[Cite as *Levine v. Brown*, 2009-Ohio-5012.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92862

MARK LEVINE, ET AL.

PLAINTIFFS-APPELLEES

vs.

JOANN BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Shaker Heights Municipal Court
Case No. 07 CVI 00005

BEFORE: Sweeney, J., Cooney, A.J., and Celebrezze, J.

RELEASED: September 24, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Joann Brown ("defendant") appeals the municipal court order overruling her objections to the magistrate's decision finding her liable for damage to her neighbor Mark Levine's ("plaintiff") property. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On October 13, 2006, a storm caused a dead tree on defendant's property to fall onto plaintiff's property, damaging plaintiff's fence and plastic patio chairs. Defendant refused to pay for the damages. On January 2, 2007, plaintiff filed suit in the small claims division of the Shaker Heights Municipal Court. On June 29, 2007, the magistrate issued a decision in favor of plaintiff, awarding $640 for removing the tree, repairing the fence, and replacing the chairs. The magistrate found that defendant's tree was noticeably dead, she "was negligent in failing to remove" it, and she was liable for the damages.

{¶ 3} On July 11, 2007, defendant filed objections to the magistrate's decision and an "affidavit of the testimony." In her affidavit, defendant stated that there was no "recorded testimony" of the March 29, 2007 hearing before the magistrate. It should be noted that the Shaker Heights Municipal Court records hearings before magistrates on audio tapes, which can be transcribed upon request. Defendant further represented in her affidavit that "she never saw or had knowledge of the dead tree or of any dangerous condition on [her] property," and that plaintiff did not make her aware of the dead tree before the storm.

{¶ 4} On July 25, 2007, the court overruled defendant's objections and adopted the magistrate's decision, awarding judgment to plaintiff in the amount of

$640. The court found that defendant failed to comply with Civ.R. 53(D)(3)(b)(iii), which states that objections to a magistrate's decision "shall be supported by a transcript of all the evidence submitted to the magistrate * * * or an affidavit of that evidence if a transcript is not available." The court also found that "[n]o representation has been offered that a transcript is unavailable."

{¶ 5} On August 23, 2007, defendant appealed the court's decision, and on October 16, 2008, this court remanded the case to the municipal court to "decide in the first instance" whether the transcript was "truly unavailable to [defendant] at the time she submitted her objections to the magistrate's decision." *Levine v. Brown*, Cuyahoga App. No. 90345, 2008-Ohio-5344, at ¶13.

{¶ 6} On January 21, 2009, the municipal court found the following upon remand:

{¶ 7} "1. Defendant never requested the tapes for a transcript at the time she filed her objections to the magistrate's decision.

{¶ 8} "2. The tapes were available at the time defendant filed her objections.

{¶ 9} "3. Because the tapes were available at the time defendant filed her objections and defendant failed to request them and failed to provide a transcript to the court with her objections, the objections were overruled.

{¶ 10} "4. The first time defendant requested the tapes in order to prepare a transcript was when defendant was filing her appeal.

{¶ 11} "5. Accordingly the objections are overruled and the court's original judgment stands."

{¶ 12} Defendant now appeals this January 21, 2009 order and raises three assignments of error for our review. We address all assignments of error together:

{¶ 13} "I. The court erred and abused its discretion in finding Appellant never requested tapes for a transcript, [sic] that the tapes were available at the time Appellant filed her objections to the magistrate's decision.

{¶ 14} "II. The court erred and abused it [sic] discretion in finding the first time Appellant requested tapes of the proceedings was when she filed her appeal.

{¶ 15} "III. The trial court erred and abused it [sic] discretion in overruling Appellant's objections to the magistrate's decision."

{¶ 16} When ruling on a magistrate's decision, the trial court "shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). In turn, an appellate court reviews a trial court's determination on a magistrate's decision under Civ.R. 53(E)(4) for 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 (internal citations omitted).

{¶ 17} However, in *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, the Ohio Supreme Court held that "[w]hen a party objecting to a [magistrate's] report has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the report, appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's report], and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." See, also, *Schott v. Schott*, Tuscarawas App. No. 2003 AP 10-0082, 2004-Ohio-1914, at ¶16 (holding that "where an appellant fails to provide a transcript of the original hearing before the magistrate for the trial court's review, the magistrate's findings of fact are considered established").

