[Cite as *Sydnor v. Qualls*, 2016-Ohio-8410.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

MARIO SYDNOR, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 15CA3701
vs.	:	
TERRY QUALLS, ET AL.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Mitchell Boggs, Jackson, Ohio, appellant, pro se .

James H. Banks, Dublin, Ohio, for appellees.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-8-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a Civ.R. 60(B) motion for relief from judgment and a Civ.R. 59 motion for a new trial filed by Mitchell Boggs, defendant below and appellant herein. The trial court previously determined that appellant and his co-defendant defrauded Mario Sydnor, Latisha Jones, and Kenetha Norvell, plaintiffs below and appellees herein, and awarded them compensatory and punitive damages. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"FAILURE OF THE COURT TO TAKE JUDICIAL NOTICE OF THE OHIO SUPREME COURT DECISION IN STATE V. KOLE[.]"

SECOND ASSIGNMENT OF ERROR:
"FAILUR[E] OF THE COURT TO TAKE JUDICIAL NOTICE OF R.C. 2713.22[.]"

THIRD ASSIGNMENT OF ERROR:

"IRREGULARITY IN THE PROCEEDINGS: CIVIL RULE 59(A)(1)[.]"

FOURTH ASSIGNMENT OF ERROR:

"FALSE STATEMENTS PROPOSED BY PLAINTIFF'S [SIC] AND THEIR COUNSEL IN DOCUMENTS TO THE COURT AND STATEMENTS AT TRIAL WERE PREJUDICIAL TO DEFENDANT BOGGS: CIVIL RULE 59(A)(2)[.]"

FIFTH ASSIGNMENT OF ERROR:

"DID TESTIMONY NOT INTRODUCED IN STATEMENTS BY PLAINTIFF'S [SIC] PRIOR TO TRIAL AND CONTRARY TO THE TESTIMONY GIVEN BY DEFENDANT BOGGS AT TRIAL RAISE THE ISSUE OF SURPRISE AS TO ALLOW A NEW TRIAL[?]"

SIXTH ASSIGNMENT OF ERROR:

"IS THE JUDGMENT OF THE COURT CONTRARY TO LAW[?]"

{¶ 2} This case arises out of a bail bond contract to secure Sydnor's release from incarceration. An October 2, 2009 bail bond premium receipt shows that Sydnor and Latisha Jones gave appellant $9,600 in cash, with a $2,980 balance due. Jones signed a promissory note to repay the balance in $500 monthly installments. Sydnor and Jones signed an application for bail bond dated November 2, 2009. Jones and Kenetha Norvell also signed an undated collateral receipt for the titles to three vehicles. On November 12, 2009, appellant filed a motion to be

released from the bond posted for Sydnor. Appellant alleged that Sydnor failed to follow the conditions of the bond contract.

{¶ 3} On March 5, 2010, appellees filed a complaint against, inter alia, appellant and Terry Qualls.[1] Appellees' complaint alleged the following causes of action: (1) breach of contract; (2) fraud; (3) negligence; (4) unjust enrichment; (5) breach of fiduciary duty; (6) abuse of process; and (7) conspiracy. Appellees also alleged that appellant engaged in the unlawful practice of law. Appellees sought compensatory and punitive damages, and further sought injunctive relief to require the defendants to return all money and property and to post bond for Sydnor.

{¶ 4} On May 29, 2012, appellant's counsel filed a motion to withdraw. The trial court subsequently granted the motion. Appellant did not retain new counsel.

{¶ 5} On July 11, 2014, appellees' counsel submitted a jury trial waiver, purportedly on behalf of "defendant." On August 7, 2014, appellees' counsel filed a corrected jury trial waiver to indicate that he filed it on behalf of appellees.

{¶ 6} On November 24, 2014, the trial court held a bench trial. During appellees' opening statement, counsel stated that on October 2, 2009, Sydnor contracted with appellant for a bond. According to appellees, they paid appellant $9,600 in cash and gave appellant the titles to three vehicles. Thirty days later, the bond was posted. On November 12, 2009, appellant and Qualls went to Norvell's sister's house, kicked in the door, and arrested appellant. During the encounter, Qualls told Norvell that if she gave him $500 and possession of one of the vehicles, he would place Sydnor on house arrest. Sydnor was not placed on house arrest.

[1] All defendants, except appellant and Qualls, were later dismissed from the case.

{¶ 7} Appellant presented his opening statement and claimed that Sydnor gave false information on the bond contract. Appellant asserted that he did not meet with appellees until November 2, 2009, and that the October 2, 2009 date is incorrect. Appellant stated that he mistakenly wrote "October" on the receipt, because he was in a hurry.

