[Cite as *Vannucci v. Schneider*, 2017-Ohio-192.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104598

DOMINIC J. VANNUCCI

PLAINTIFF-APPELLEE

vs.

DONNA SCHNEIDER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Berea Municipal Court
Case No. 16CVI00060

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Jones, J.

RELEASED AND JOURNALIZED: January 19, 2017

FOR APPELLANT

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Donna Schneider, appeals from a judgment finding in favor of plaintiff-appellee, Dominic Vannucci, on his complaint for attorney fees. Schneider raises one assignment of error for our review:

> The trial court erred by Donna Schneider's (Appellant) conviction for liability of attorney fees of her 25-year old, married son. In violation of [R.C. 3109.01], age of majority.

{¶2} Within this assignment of error, Schneider raises five issues. We find merit to one of her issues, reverse the trial court's judgment, and remand for the trial court to consider the transcript when addressing Schneider's objections to the magistrate's decision.

I. Procedural History and Factual Background

{¶3} In January 2016, Vannucci filed a complaint in Berea Municipal Court against Schneider and her son, Travis Garner, for $2,675 in attorney fees. According to the complaint, Schneider and Garner retained Vannucci to represent Garner in a Cuyahoga County Juvenile Court case involving the custody and visitation of Garner's minor child.

{¶4} The matter was heard before a magistrate. The magistrate issued his decision with findings of fact and conclusions of law on April 13, 2016. The magistrate found that Schneider contacted Vannucci to represent Garner in a juvenile court proceeding regarding the custody and visitation of Garner's minor child. The magistrate also found that Schneider retained Vannucci, and paid him a retainer fee of $1,300. The

magistrate noted that at the hearing:

> Both Defendants and the Plaintiff testified that the great majority of communication was between the Plaintiff and Defendant, Donna Schneider. In fact, Defendant Donna Schneider testified that "90% of the time I spoke to Dominic about the matter." Defendant, Donna Schneider, also testified that she prepared the visitation schedule and the witness list that was to be used by the Plaintiff in the juvenile case. Defendant, Travis Garner admitted that he would not return Plaintiff's phone calls.

{¶5} The magistrate further found that had it not been for Schneider, Vannucci would not have agreed to take the case because Garner had no "true residence and no means of paying him."

{¶6} The magistrate made the following conclusions of law:

> 1. Defendant, Donna Schneider, hired and retained Plaintiff, Attorney, Dominic J. Vannucci, to represent her family in a Cuyahoga County Juvenile Court case involving her son's custody/visitation issues with her son's, defendant, Travis Garner's minor child.
>
> 2. An attorney-client relationship was in fact created by and between Attorney, Dominic J. Vannucci, and defendants Travis Garner and Donna Schneider.
>
> 3. The attorney-plaintiff properly conducted his representation of the clients. However, he could not communicate with Travis Garner, and relied on his communications with defendant, Donna Schneider.
>
> 4. It is clear to this Court, that both defendants, Donna Schneider and Travis Garner, retained the plaintiff, Dominic Vannucci, and but for Donna Schneider's initial retainer, presence, and constant involvement in the case that the plaintiff would not of agreed to said representation or continuance of the representation in this matter. To say the least, the plaintiff relied on defendant, Donna Schneider's total involvement in the case both in terms of representation and financial payment.
>
> 5. The plaintiff's fee was supported, very reasonable and basically uncontested.

{¶7} The magistrate recommended finding in favor of Vannucci against both Garner and Schneider in the amount of $2,675, plus three percent interest from June 29, 2015, as well as costs.

{¶8} On April 21, 2016, the record indicates that Schneider filed a "request for transcript," stating "I am requesting a copy of the transcript of [the] hearing. I have been told that the transcript will be on a disc ('DVD') and the cost is $25.00 which I am paying." The record further indicates that Schneider paid $25 to the clerk's office that same day.