{¶ 18} Civil Rule 53 "has been construed to mean that a party may support its objections with an affidavit in lieu of a transcript only when the party demonstrates that a transcript is not available, and if the affidavit describes all the relevant evidence presented at the hearing, not just the evidence that the objecting party feels is significant." *In re E.B.*, Cuyahoga App. No. 85035, 2005-Ohio-401, at ¶11 (citing *Galewood v. Terry Lumber & Supply Co.,* Summit App. No. 20770, 2002-Ohio-947; *Csongei v. Csongei* (July 30, 1997), Summit App. No. 18143).

{¶ 19} In the instant case, transcripts from the hearing before the magistrate were not filed in the trial court at the time the court issued its January 21, 2009 decision. Rather, defendant filed an "affidavit of the testimony" along with her

objections on July 11, 2007, and then filed the transcript on January 17, 2008, which is the same day she filed the municipal court record in her first appeal, Cuyahoga App. No. 90345.

{¶ 20} Defendant failed to meet the Civ.R. 53(D)(3)(b)(iii) threshold in two aspects: first, she failed to demonstrate that the transcript was unavailable; and second, her affidavit does not describe all the relevant evidence presented at the hearing. A review of the municipal court's docket shows that defendant did not request that the audio tapes from the hearing before the magistrate be transcribed. In fact, there is no activity whatsoever on the docket between June 29, 2007 - the date of the magistrate's decision - and July 11, 2007, when defendant filed her objections and affidavit. Additionally, upon remand, the court stated that the transcript was available at the time defendant filed her objections, but defendant never requested it.

{¶ 21} We conclude that the court had no evidence or documents before it to review, and therefore, could not make a finding independent of the magistrate's report. Accordingly, the magistrate's findings of fact are considered established and the court did not abuse its discretion in overruling defendant's objections.

{¶ 22} Furthermore, even assuming that the transcript was unavailable, thus allowing defendant to file an affidavit of the evidence, we find that defendant's affidavit does not suffice under Civ.R. 53. Although we may not take the transcript into consideration in determining whether the court abused its discretion by adopting the magistrate's decision, a cursory review of the transcript

that was filed for the first time on appeal shows that defendant's affidavit is not an accurate or complete representation of the hearing, nor is it relevant to the substance of this case.

{¶ 23} For example, defendant's affidavit focuses on plaintiff's failure to make her aware that her tree was dead and that it may be dangerous. However, Ohio law puts no such duty on plaintiff. Additionally, defendant's affidavit focuses on her lack of actual knowledge of the dead tree. However, defendant ignores the doctrine of constructive knowledge, which Ohio law recognizes, and of which plaintiff presented evidence.

{¶ 24} The substantive legal issue in the instant case is whether defendant "exercised reasonable care to prevent an unreasonable risk of harm from the dead tree." *Kurzenberger v. Bennett/Dover Homes, Inc*. (May 29, 1997), Cuyahoga App. No. 71246 (emphasis omitted). See, also, *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 404 (holding that "an owner of land abutting a highway may be held liable on negligence principles under certain circumstances for injuries or damages resulting from a tree or limb falling onto the highway from property").

{¶ 25} The magistrate concluded in her decision that "defendant's tree was sick enough that a reasonable person viewing it would notice it was dangerous." This is supported by photographs in the record showing the dead tree riddled with termite holes, with no live branches, bark, or green leaves. Additionally, plaintiff testified that the tree had been dead for at least a year, and that it was easily

visible. Plaintiff also testified that defendant and her husband had a history of refusing to remove trees and trim branches on their property that plaintiff felt may be a danger to his property, which bolsters the theory that she knew or should have known about the dead tree at issue in the instant case.

{¶ 26} In conclusion, we find that the municipal court did not abuse its discretion in adopting the magistrate's report, as it did not have proper Civ.R. 53 evidence to review the magistrate's findings. Defendant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant their 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 Shaker Heights Municipal Court to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR