[Cite as *Zaryki v. Breen*, 2016-Ohio-7086.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DIANE ZARYKI	C.A. No. 27968
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KEVIN BREEN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2004-04-1589

DECISION AND JOURNAL ENTRY

Dated: September 30, 2016

WHITMORE, Judge.

{¶1} Defendant-Appellant, Kevin Breen ("Father"), appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms in part, vacates in part, and dismisses the appeal in part.

I

{¶2} Father and Plaintiff-Appellee, Diane Zaryki ("Mother"), never married, but had one child together in 2002. In 2004, Mother filed a complaint in the Domestic Relations Court, seeking to allocate the parties' parental rights and responsibilities. Since that time, the parties have been before the court on numerous occasions due to issues involving custody, child support, and insurance for their daughter. From the inception of the suit, the same magistrate has heard the parties' motions and has conducted hearings, when necessary.

{¶3} In January 2015, Father filed a motion to disqualify the magistrate because she was biased and/or prejudiced against him. He attached to his motion an affidavit in which he

detailed various instances of purported bias that had occurred over the past 10 years. On January 14, 2015, the trial court denied Father's motion without a hearing.

{¶4} In March 2015, the Summit County Child Support Agency ("CSEA") determined that Father was in arrears on his child support payments and rejected Father's claim that there had been a mistake of fact. Father then sought to appeal CSEA's determination in the Domestic Relations Court. On April 14, 2015, the magistrate held a hearing on Father's challenge to CSEA's arrearage determination. The magistrate then issued a written decision on April 30, 2015. In her decision, the magistrate rejected Father's mistake of fact argument and determined that he had an outstanding arrearage. The trial court adopted the magistrate's decision on the same day as its issuance. On May 15, 2015, Father filed his objections to the magistrate's decision. Mother then opposed the objections on the basis of their untimeliness, and Father filed a reply brief. On June 2, 2015, Father also filed a second motion to disqualify the magistrate, owing to her alleged bias and prejudice in favor of Mother.

{¶5} On September 2, 2015, the trial court issued a judgment entry on both Father's objections to the magistrate's decision and his motion to disqualify the magistrate. The court determined that Father's objections were untimely and not supported by a transcript, so the court overruled them. The court also determined that Father had failed to set forth any evidence of bias or prejudice on the part of the magistrate. Consequently, it denied his motion to disqualify.

{¶6} Father now appeals from the court's judgment and raises three assignments of error for our review.

II

Assignment of Error Number One

THE TRIAL COURT ERRED IN ITS SEPTEMBER 2 JUDGMENT ORDER DENYING DEFENDANT'S MOTION TO REMOVE AND REASSIGN THIS

> CASE FROM MAGISTRATE GUI ON THE BASIS OF DEMONSTRATED BIAS AND PREJUDICE AND IN FAILING TO CONDUCT A HEARING ON DEFENDANT'S MOTION.

{¶7} In his first assignment of error, Father argues that the trial court erred when it denied without a hearing his motion to disqualify the magistrate due to her alleged bias and prejudice. We disagree.

{¶8} "Magistrates are judges within the meaning of the Judicial Code of Conduct." *Lingenfelter v. Lingenfelter*, 9th Dist. Wayne No. 14AP0005, 2015-Ohio-4002, ¶ 9. Although this Court generally cannot review allegations of judicial misconduct, we "can review properly raised challenges to a magistrate's impartiality." *Id.* at ¶ 10. The Civil Rules allow a party to file a motion to disqualify a magistrate "for bias or other cause." Civ.R. 53(D)(6). The trial court then may exercise its discretion to determine whether disqualification is warranted. *Id. Accord State ex rel. Williams v. Sieve*, 130 Ohio St.3d 207, 2011-Ohio-5258, ¶ 1. This Court reviews a trial court's disqualification decision for an abuse of discretion. *See Lingenfelter* at ¶ 10. An abuse of discretion implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶9} "[A] magistrate is presumed not to harbor bias or prejudice against any party in a proceeding * * *." *Melick v. Melick*, 9th Dist. Summit No. 26488, 2013-Ohio-1418, ¶ 9. Consequently, "the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity." *Barnett-Soto v. Soto*, 9th Dist. Medina No. 02CA0011-M, 2003-Ohio-535, ¶ 23.

> The terms "bias" or "prejudice" refer to "a hostile feeling or spirit of ill will on the one hand, or undue friendship or favoritism on the other, toward one of the litigants or his or her attorneys, with a formation of a fixed anticipatory judgment on the part of a judge as distinguished from an open state of mind which will be governed by the law and the facts."

Hurst v. Hurst, 5th Dist. Licking No. 12-CA-70, 2013-Ohio-2674, ¶ 67, quoting 22 Ohio Jurisprudence 3d 203, Courts and Judges, Section 126 (1988). "The existence of prejudice or bias against a party * * * is difficult to question unless the [magistrate] specifically verbalizes personal bias or prejudice toward a party." *Barnett-Solo* at ¶ 23, quoting *Okocha v. Fehrenbacher*, 101 Ohio App.3d 309, 322 (8th Dist.1995).

{¶10} Father filed two motions to disqualify the magistrate in this case. He filed his first motion on January 5, 2015, and supported that motion with his own affidavit. In his affidavit, Father outlined ten years' worth of occurrences that he claimed were evidence of the magistrate's tendency to favor Mother. On January 14, 2015, the trial court denied Father's first motion to disqualify. Father never attempted to appeal from the court's ruling.

{¶11} On June 2, 2015, Father filed his second motion to disqualify the magistrate. Again, he attached his own affidavit in support of his motion. The second affidavit was identical to the first affidavit that Father filed in January 2015, except that it included one new paragraph. The new paragraph concerned the magistrate's actions on Father's challenge to CSEA's arrearage determination. Father averred that, during the April 14, 2015 hearing on his arrearage determination, the parties agreed that there was no outstanding arrearage. Father averred that the magistrate "disregarded the agreement" of the parties when she found that he owed arrearages. Accordingly, he argued that the magistrate's actions were further evidence of her bias against him.

{¶12} In rejecting Father's second motion to disqualify, the trial court only considered the new allegations that Father raised in his second affidavit, regarding the magistrate's actions on his arrearages. The court did not consider the other allegations in Father's affidavit, presumably because it already had ruled on those allegations in January 2015. Father has not

argued that the court erred by limiting its review to the new allegations in his affidavit. *See* App.R. 16(A)(7); *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). Consequently, we also confine our analysis to the new allegations that Father raised in his second motion to disqualify.

{¶13} In rejecting Father's second motion to disqualify, the trial court noted that it had considered Father's motion, the related filings, and the audio recording of the April 14, 2015 hearing before the magistrate on Father's arrearages. The court concluded that it found "no evidence of bias or prejudice by [the magistrate] towards [Father] in this hearing or in the decision that she made." As such, the court denied Father's second motion to disqualify.

{¶14} Father argues that the court abused its discretion when it denied his second motion to disqualify without holding a hearing. Having reviewed the record, however, we are unable to conclude that the court abused its discretion. That is because the record does not contain a transcript of the April 14, 2015 hearing before the magistrate. Father specifically argued that the magistrate was biased against him because she "disregarded the agreement" that the parties reached at the hearing. Moreover, in reaching its decision, the trial court reviewed the audio recording of the April 14th hearing.

{¶15} "It is an appellant's duty to ensure that the record, or the portion necessary for review on appeal, is filed with the appellate court." *Swedlow v. Riegler*, 9th Dist. Summit No. 26710, 2013-Ohio-5562, ¶ 14, quoting *Shumate v. Shumate*, 9th Dist. Lorain No. 09CA009707, 2010-Ohio-5062, ¶ 6. "Where the transcript of a hearing is necessary to resolve assignments of error, but such transcript is missing from the record, the reviewing court has 'no choice but to presume the validity of the lower court's proceedings, and affirm.'" *Shumate* at ¶ 9, quoting *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). Because Father failed to ensure

that the record here contained a transcript of the April 14th hearing before the magistrate, we have no choice but to presume regularity in the proceedings. Consequently, we cannot conclude that the trial court abused its discretion in denying Father's second motion to disqualify. Father's first assignment of error is overruled.

Assignment of Error Number Two

> THE TRIAL COURT ERRED IN ITS SEPTEMBER 2 ORDER FINDING DEFENDANT-APPELLANT IN ARREARS OF CHILD SUPPORT IN THE AMOUNT OF $3.84 PLUS PROCESSING CHARGES OF $251.80 AS OF MARCH 30, 2015.

{¶16} In his second assignment of error, Father argues that the trial court erred when it overruled his objections to the magistrate's decision on his child support arrearages. Because the record reflects that the trial court lacked jurisdiction to consider Father's objections, we cannot consider his argument on the merits.

{¶17} This Court is obligated to raise sua sponte questions related to our jurisdiction. *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.*, 29 Ohio St.2d 184, 186 (1972). We have jurisdiction to hear appeals only from final orders and judgments. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.03. "In the absence of a final, appealable order, this Court must dismiss the appeal for lack of subject matter jurisdiction." *Price v. Klapp*, 9th Dist. Summit No. 27343, 2014-Ohio-5644, ¶ 6. "If a trial court lacks jurisdiction, any order it enters is a nullity and is void." *Ohio Receivables, LLC v. Guice*, 9th Dist. Lorain No. 10CA009813, 2011-Ohio-1293, ¶ 7, quoting *Ohio Receivables, LLC v. Landlaw*, 9th Dist. Wayne No. 09CA0053, 2010-Ohio-1804, ¶ 6. "While this Court lacks jurisdiction to consider nullities, we have inherent authority to recognize and vacate them." (Internal citation omitted.) *Hairline Clinic, Inc. v. Riggs-Fejes*, 9th Dist. Summit No. 25171, 2011-Ohio-5894, ¶ 7.

