exercise of the trial court's *de novo* review.

The magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function."

{¶ 23} "The 'abuse of discretion' standard that the trial court applied to review the decision of its magistrate is an appellate standard of review. It is applicable to the review performed by a superior court of the judgments and orders of inferior courts. Inherent in the abuse of discretion standard are presumptions of validity and correctness, which acknowledge the independence of the inferior courts by deferring to the particular discretion they exercise in rendering their decisions. Because its magistrate does not enjoy that independence, such presumptions are inappropriate to the trial court's review of a magistrate's decisions. Therefore, a trial court errs when it applies the abuse of discretion standard of review in ruling on Civ.R. 53(E)(3) objections to the decision of the appointed magistrates * * *." Id.

{¶ 24} In the portion of its opinion titled "Standard of Review," however, the trial court correctly notes that it must independently review the findings of fact and conclusions of law rendered by the magistrate. Thus, it is apparent to us that the trial court employed a de novo standard when reviewing Hawes objections to the magistrate's decision. The court's use of the term "abuse of discretion," while inaccurate, does not require reversal on that basis.

{¶ 25} Under prior Civ. R. 53(C)(3)(a) (now Civ.R. 53(D)(2)(a)(i)), magistrates have very limited power to enter orders without judicial approval. Such orders include pre-trial matters like discovery orders and requests for continuances as in the instant case. *Crane v. Teague*, Montgomery App. No. 20684, 2005-Ohio-5782. The pretrial order must be identified as a magistrate's order, signed by the

magistrate, filed with the clerk, and must be served by the clerk on all parties or their attorneys. Civ. R. 53(C)(3)(c); see current Civ. R. 53(D)(2)(a)(ii). When a pretrial order is entered by a magistrate, Civil Rule 53 allows a review by the trial court through a motion to set aside the order, which must be filed no later than ten days after the magistrate's order is entered. Civ. R. 53(C)(3)(b); see current Civ. R. 53(D)(2)(b). After a thorough review of the record, it is evident that Hawes failed to file a motion to set aside the magistrate's denial of his request for a continuance to the trial court pursuant to Civ.R. 53(C)(3)(b). Thus, Hawes has waived any argument regarding the denial of his pretrial motion for a continuance for the purposes of the instant appeal.

{¶ 26} Hawes' first assignment of error is overruled.

III

{¶ 27} Hawes' second assignment of error is as follows:

{¶ 28} "THE TRIAL COURT ABUSED ITS DISCRETION IN APPOINTING A RECEIVER ABSENT EVIDENCE OF IMPENDING LOSS, DAMAGE OR MATERIAL INJURY TO ANY PROPERTY OR FUND; AND WHEN LESS DRASTIC MEASURES WOULD HAVE PROTECTED ANY PUTATIVE INTEREST OF THE APPELLEE."

{¶ 29} In his second assignment, Hawes argues that the trial court abused its discretion by appointing a receiver pursuant to R.C. § 2735.01(A), absent clear and convincing evidence that a particular property or fund was in danger of being lost, removed, or otherwise damaged by appellants.

{¶ 30} R.C. § 2735.01(A) states in pertinent part:

{¶ 31} "A receiver may be appointed by the supreme court or judge thereof, the court of appeals or a judge thereof in his district, the court of common pleas or a judge thereof in his county, or the probate court, in causes pending in such courts respectively, in the following cases:

{¶ 32} "(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured."

{¶ 33} "The appointment of a receiver is the exercise of an extraordinary, drastic and sometimes harsh power which equity possesses and is only to be exercised where the failure to do so would place the petitioning party in danger of suffering irreparable loss or injury." *Hoiles v. Watkins* (1927), 117 Ohio St. 165, 174. Owing to the extreme nature of the remedy is the requirement that the movant must demonstrate the need for a receiver by clear and convincing evidence. *Malloy v. Malloy Color Lab, Inc.* (1989), 63 Ohio App.3d 434, 437. Once the movant has satisfied this burden, a trial court is vested with the sound discretion to appoint a receiver. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73. "A court[,] in exercising its discretion to appoint or refuse to appoint a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and

effectiveness of other remedies." *Id*.

{¶ 34} Thus, a reviewing court will not reverse the lower court's appointment of a receiver absent an abuse of discretion. *Milo v. Curtis* (1994), 100 ohio App.3d 1, 5. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 35} Initially, we note that the lease agreement for "Leo's II" is in the name of Patricia Douglas. The liquor license for the bar is also in Douglas' name. It is also undisputed that no written partnership agreement or joint venture agreement was ever drafted by the parties. All of Crawford's claims for monetary damages are based upon his assertion that he and Hawes entered into an oral partnership agreement to create and manage "Leo's II." In further support of his claims for monetary damages, we note that Crawford provided the magistrate with numerous receipts which established that he invested a relatively substantial amount of money in the bar before it opened for business.

{¶ 36} While Crawford affirmatively established that he invested his money and time in the opening and early management of the bar, he failed to produce any evidence which established that a property or fund associated with the bar was in danger of financial loss or damage as required by the clear and unambiguous language in R.C. § 2735.01(A). Crawford did not present any accounting records

or financial records which disclosed financial mismanagement on the part of Hawes or Douglas. In fact, when cross-examined regarding his allegations of theft and financial mismanagement perpetrated by Hawes and Douglas, Crawford testified as follows:

{¶ 37} "Q: Now, do you have any documentation, sir, of any kind of theft that's going on in the club?

{¶ 38} "Crawford: Man, why you keep attaining to – you keep saying theft. Man, I'm not there. They shove me out of my business, the one I created, the one I (indiscernible) him and thought it was a friend. I asked him to come and be a partner of this Leo. Where you think the name come from? I had Leo's before. That's Leo's Two. This man shoved me out. His mom went on agreed and side with him, shove me out, not give me my money. That's why we're here today.

{¶ 39} "Q: Okay.

{¶ 40} "Crawford: this is the bottom line, man. You keep asking me the same questions, the same question. There's no document, no.

{¶ 41} "Q: Well, do you know –

{¶ 42} "Crawford: Okay (indiscernible) I mean here (indiscernible) all the employee's at Leo's but I'm the only one on this. I'm the only one signing business checks.

{¶ 43} "Q: That's something you didn't apply for. But my question to you, sir –

{¶ 44} "Crawford: Okay.

{¶ 45} "Q: – is that you made an allegation that there's stealing going on and

there's misappropriation of funds.

{¶ 46} "Crawford: I'm not there, yes. I'm still – a whole month and two weeks.

{¶ 47} "Q: So you don't know that?

{¶ 48} "Crawford: Yes.

{¶ 49} "Q: You don't know that.

{¶ 50} "Crawford: Yeah, I do know. I ain't got my money.

{¶ 51} "Q: You don't know that.

{¶ 52} "Crawford: I don't have my money.

{¶ 53} "Q: There's a dispute as to the –

{¶ 54} "Crawford: I don't have my money, man. I don't have my money, period.

{¶ 55} "Q: So the fact that you don't have your money –

{¶ 56} "Crawford: That's right.

{¶ 57} "Q: – is your sole conclusion –

{¶ 58} "Crawford: That's right.

{¶ 59} "Q: – for basing –

{¶ 60} "Crawford: Yeah, he's stealing.

{¶ 61} "***

{¶ 62} "Crawford: Yes, he's stealing.

{¶ 63} "Q: Okay, based upon –

{¶ 64} "Crawford: I'm telling you – telling him in his face, yeah you stealing. Yeah, you stealing. ***."

{¶ 65} The record of the receivership hearing establishes that Crawford presented no evidence, other than his unsubstantiated allegations, that Hawes and Douglas were stealing money from the bar. Contrary to Crawford's assertions, Hawes presented evidence at the hearing which demonstrated that the bar's financial records were being kept by an accountant. Evidence was also adduced which established that the taxes and insurance on the bar were current, and all of the bar's employees' salaries were also being paid on time. Hawes' testimony suggests that the bar was an ongoing, solvent business. Crawford failed to establish that any monies or profits generated by the bar were "in danger of being lost, removed, or materially injured." As movant, Crawford failed to establish by clear and convincing evidence his right to have a receiver appointed.

{¶ 66} The evidence adduced at the hearing only established that Crawford had a financial interest in the bar. Absent any evidence of fraud or financial mismanagement on behalf of Hawes or Douglas, Crawford was not entitled to the drastic measure of having a receiver appointed to take control of the bar pursuant to R.C. § 2735.01(A). Thus, the trial court abused its discretion when it adopted the magistrate's recommendation that a receiver be appointed to manage the affairs of the bar.

{¶ 67} Hawes' second assignment of error is sustained.

IV

{¶ 68} Hawes' final assignment of error is as follows:

{¶ 69} "THE TRIAL COURT ERRED IN APPOINTING A RECEIVER WHEN

THE PARTY SEEKING A RECEIVERSHIP DID NOT PROVE THE EXISTENCE OF PROPERTY OR A FUND BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY O.R.C § 2735.01(A)."

{¶ 70} In light of our disposition regarding his second assignment, Hawes' third assignment of error is rendered moot.

V

{¶ 71} Hawes' second assignment of error having been sustained, the judgment of the trial court is reversed and this matter is remanded for proceedings consistent with this opinion.

. . . . . .

GRADY, J., concurs.

FAIN, J., concurring in the judgment:

{¶ 72} I concur fully in all of the holdings set forth in Judge Donovan's well-reasoned opinion for this court.

{¶ 73} My purpose in writing separately is merely to continue my war against one of the most unfortunate formulations – if not the most unfortunate formulation – to appear in Ohio appellate jurisprudence:

{¶ 74} "The term 'abuse of discretion' connotes more than an error of law or of judgment."

{¶ 75} I have traced this offensive formulation as far back as *Steiner v. Custer* (1940), 137 Ohio St. 448, 450, which, in turn, cites Black's Law Dictionary (2 Ed.), 11 as authority. The definition of "abuse of discretion" in Black's Law Dictionary, Eighth Edition (2004), at 11, offers no support for the offensive

formulation:

{¶ 76} "1. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

{¶ 77} Interestingly, the definition of "abuse of discretion" in Black's Law Dictionary, Fourth Edition (1968), which was the edition of Black's Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

{¶ 78} " 'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*. * * * * . And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

{¶ 79} "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to

imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with 'abuse of discretion' as respects setting aside verdict as against evidence. * * * * ." (Citations omitted; emphasis added.)

{¶ 80} I can only speculate that the origins of the offending formulation lay in an attempt to make the following point too succinctly:

{¶ 81} When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.[2] By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

{¶ 82} I know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding,* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 83} I will save the enterprising researcher the trouble of combing through

[2]Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

opinions in which I appear as the author by freely admitting that, on numerous occasions, I have been too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney's draft. I am confident, however, that in none of the opinions I have authored is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 84} So let me close by boldly declaring that no court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.[3]

. . . . . .

Copies mailed to:

Ryan Crawford
Michael C. Thompson
Hon. A. J. Wagner

[3]This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.