{¶ 8} Appellant and Sydnor were the only witnesses, and they gave conflicting accounts of their interactions. Appellant explained that he held the titles for the motor vehicles to secure the balance due on the bond contract and that he did not take physical possession. He and Qualls arrested Sydnor on November 12 based upon his belief that Sydnor had provided false information because appellant claimed, Sydnor did not live at the address Sydnor listed on the bond application. Appellant stated that he drove by the address and he did not believe anyone lived there. Appellant testified that the house was being remodeled. Appellant stated that he called Sydnor and Jones to inform them that they needed to meet with him to correct the address. Appellant explained that when he did not hear from Sydnor, he decided to track him down and arrest him.

{¶ 9} Appellant stated that he learned that Sydnor was staying at Norvell's sister's house in Columbus. Appellant testified that before he entered the sister's house, he contacted the Columbus Police Department. Appellant explained that he and Qualls kicked down the door and arrested Sydnor, and that he did not see any children present at the time.

{¶ 10} Sydnor testified and, in essence, disagreed with everything to which appellant had testified. Sydnor also denied that appellant contacted him and informed him that Sydnor had given a false address. Sydnor also stated that he had not received any information about a problem with his bond.

{¶ 11} Sydnor stated that on the night appellant arrested him, he was with Norvell at her sister's house and that he and Norvell were babysitting. Sydnor additionally refuted appellant's claim that Columbus Police officers were present.

{¶ 12} Sydnor stated that appellant and Qualls promised to release him on an ankle monitor in exchange for $500 and possession of one of the vehicles, a Buick. Norvell gave Qualls $500 and the Buick the next day, but Sydnor was not released on an ankle monitor. Sydnor stated that he called appellant, and appellant "said he ain't letting me out." Sydnor demanded that appellant return the money, but appellant refused.

{¶ 13} On cross-examination, Sydnor stated that it is "not accurate" that the house listed on the bond application was being remodeled. Sydnor denied talking to appellant on November 3, 2009, and denied that they had a conversation in which appellant told Sydnor that "there's false information on the contract and that you had to meet with me to get it corrected or your bond was going to be forfeited[.]"

{¶ 14} The trial court asked Sydnor "if there's anything that's untruthful on that [bond] application." Sydnor stated, "I believe everything's true on this."

{¶ 15} After the parties presented their evidence, the trial court allowed them to file post-trial briefs. In his post-trial brief, appellant alleged that appellees' claim that they signed the bond contract in October 2009 is false. Appellant pointed out that he testified at trial that the date should have been November 2, 2009. Appellant also asserted that he had a right to enter Norvell's sister's house to arrest Sydnor. Appellant claimed that Sydnor had not been merely "babysitting," but had been living at Norvell's sister's house.

{¶ 16} On February 10, 2015, the trial court entered judgment in appellees' favor, awarded the plaintiffs $15,600 in compensatory damages and $5,000 in punitive damages.

{¶ 17} On March 4, 2015, appellant filed a Civ.R. 60(B) motion for relief from judgment that generally attacked Sydnor's credibility. Appellant also filed a motion for a new trial and complained that (1) the jury trial waiver was not proper because his consent was not obtained; (2) appellees made false statements in their complaint; (3) Sydnor's testimony that he and Norvell were babysitting surprised him and he was unable to subpoena witnesses to contradict this testimony; and (4) the trial court did not properly apply the law.

{¶ 18} On April 29, 2015, the trial court denied appellant's motion for a new trial and motion for relief from judgment. This appeal followed.

I

PRO SE APPEAL

{¶ 19} Before we consider appellant's assignments of error, we observe that appellant is acting pro se in this appeal. Because we ordinarily prefer to review a case on its merits rather than dismiss it due to procedural technicalities, we afford considerable leniency to pro se litigants. E.g., Viars v. Ironton, 4th Dist. Lawrence No. 16CA8, 2016-Ohio-4912, ¶25; Miller v. Miller, 4th Dist. Athens No. 14CA6, 2014-Ohio-5127, ¶13; In re Estate of Pallay, 4th Dist. Washington No. 05CA45, 2006–Ohio–3528, ¶10; Robb v. Smallwood, 165 Ohio App.3d 385, 2005–Ohio–5863, 846 N.E.2d 878, ¶5 (4th Dist.); Besser v. Griffey, 88 Ohio App.3d 379, 382, 623 N.E.2d 1326 (4th Dist.1993); State ex rel. Karmasu v. Tate, 83 Ohio App.3d 199, 206, 614 N.E.2d 827 (4th Dist.1992). "Limits do exist, however. Leniency does not mean, however, that we are required 'to find substance where none exists, to advance an argument for a pro se litigant or to address

issues not properly raised.'" State v. Headlee, 4th Dist. Washington No. 08CA6, 2009–Ohio–873, ¶6, quoting State v. Nayar, 4th Dist. Lawrence No. 07CA6, 2007–Ohio–6092, ¶28. Furthermore, we will not "conjure up questions never squarely asked or construct full-blown claims from convoluted reasoning." Karmasu, 83 Ohio App.3d at 206. We will, however, consider a pro se litigant's appellate brief so long as it "contains at least some cognizable assignment of error." Robb at ¶5; accord Coleman v. Davis, 4th Dist. Jackson No. 10CA5, 2011–Ohio–506, ¶14 (considering pro se litigant's brief when it contains "some semblance of compliance" with appellate rules of practice and procedure). In the case sub judice, we believe that appellant's brief contains some cognizable assignments of error that we may consider on the merits.