{¶9} Schneider timely filed objections to the magistrate's decision on April 27, 2016. In support of her objections, Schneider filed an affidavit of evidence rather than a transcript of the proceedings.

{¶10} On May 11, 2016, the trial court overruled Schneider's objections, approved the magistrate's decision in its entirety, and entered judgment in favor of Vannucci in the amount of $2,675, plus three percent interest from June 29, 2015, and costs. The trial court found that Schneider failed to file a transcript of the magistrate's proceedings and thus it could not consider her objections, but it noted that in overruling her objections, it reviewed the case file, magistrate's notes and findings of fact and conclusions of law, the exhibits presented at trial, defendant's objections and affidavit, and plaintiff's brief in opposition. It is from this judgment that Schneider now appeals.

II. Issues Raised on Appeal and Standard of Review

{¶11} In her sole assignment of error, Schneider argues that the trial court abused

its discretion when it adopted the magistrate's decision. Within this assignment of error, she raises five issues on appeal: (1) she claims that she was not Vannucci's client because she never signed a contract, (2) she argues that she was not Vannucci's client because the juvenile court pleadings only had her son's name on them, (3) she maintains that she could not legally be held liable for her adult son's debts, (4) she contends that the trial court's conclusion that she only objected to the magistrate's factual findings (which it found that it could not review without a transcript) was in error, because she asserts that she also challenged the magistrate's conclusions of law, and (5) she finds fault with the trial court's conclusion that she failed to file a transcript, asserting that she filed an affidavit because a transcript was not available.

{¶12} The standard of review for proceedings in small claims court is abuse of discretion. *Video Discovery, Inc. v. Passov*, 8th Dist. Cuyahoga No. 86445, 2006-Ohio-1070, ¶ 7; *Feinstein v. Habitat Wallpaper & Blinds*, 8th Dist. Cuyahoga No. 67419, 1994 Ohio App. LEXIS 5771 (Dec. 22, 1994). In reviewing the trial court's ruling on objections to a magistrate's decision in small claims court, we must determine whether the trial court abused its discretion in reaching its decision. *Tennant v. Gallick*, 9th Dist. Summit No. 26827, 2014-Ohio-477, ¶ 35. *Fields v. Cloyd*, 9th Dist. Summit No. 24150, 2008-Ohio-5232, ¶ 9.

{¶13} We also review a trial court's adoption of a magistrate's decision under an abuse of discretion standard of review. *Abbey v. Peavy*, 8th Dist. Cuyahoga No. 100893, 2014-Ohio-3921, ¶ 13, citing *Lindhorst v. Elkadi*, 8th Dist. Cuyahoga No. 80162,

2002-Ohio-2385.

III. Civ.R. 53

{¶14} We will address Schneider's issue relating to the transcript first because it is dispositive of this appeal. Schneider contends that the trial court erred when it concluded that she had not complied with Civ.R. 53 because she did not file a transcript of the proceedings with her objections to the magistrate's decision. She raises several subissues within this argument.

{¶15} Schneider first argues that she filed an affidavit instead of a transcript because a transcript was not available. A cursory review of the record, however, shows that a transcript of the proceedings was available. Indeed, Schneider filed a transcript of the proceedings on appeal. Civ.R. 53 only permits an affidavit if a transcript is not available. Civ.R. 53(D)(3)(b)(iii); *In re E.B.*, 8th Dist. Cuyahoga No. 85035, 2005-Ohio-401, ¶ 11, citing *Galewood v. Terry Lumber & Supply Co.*, 9th Dist. Summit No. 20770, 2002-Ohio-947.

{¶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). Under Civ.R. 53, any "objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii).

{¶17} It is well established that if the objecting party fails to file a proper transcript of all relevant testimony with his or her objections, a trial court's review is necessarily limited to the magistrate's conclusions of law. *In re C.L.*, 8th Dist. Cuyahoga No. 93720, 2010-Ohio-682, ¶ 8; *Allread v. Allread*, 2d Dist. Darke No. 2010 CA 6, 2011-Ohio-1271, ¶ 18. The Ohio Supreme Court has also said that:

> If a party fails to follow the procedures set forth in Civ.R. 53(D)(3)(b)(iii) for objecting to a magistrate's findings by providing a transcript to the trial court when filing objections, that party waives any appeal as to those findings other than claims of plain error. Civ.R. 53(D)(3)(b)(iv). The fact that the party later supplies a statement under App.R. 9(C) is of no consequence; the appellate court is still precluded from reviewing the factual findings. *Swartz v. Swartz*, 9th Dist. Medina No. 11CA0057-M, 2011-Ohio-6685, ¶ 10. In plain terms, the court of appeals cannot consider evidence that the trial court did not have when it made its decision. *Herbert v. Herbert*, 12th Dist. Butler No. CA2011-07-132, 2012- Ohio-2147, ¶ 13-15.

State ex rel. Pallone v. Ohio Court of Claims, 143 Ohio St.3d 493, 2015-Ohio-2003, 39 N.E.3d 1220, ¶ 11.

{¶18} As we noted previously, Schneider has submitted a transcript on appeal. We cannot consider the transcript, however, because the trial court did not have the transcript before it when it made its decision. *See Pallone*; *see also In re S.H.*, 8th Dist. Cuyahoga No. 100911, 2014-Ohio-4476, ¶ 16, citing *In re J.K.*, 4th Dist. Ross No. 11CA3269, 2012-Ohio-214.

{¶19} Schneider further argues that because she was pro se, she did not know how long it takes to obtain and transcribe a transcript. Litigants who choose to proceed pro se, however, are presumed to know the law and correct procedure, and are held to the

same standards as other litigants. *Kilroy v. B.H. Lakeshore Co.*,111 Ohio App.3d 357, 363, 676 N.E.2d 171 (8th Dist.1996). A pro se litigant "cannot expect or demand special treatment from the judge, who is to sit as impartial arbiter." *Id*.

{¶20} Schneider also argues that a "transcript was not available" within the meaning of Civ.R. 53(D)(3)(b)(iii) because "there is no way that anyone [could] get a transcript prepared in the 14 days allowed." In support of her argument, she explains:

> April 13, 2016 the Magistrate filed his Decision against Mrs. Schneider's objection. It took 5 days to receive the April 13, 2016 Decision. She only had 14 days (from April 13th) to file her response. Mrs. Schneider tried, but the Trial Court does not do transcripts. She ordered the DVD of the trial from the trial court. That takes almost 7 days. To be transcribed takes at least 2 weeks. That's 21 days which is over the 14-day deadline. Not including the preparation time of the Objection[.] * * * Mrs. Schneider ordered the DVD anyway and when she received it, took it immediately to get it transcribed. That is why a transcript was not available and an affidavit was used instead as permitted by Berea Court. This is a "small claims case." Only an attorney would know in advance what you have to do and how long it takes.

{¶21} Civ.R. 53(D)(3)(a)(iii) mandates that "[a] magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed." We find several issues relating to the Civ.R. 53(D)(3)(a)(iii) requirements in this case.

{¶22} We first note that the magistrate's decision is not identified as a magistrate's decision. It is incorrectly identified as "Magistrate's Findings of Fact and Conclusions

of Law."[1]

{¶23} Further, after reviewing the certified docket on appeal, there is nothing in the magistrate's decision or in the certified docket that shows that Schneider was actually served with the magistrate's decision as required.[2] We do acknowledge, however, that Schneider states that she did receive it; it was just five days after it was issued. The magistrate issued its decision on April 13, 2016, which was a Wednesday. Civ.R. 53(D)(3)(a)(iii) requires that the decision be served on the parties within three days after the decision is filed. Schneider claims that she received it five days after it was filed, which would have been April 18, 2016, a Monday. Because mail is not delivered on Sundays, it appears that the clerk did serve the magistrate's decision within three days of it being filed. Neither of these issues, however, is reversible error.

{¶24} We reverse this case for another reason. We find that the trial court acted unreasonably and abused its discretion because it overruled Schneider's objections due to lack of a transcript *before* 30 days had passed from the time the magistrate's decision was filed. Under Civ.R. 53(D)(3)(b)(iii), Schneider had 30 days to file the transcript — at a minimum (the rule permits the court to extend that time). In *DeFrank-Jenne v. Pruitt*, 11th Dist. Lake No. 2008-L-156, 2009-Ohio-1438, the court explained:

> Civil Rule 53 unambiguously grants a litigant thirty days in which to

[1]There was also a previous magistrate's decision filed on March 9, 2016, that did not include findings of fact and conclusions of law. This decision was also incorrectly identified as "Magistrate's Report and Recommendation Small Claims."

[2]The online docket shows that Vannucci was served with the magistrate's decision, but not Schneider.

> file a transcript in support of objections. The municipal court's decision to overrule DeFrank-Jenne's objections on the grounds that she failed to file a transcript prior to the expiration of this thirty-day period constitutes an abuse of discretion. *Cavo v. Cavo*, 4th Dist. No. 05CA14, 2006 Ohio 928, at P26 ("where the trial court denied Appellant's objections based on his failure to file a supporting transcript or affidavit when Appellant still had four days under the statute to file such supporting documentation, * * * the trial court acted unreasonably and therefore abused its discretion").
>
> The previous version of Civil Rule 53 did not specify a time for filing the supporting transcript or affidavit. *See, e.g., Ludlow v Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶ 17 ("the rule does not establish a time within which the objecting party must file such evidence") (citation omitted). Courts interpreted the rule as affording litigants a "reasonable time in which to secure a transcript." *Black v. Brewer*, 178 Ohio App.3d 113, 2008-Ohio-4365, at ¶ 26, 897 N.E.2d 163 (citations omitted).
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> Effective July 1, 2006, the Rule was modified to allow the objecting party thirty days to submit supporting evidence. Staff Note to Civ.R. 53 ("Sentence two of Civ.R. 53(D)(3)(b)(iii) adds a new requirement, adapted from Loc.R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause."). It follows, then, that a court does not act reasonably when it affords a party less than thirty days from the date on which objections are filed to submit a transcript or affidavit in support.

DeFrank-Jenne at ¶ 12-14.

{¶25} In this case, the magistrate's decision was filed on April 13, 2016. Schneider received it on April 18, 2016. She requested a transcript of the proceedings, which was a DVD, on April 21, 2016. She timely filed her objections on April 27, 2016. Schneider had until May 13, 2016, to file the transcript. The trial court, however, overruled her objections and adopted the magistrate's decision on May 11, 2016. The rule is clear — a party who objects to a magistrate's decision has 30 days — at a

minimum — to provide a transcript of the magistrate's proceedings. We therefore find that the trial court acted unreasonably and abused its discretion in overruling Schneider's objections and adopting the magistrate's decision before the 30-day time period. We also cannot say that there was harmless error in this case given the fact that Schneider stated she had obtained the transcript within 21 days (seven days to get the DVD and two weeks to have it transcribed), which would have been within the 30-day time frame.

{¶26} Thus, we find merit to Schneider's argument that the trial court abused its discretion when it overruled her objections and adopted the magistrate's decision because it did so without waiting 30 days for Schneider to file the transcript of the proceedings. Accordingly, Schneider's sole assignment of error is sustained on that basis. The remaining issues are moot.

{¶27} We therefore reverse the judgment of the trial court. Upon remand, we instruct the trial court to consider the transcript and follow the required "action on objections" set forth in Civ.R. 53(D)(4)(d):

> If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the 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. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

{¶28} Judgment reversed; case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 Berea 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.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
LARRY A. JONES, SR., J., CONCUR