{¶18} Father does not dispute that he failed to file timely objections to the magistrate's April 30, 2015 decision. *See* Civ.R. 53(D)(3)(b)(i) (objections must be filed within 14 days). Instead, he argues that untimely objections do not pose a jurisdictional defect because the Civil Rules allow trial courts to extend the time for filing objections. *See* Civ.R. 53(D)(5) (permitting reasonable extension for "good cause shown"). This Court has specifically held, however, that a trial court lacks jurisdiction to rule on untimely objections to a magistrate's decision when (1) the court has entered judgment on the magistrate's decision, and (2) the time for taking an appeal from the court's judgment has expired. *J.B. v. R.B.*, 9th Dist. Medina No. 14CA0044-M, 2015-Ohio-3808, ¶ 8.

{¶19} The trial court here immediately entered judgment on the magistrate's April 30, 2015 decision. Because no timely objections were filed, there was no automatic stay of the court's judgment and the time for filing an appeal from that judgment began to run. *See id.* at ¶ 5, citing App.R. 4(B)(2)(c). Following the expiration of that time, the trial court lacked jurisdiction to consider any objections to the magistrate's decision. *J.B.* at ¶ 5, 8.

{¶20} Although the trial court recognized that Father's objections were untimely, it still overruled them. Because more than 30 days had passed since the court issued its judgment on the magistrate's decision, however, the court lacked jurisdiction to consider the untimely objections. *See* discussion, *supra*. The court's ruling on the objections is, therefore, a nullity, and this Court must dismiss the appeal insofar as it concerns that ruling. *See Guice*, 2011-Ohio-1293, at ¶ 7, quoting *Landlaw*, 2010-Ohio-1804, at ¶ 6. Even so, we exercise our inherent authority to vacate the aforementioned portion of the court's ruling as a nullity. *See Hairline Clinic, Inc.*, 2011-Ohio-5894, at ¶ 7. Consequently, to the extent that it concerns Father's untimely objections, the court's September 2, 2015 judgment entry is vacated. *See J.B.* at ¶ 8-9.

Assignment of Error Number Three

> THE TRIAL COURT ERRED IN ORDERING DEFENDANT TO APPEAR AND SHOW CAUSE ON CONTEMPT WHILE FAILING TO EVEN SCHEDULE A HEARING ON DEFENDANT'S CROSS MOTION TO SHOW CAUSE ON CONTEMPT AGAINST PLAINTIFF.

{¶21} In his third assignment of error, Father argues that the magistrate erred when, on September 28, 2015, she ordered him to appear for a contempt hearing under the threat of arrest. Father acknowledges that he has not yet been found in contempt, but argues that "he most likely will be" and that the magistrate's order is "more evidence of [her] bias and prejudice * * *."

{¶22} "An appellate court 'is without jurisdiction to review a judgment or order that is not designated in the appellant's notice of appeal.'" *State v. Chavers*, 9th Dist. Wayne No. 07CA0065, 2008-Ohio-3199, ¶ 14, quoting *State v. Dixon*, 9th Dist. Summit No. 21463, 2004-Ohio-1593, ¶ 7. Here, Father appealed strictly from the trial court's September 2, 2015 judgment. He failed to include the magistrate's September 28, 2015 order in his notice of appeal. Moreover, the order was not an interlocutory one that would have merged with the court's final judgment, as it post-dated the judgment. *See Aber v. Vilamoura, Inc.*, 184 Ohio App.3d 658, 2009-Ohio-3364, ¶ 7 (9th Dist.), quoting *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶ 9 (2d Dist.). Even assuming that Father could have appealed from the magistrate's order, he failed to designate the order in his notice of appeal. *See* App.R. 3(D). As such, we lack jurisdiction to consider his argument relating to the order. *See Chavers* at ¶ 14, quoting *Dixon* at ¶ 7.

III

{¶23} Father's first assignment of error is overruled. Because this Court lacks jurisdiction to consider Father's second and third assignments of error, we dismiss the appeal to the extent that it concerns those assignments. Even so, pursuant to our inherent authority to

recognize nullities, we vacate the trial court's September 2, 2015 judgment insofar as it addresses Father's untimely objections to the magistrate's decision. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed in part and vacated in part. Additionally, the appeal is dismissed in part.

Judgment affirmed in part,
vacated in part,
and appeal dismissed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

SCHAFER, J.
CONCURS.

CARR, P. J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶24} As to the second assignment of error, I respectfully dissent on the basis of my separate, dissenting opinion in *J.B. v. R.B.*, 9th Dist. Medina No. 14CA0044-M, 2015-Ohio-3808. I concur with the remainder of the opinion.

APPEARANCES:

KEVIN BREEN, Appellant.

ARTHUR AXNER, Attorney at Law, for Appellee.