II

FAILURE TO TIMELY APPEAL TRIAL COURT'S FEBRUARY 10, 2015 JUDGMENT

{¶ 20} In his first and second assignments of error, appellant asserts that the trial court's underlying judgment is incorrect because the court failed to follow the law.

{¶ 21} We, however, do not have jurisdiction to review appellant's first and second assignments of error. "Generally, an appeal of a judgment or final order must be filed within 30 days from the entry of the judgment or order." In re H.F., 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607, ¶10. "'If a party fails to file a notice of appeal within thirty days as App.R. 4(A) requires, we do not have jurisdiction to entertain the appeal. The timely filing of a notice of appeal under this rule is a jurisdictional prerequisite to our review.'" Chase Home Finance, L.L.C. v. Gersten, 4th Dist. Ross No. 12CA3314, 2013–Ohio–252, ¶11, quoting Hughes v. A & A Auto Sales, Inc., 4th Dist. Lawrence No. 08CA35, 2009–Ohio–2278, ¶7.

{¶ 22} In the case at bar, appellant did not timely appeal the trial court's February 10, 2015 decision. Although appellant filed a motion to amend his appeal to include the trial court's February 10, 2015 judgment, we denied his motion. We thus lack jurisdiction to review any assignments of error that relate to the trial court's February 10, 2015 judgment. We further lack jurisdiction to consider any other arguments appellant raises throughout his brief that challenge the merits of the court's February 10, 2015 judgment.

{¶ 23} Accordingly, we summarily overrule appellant's first and second assignments of error.

III

CIV.R. 60(B)

{¶ 24} Initially, we point out that none of appellant's assignments of error specifically mention Civ.R. 60(B), nor has he crafted any specific arguments regarding the trial court's decision to overrule his Civ.R. 60(B) motion. Nevertheless, we broadly construe his assignments of error to generally challenge the court's decision that overruled his Civ.R. 60(B) motion.

A

STANDARD OF REVIEW

{¶ 25} An appellate court will not reverse a trial court's decision concerning a Civ.R. 60(B) motion unless the court abused its discretion. Harris v. Anderson, 109 Ohio St.3d 101, 846 N.E.2d 43, ¶7 (2006), citing State ex rel. Russo v. Deters, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997); Rose Chevrolet, Inc. v. Adams, 36 Ohio St.3d 17, 21, 520 N.E.2d 564 (1988). "'[A]buse of discretion' [means] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.'" State v.

Kirkland, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014–Ohio–1966, ¶67, quoting State v. Brady, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶23. "An abuse of discretion includes a situation in which a trial court did not engage in a "'sound reasoning process."'" State v. Darmond, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶34, quoting State v. Morris, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶14, quoting AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). The abuse-of-discretion standard is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court. Darmond at ¶34.

B

CIV.R. 60(B) REQUIREMENTS

{¶ 26} Civ.R. 60(B) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the

judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 27} "To succeed on a motion for relief from judgment under Civ.R. 60(B), a movant must establish (1) a meritorious defense or claim to present, in the event that relief from judgment is granted, (2) entitlement to relief under one of the provisions in Civ.R. 60(B)(1) through (5), and (3) compliance with the rule's time requirements." Bank of Am., N.A. v. Kuchta, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶10-11, citing GTE Automatic Elec., Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), at paragraph two of the syllabus. "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." Strack v. Pelton, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994).

{¶ 28} We additionally note that "[r]elief from a final judgment should not be granted unless the party seeking such relief makes at least a prima facie showing that the ends of justice will be better served by setting the judgment aside." Rose Chevrolet, 36 Ohio St.3d at 21. "Civ.R. 60(B) exists to resolve injustices that are so great that they demand a departure from the strict constraints of res judicata. However, the rule does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision." Kuchta at ¶15 (citation omitted). Thus, "Civ.R. 60(B) cannot be used as a substitute for appeal." In re Complaint of Pilkington N. Am., Inc., 145 Ohio St.3d 125, 2015-Ohio-4797, 47 N.E.3d 786, ¶34, citing Kuchta at ¶16, citing Harris v. Anderson, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶8–9; accord Key, 81 Ohio St.3d at 90-91; State ex rel. Durkin v. Ungaro, 39 Ohio St.3d 191, 193, 529 N.E.2d 1268 (1988) (stating that Civ.R. 60(B) "cannot be used in order to obtain review of a judgment where a timely appeal was not filed"). Otherwise, "judgments would never be final

because a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a motion for reconsideration or a motion to vacate judgment." Id. Accordingly, the doctrine of res judicata bars claims raised in a Civ.R. 60(B) motion that could have been raised on direct appeal. Kuchta at ¶16; Key, 81 Ohio St.3d at 90-91.

{¶ 29} The doctrine of res judicata generally provides that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." Grava v. Parkman Twp., 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus; accord Lycan v. Cleveland, 146 Ohio St.3d 29, 2016-Ohio-422, 51 N.E.3d 593, ¶18. "'"The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it."'" Brooks v. Kelly, 144 Ohio St.3d 322, 2015-Ohio-2805, 43 N.E.3d 385, ¶7, quoting Grava, 73 Ohio St.3d at 382, quoting Natl. Amusements, Inc. v. Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). Consequently, if a Civ.R. 60(B) motion raises issues that the movant could have challenged on direct appeal, then the doctrine of res judicata prevents the movant from employing Civ.R. 60(B) as a means to set aside the court's judgment. See Blasco v. Mislik, 69 Ohio St.2d 684, 686, 433 N.E.2d 612 (1982) (noting that Civ.R. 60(B) relief inappropriate under doctrine of res judicata when "contentions merely challenge the correctness of the court's decision on the merits and could have been raised on appeal").

C

APPLICATION

{¶ 30} In the case at bar, we do not believe that the trial court abused its discretion by overruling appellant's motion for relief from judgment. Appellant's motion generally references

"fraud," false testimony, surprise, and lack of witness credibility. Appellant claimed that appellees committed fraud by alleging in their complaint that on October 2, 2009, they gave appellant money for the bond. Appellant asserts that appellees actually gave him the money on November 2, 2009, even though the "bail bond premium receipt" is dated October 2, 2009. Appellant argued that Sydnor's testimony that he was babysitting children on the night of his arrest is false, contradicts appellant's testimony, and was not corroborated. Appellant additionally contended that he did not learn about Sydnor's claim that he was watching children until the trial. Appellant thus asserted that he was surprised by the testimony and lacked an opportunity to subpoena witnesses to refute Sydnor's statement. Appellant alleged that he would have subpoenaed witnesses who would have testified that Sydnor's testimony was false and that Sydnor actually lived at that residence.

{¶ 31} We believe that the doctrine of res judicata bars most, if not all, of the claims appellant raised in his Civ.R. 60(B) motion. Specifically, appellant could have argued on direct appeal that (1) appellees falsely alleged that they signed the bond contract in October 2009, instead of November 2009; and (2) the alleged falsity of Sydnor's testimony that he was at Norvell's sister's house simply to help watch the children. Both issues concern witness credibility, an issue appellant could have challenged on direct appeal. Thus, res judicata prevents appellant from attacking the correctness of the court's judgment based upon issues involving witness credibility when appellant could have raised those issues on direct appeal.

{¶ 32} Assuming, arguendo, that res judicata does not bar appellant's claims, the trial court could have reasonably determined that appellant failed to establish that one of the Civ.R. 60(B)(1)-(5) provisions entitled him to relief. Although appellant did not cite the particular Civ.R.

60(B) provision that he believes entitles him to relief, his allegations appear to implicate Civ.R. 60(B)(1), (3), or (5).

1

Civ.R. 60(B)(1)–Surprise

{¶ 33} To the extent that res judicata does not bar appellant's claimed "surprise,"[2] appellant's "surprise" is not the "surprise" Civ.R. 60(B)(1) envisions. Appellant contends that Sydnor's testimony that Sydnor was babysitting the night of Sydnor's arrest "surprised" appellant. "Surprise," within the meaning of Civ.R. 60(B)(1) does not result when a party is unprepared for trial or when a party proceeds pro se without an understanding of proper trial procedure. Appellant could have prevented his alleged surprise that Sydnor claimed to be babysitting by engaging in pretrial discovery.[3] Because he chose to proceed pro se, however, appellant was unaware of many aspects of trial preparation. Civ.R. 60(B) is not intended to afford pro se litigants relief for mistakes resulting from the lack of legal counsel or from a pro se litigant's lack of legal acumen. Indeed, "'[i]t is well established that pro se litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel.'" State ex rel. Fuller v. Mengel, 100 Ohio St.3d 352, 800 N.E.2d 25, 2003-Ohio-6448, ¶10, quoting Sabouri v. Ohio Dept. of Job & Family Serv., 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (2001). Thus, acting pro se ordinarily is not an excuse that justifies

[2] During the trial, appellant requested the court to continue the matter so that he could find additional witnesses to counteract his "surprise." Thus, he could have challenged, in a direct appeal, the trial court's decision to deny his request to continue the matter.

[3] We observe that on November 12, 2009, appellant filed a flurry of motions, including several motions for discovery and a motion to continue the trial. The trial court pointed out to appellant that he had not followed the proper rules to obtain discovery.

relief from judgment under Civ.R. 60(B)(1). Ragan v. Akron Police Dept., 9th Dist. Summit No. 16200 (Jan. 19, 1994).

> "If the fact that a party chose not to be represented by counsel and was unsuccessful in pursuing his rights entitled that party to relief from judgment, every judgment adverse to a pro se litigant could be vacated to permit a second attempt, this time with counsel. Such a circumstance would be unjust to the adverse party."

Id. (citations omitted). Likewise, "a pro se litigant's misunderstanding of the law does not provide grounds for granting a Civ.R. 60(B) motion for relief from judgment." Dayton Power & Light v. Holdren, 4th Dist. Highland No. 07CA21, 2008-Ohio-5121, 2008 WL 4436003, ¶12; DJL, Inc. v. Massingille, 8th Dist. Cuyahoga No. 96644, 2011–Ohio–6281, ¶24. Consequently, appellant cannot establish the "surprise" that would warrant relief under Civ.R. 60(B)(1).

2

Civ.R. 60(B)(3)–Fraud

{¶ 34} Appellant also asserts that appellees engaged in fraud by asserting that they signed the bond contract in October 2009. Appellant claims that they signed the contract in November 2009, and that the October 2009 date that appears on the bail bond receipt is a mistake.

{¶ 35} The fraud contemplated in Civ.R. 60(B)(3), however, is "deceit or other unconscionable conduct committed by a party to obtain a judgment and does not refer to conduct that would have been a defense to or claim in the case itself." Kuchta at ¶13 (citations omitted). In the case at bar, appellant cannot establish that appellees engaged in deceit or other unconscionable conduct in order to obtain a judgment. Instead, he has shown that he disagrees with appellees as to when they gave him money for the bond. A conflict in testimony, standing alone, generally does not fit the requirement of "deceit or other unconscionable conduct committed

by a party to obtain a judgment." Id.; accord Chapman v. Smith, 6th Dist. Lucas No. 81♥344, 1982 WL 6883 *2 (Apr. 16, 1982) ("Since appellants did not show fraud, but merely showed a conflict in testimony, the decision of the trial court not to vacate the judgment upon its own motion was well within its discretion."). Consequently, appellant did not establish that appellees engaged in the type of fraud that warrants relief under Civ.R. 60(B)(3).

3

Civ.R. 60(B)(5)–Any Other Reason

{¶ 36} "Civ.R. 60(B)(5) is a catchall provision which reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. However, the grounds for invoking the provision must be substantial." Volodkevich v. Volodkevich, 35 Ohio St.3d 152, 154, 518 N.E.2d 1208, (1988), citing Caruso–Ciresi, Inc. v. Lohman, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983), paragraphs one and two of the syllabus.

{¶ 37} In the case at bar, the trial court could have reasonably determined that appellant failed to show that operation of the judgment would be unjust. Appellant has not shown any facts to demonstrate that enforcing the judgment would cause a miscarriage of justice.

{¶ 38} Accordingly, we overrule any of appellant's assignments of error that challenge the trial court's decision to deny his Civ.R. 60(B) motion for relief from judgment.

IV

CIV.R. 59

{¶ 39} In his third through sixth assignments of error, appellant argues that the trial court erred by overruling his motion for a new trial. We do not agree.

{¶ 40} Civ.R. 59(A) permits a trial court to grant a new trial upon any of the following grounds:

> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
> (2) Misconduct of the jury or prevailing party;
> (3) Accident or surprise which ordinary prudence could not have guarded against;
> * * * *
> (7) The judgment is contrary to law;
> * * * *

{¶ 41} When "a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court." Rohde v. Farmer, 23 Ohio St.2d 82, 262 N.E.2d 685 (1970), paragraph one of the syllabus; accord Harris v. Mt. Sinai Med. Ctr., 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶35. When, however, "a new trial is granted by a trial court, for reasons which involve no exercise of discretion but only a decision on a question of law, the order granting a new trial may be reversed upon the basis of a showing that the decision was erroneous as a matter of law." Rohde, paragraph two of the syllabus; see also Ferguson v. Dyer, 149 Ohio App.3d 380, 2002-Ohio-1442, 777 N.E.2d 850 (10th Dist.), ¶11.

{¶ 42} The decision regarding a motion for a new trial under Civ.R. 59(A)(1), (2), or (3) rests within the trial court's discretion, and an appellate court will not reverse that decision absent an abuse of that discretion. Lewis v. Nease, 4th Dist. Scioto No. 05CA3025, 2006–Ohio–4362, ¶73; Wright v. Suzuki Motor Corp., 4th Dist. Meigs No. 03CA2, 03CA3, and 03CA4, 2005-Ohio-3494, 2005 WL 1594850, ¶119. On the other hand, a decision regarding a Civ.R. 59(A)(7) new trial motion presents a question of law that appellate courts independently review.

Pangle v. Joyce, 76 Ohio St.3d 389, 391, 667 N.E.2d 1202 (1996), citing O'Day v. Webb, 29 Ohio St.2d 215, 280 N.E.2d 896 (1972), paragraph two of the syllabus; Dolan v. Glouster, 4th Dist. Athens Nos. 11CA18, 11CA19, 11CA33, 12CA1, and 12CA6, 2014-Ohio-2017, 2014 WL 1901133, fn. 22; Portsmouth Ins. Agency v. Med. Mut. of Ohio, 4th Dist. Scioto No. 10CA3405, 2012-Ohio-2046, 2012 WL 1623864, ¶102.

A

CIV.R. 59(A)(1)

{¶ 43} Appellant first claims that appellees' jury trial waiver is an "irregularity" that warrants a new trial. Appellant states that he does not "belie[ve] that the proper procedures under [Civ.R.] 38 were * * * followed."

{¶ 44} "In the context of a motion for new trial, an 'irregularity' is a departure from the due, orderly, and established mode of proceeding, whereby a party, through no fault of his own, is deprived of some right or benefit otherwise available to him." Gill v. Grafton Corr. Inst., 10th Dist. Franklin No. 10AP–1094, 2011–Ohio–4251, ¶34. "The rule preserves the integrity of the judicial system when the presence of serious irregularities in a proceeding could have a material adverse effect on the character of and public confidence in judicial proceedings." Wright at ¶114.

{¶ 45} "Civ.R. 38(D) states that once a party has demanded a jury trial, the demand cannot be withdrawn without the consent of the parties." Soler v. Evans, St. Clair & Kelsey, 94 Ohio St.3d 432, 438, 763 N.E.2d 1169 (2002). Additionally, Civ.R. 39(A) sets forth the "general methods" by which a party may waive a properly-demanded jury trial. Id. The rule states:

> The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court

> sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to the court.

{¶ 46} In the case at bar, even if the jury trial waiver constituted an "irregularity," we do not believe that the trial court abused its discretion by concluding that appellant was not entitled to a new trial. Before trial, appellant did not object to proceeding without a jury. The Ohio Supreme Court has stated that "'[a] party may waive his right to a jury trial by acts, as well as by words.'" State ex rel. Russo v. McDonnell, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶53, quoting Bonewitz v. Bonewitz, 50 Ohio St. 373, 34 N.E. 332 (1893), paragraph one of the syllabus. Furthermore, this court previously held that "a party may not stand idly by while the court conducts a bench trial and then complain on appeal that the court should have held a jury trial." Goddard v. Goddard, 192 Ohio App.3d 718, 2011–Ohio–680, 950 N.E.2d 567, ¶19 (4th Dist.); accord Fultz v. Fultz, 4th Dist. Pickaway No. 13CA9, 2014-Ohio-3344, 2014 WL 3779087, ¶41-42; Abbe Family Found. & Trust v. Portage Cty. Sheriff, 11th Dist. Portage No.2005–P–0060, 2006–Ohio–2497, ¶47 ("A party may waive his or her right to a jury trial, even after filing a jury demand, by participating in a trial before the court without objecting to the lack of a jury."); Toma v. Toma, 8th Dist. Cuyahoga No. 82118, 2003–Ohio–4344; Cavanaugh Bldg. Corp. v. Liberty Elec. Co., 9th Dist. Summit No. 19146 (Apr. 28, 1999); Foremost Ins. Co. v. Gimbel Agency, Inc., 11th Dist. Portage No. 96–P–0203 (Aug. 29, 1997); Nenadal v. Landerwood Co., 8th Dist. Cuyahoga No. 65428 (May 12, 1994), quoting Royal American Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1018 (C.A.2, 1989) (explaining that it "would be 'patently unfair' and, 'in effect, [an] "ambush [of the] trial judge" on appeal' if appellant were allowed 'to lodge an early demand for a

jury,' participate in a bench trial without objection, and then assign as error the failure to honor the jury demand"); Henning v. Steiner, 9th Dist. Wayne No. 2725 (Oct. 7, 1992).

{¶ 47} In the case at bar, appellant participated, without objection, in a bench trial and did not complain about the lack of a jury. Appellant could have objected, but did not. Therefore, the trial court did not abuse its discretion by overruling appellant's request for a new trial based upon an alleged irregularity in the proceedings. See Fultz; Goddard.

B

CIV.R. 59(A)(2)

{¶ 48} Appellant next asserts that he is entitled to a new trial due to misconduct of appellees and their counsel. Appellant believes that appellees and their counsel engaged in a litany of misconduct involving false and frivolous allegations. Appellant claims that appellees falsely claimed that they signed the bond contract in October. Appellant notes that he testified that it occurred in November. He further alleges that appellees' claim that he kept the money without posting the bond for thirty days is false. He points to his testimony that he did not meet with appellees until November 2, 2009. Appellant also contends that appellees' claim that he did not contact Columbus Police Department before arresting Sydnor is false and contradicted by his testimony. Appellant additionally argues that appellees' counsel violated various rules of professional conduct.

{¶ 49} Civ.R. 59(A)(2) permits a trial court to grant a new trial if the prevailing party engaged in misconduct. Seibert v. Murphy, 4th Dist. Scioto No. 02CA2825, 2002-Ohio-6454. "The determination of whether alleged misconduct of counsel was sufficient to taint the verdict with passion or prejudice ordinarily lies within the sound discretion of the trial court." Stephens

v. Vick Express, Inc., Butler App. Nos. CA2002–03–066 and CA2002–03–074, 2003-Ohio-1611, 2003 WL 1689602, ¶31, citing Lance v. Leohr, 9 Ohio App.3d 297, 298, 9 OBR 544, 459 N.E.2d 1315 (1983). In exercising this discretion, trial courts have a "'duty in the executive control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished.'" Pesek v. University Neurologists Assn., Inc., 87 Ohio St.3d 495, 501, 721 N.E.2d 1011 (2000), quoting Jones v. Macedonia–Northfield Banking Co., 132 Ohio St. 341, 351, 8 O.O. 108, 7 N.E.2d 544 (1937). "'Before a reviewing court will disturb the exercise of the trial court's discretion, the record must clearly demonstrate highly improper argument by counsel which tends to inflame the jury.'" Wright at ¶119, quoting Lance, 9 Ohio App.3d at 298,.

{¶ 50} In the case sub judice, we do not believe that the trial court abused its discretion by determining that Civ.R. 59(A)(2) did not entitle appellant to a new trial. Appellant's claims that appellees and their counsel engaged in misconduct are based upon his belief that his testimony was more credible than Sydnor's testimony. Appellant thinks appellees and their counsel lied, and he thinks his version of events is the most believable. Disagreement over facts, however, is not misconduct sufficient to warrant a new trial. See Seibert at ¶15 (noting that new trial not warranted if movant fails to establish falsity of testimony); Markan v. Sawchyn, 36 Ohio App.3d 136, 138, 521 N.E.2d 824, (8th Dist.1987) ("If apparent contradictions by witnesses justified a new trial, courts would be besieged with motions for new trials because such evidence is found in almost every trial."); accord Silver v. Jewish Home of Cincinnati, 190 Ohio App.3d 549, 2010-Ohio-5314, 943 N.E.2d 577, ¶33 (12th Dist.).

C

CIV.R. 59(A)(3)

{¶ 51} Appellant also argues that Civ.R. 59(A)(3) entitles him to a new trial. Appellant claims that Sydnor's testimony that Sydnor was merely present at the residence to help babysit surprised him.

{¶ 52} Civ.R. 59(A)(3) allows a trial court to order a new trial based upon "surprise which ordinary prudence could not have guarded against." To warrant a new trial on Civ.R. 59(A)(3) "surprise" grounds, the complaining party must show unfair surprise and not simply "surprise" as a result of inadequate trial preparation. See generally Wright, supra, ¶121, citing Cummings v. B.F. Goodrich Co., 86 Ohio App.3d 176, 188, 620 N.E.2d 209 (4th Dist. 1993), and Parsch Lumber Co. v. McGrath, 37 Ohio App. 37, 173 N.E. 629 (1930) (explaining that a court may grant a motion for a mistrial when a party is confronted by surprising new facts or conditions which were unknown despite reasonable trial preparation); On Line Logistics, Inc. v. Amerisource Corp., 8th Dist. Cuyahoga No. 82056, 2003-Ohio-5381, ¶13-15.

{¶ 53} In the case at bar, while appellant may have been surprised when Sydnor testified that he was at Norvell's sister's house babysitting, appellant's surprise was not unfair. Appellant fails to show that he exercised ordinary prudence when preparing for trial and that he could not have guarded against his surprise.

D

CIV.R. 59(A)(7)

{¶ 54} Appellant also alleges that Civ.R. 59(A)(7) entitles him to a new trial. He contends that the trial court's judgment is contrary to law. In particular, appellant claims that the court's

judgment is contrary to State v. Kole, 92 Ohio St.3d 303, 750 N.E.2d 148 (2001) and R.C. 2713.22.

{¶ 55} In Mota v. Gruszczynski, 197 Ohio App.3d 750, 2012-Ohio-275, 968 N.E.2d 631, (8th Dist.), the court explained the interplay between Kole, R.C. 2713.22, and a civil action against a bounty hunter. In Mota, the plaintiff was a bounty hunter who was bitten by a dog while arresting his subject at his parents' home. The plaintiff subsequently filed a complaint against the parents and their son, the subject of his arrest. The trial court entered summary judgment in the defendants' favor on the basis that the plaintiff was trespassing when the dog bit him. The appellate court upheld the trial court's decision, reasoning:

> "Mota contends that he was 'privileged' to enter the home of Jerome M. and Marion because he was acting on a warrant to arrest their son. In essence, he maintains that his status as a bounty hunter grants him the privilege to enter the property of third parties who are not subject to the warrant, and that such privilege defeats the 'trespasser' defense in R.C. 955.28(B). In support of his argument, Mota relies on R.C. 2713.22, which provides: "For the purpose of surrendering the defendant, the bail may arrest him at any time or place before he is finally charged, or, by a written authority indorsed on a certified copy of the bond, may empower any person of suitable age and discretion to do so." (Emphasis added.)
>
> Initially, we note that no Ohio court has interpreted R.C. 2713.22 as providing carte blanche authority to a bounty hunter in pursuit of a fugitive to enter the dwelling of a third party who is not a party to the bail contract. Indeed, we find only one case that has even discussed R.C. 2713.22 since its passage in 1953—State v. Kole, 92 Ohio St.3d 303, 750 N.E.2d 148 (2001). In Kole, a bail-bond company contracted with Kole, a bounty hunter, to apprehend a fugitive. Id. at 303, 750 N.E.2d 148. In the course of pursuing the fugitive, Kole entered the residence of a third party without permission. Id. at 304, 750 N.E.2d 148. Kole was subsequently indicted on several criminal offenses, including abduction and burglary, related to his entry of the premises and was found guilty on all counts. His conviction was upheld by the court of appeals. Id.
>
> At trial, Kole's defense counsel relied on case law for the proposition that a common-law defense existed for bounty hunters pursuing a fugitive, and that based on this authority, Kole had an absolute privilege to enter the home of a third party. Id. at 305, 750 N.E.2d 148. Defense counsel, however, failed to cite or present R.C. 2713.22 as an alternative theory in defending the charges. The Ohio Supreme

> Court found this to be ineffective assistance of counsel and remanded the matter for a new trial. In doing so, however, the Ohio Supreme Court expressly declined to hold that R.C. 2713.22 authorized a bail bondsman as a matter of law to enter the home of a third party for purposes of apprehending a fugitive when the third party is not a party to the bail contract. Id. at 308, 750 N.E.2d 148. The court specifically declined to recognize an 'absolute privilege' to enter the home of a third party. Instead, the Kole decision addressed the issue whether defense counsel was ineffective in failing to argue R.C. 2713.22 as a statutory defense to the crimes charged.
>
> While we recognize that Kole may be instructive in cases where a bounty hunter is facing criminal prosecution in connection with his pursuit of a fugitive, we do not find it to be controlling in the present case. Notably, Mota is not relying on R.C. 2713.22 as a defense to a criminal prosecution or even as an excuse to avoid civil liability. Instead, he seeks to use the statute for purposes of establishing a 'privilege' to defeat the 'trespasser' defense in R.C. 955.28(B) and recover monetary damages. We fail to find any support for such use of the statute. Nor do we believe that to be the intended use of the statute."

Id. at ¶¶14-17.

{¶ 56} Similarly, in the case at bar, appellant is not relying on R.C. 2713.22 as a defense to a criminal prosecution. While appellant does appear to rely upon it in an attempt to avoid civil liability, appellant does not explain why the statute would relieve him of civil liability for improperly retaining appellees' money and collateral. The court's judgment awarding appellees damages was not based upon appellant entering the residence and arresting appellant. Instead, the court awarded appellees damages because it found that appellant improperly withheld appellees' money and collateral. The court found that (1) in order to secure a bond for Sydnor's release from incarceration, appellees paid appellant $9,600 and gave him title to three vehicles; (2) Norvell later paid Qualls $500 and gave him possession of one of the vehicles; (3) Boggs filed a motion to be released from the bond based upon a false claim that Sydnor failed to follow the conditions of the bond contract; and (4) appellees "have been defrauded of money and property in the amount of" $15,600. Whether appellant did or did not properly enter the residence is of no relevance to the

court's finding that appellant improperly withheld appellees' money and collateral. We therefore disagree with appellant that the trial court's judgment is contrary to law.

{¶ 57} Accordingly, based upon the foregoing reasons, we overrule appellant's third through sixth assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J. : Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.