

overruling defendant's objections to the magistrate's decision before the 30-day period in which to file the transcript expired, we reverse.

I. Facts and Procedural History

{¶2} On the night of February 13, 2008, the Jefferson Township Fire Department received a call reporting an odor of fuel oil and a visible "sheen" on a local waterway, Swisher Creek. The department responded to the call and followed the leak back from the creek to a machine shop on defendant's property where two 250-gallon fuel oil tanks were being stored behind the building. Jefferson Township Fire Chief Dale S. Ingram was able to ascertain the source of the leak through stains in the snow and observed that the suspect tank was rusted through and completely drained. Ingram contacted defendant and learned the empty tank was filled a few days before with 250 gallons of fuel oil.

{¶3} Because the spill was over 50 gallons, standard operating procedures for the fire department dictated they contact the OEPA. The OEPA sent a response team to defendant's property the next morning. Christopher Bonner, On-Scene Coordinator for the OEPA, was responsible for "assessing the damage from the spill, dealing with the responsible party, and overseeing remedial work." (Magistrate's Decision, 2.) According to the magistrate's determination, "Mr. Bonner asked Mr. Lowry to call his insurer to get a contractor to commence the cleanup and told him that if he did not obtain a contractor to do the cleanup, [the OEPA] would do so and bill Mr. Lowry." (Magistrate's Decision, 3.)

{¶4} Bonner waited for Lowry to respond; when he did not, "[the OEPA] called in a contractor," Environmental Enterprises, Inc. ("EEI"). (Magistrate's Decision, 3.) The OEPA submitted to defendant a statement of billing to recover the costs allegedly

incurred; included in the bill was a charge to compensate the OEPA for the amount it paid to EEI.

{¶5} A magistrate conducted a bench trial on October 12, 2010. According to the magistrate's decision, defendant during the trial did not dispute that the oil spill came from the rusted-through fuel oil tank; nor did he challenge that the tank had been refilled only a few days before the spill. Instead, he contended the OEPA and EEI incompetently performed the cleanup work, so the costs charged to him were unreasonable.

{¶6} On October 27, 2010, the magistrate issued a decision, finding "the credible evidence and the weight of the evidence establish that the cleanup of the spill was reasonable and necessary" and holding defendant liable for \$15,855.92, plus prejudgment interest, pursuant to R.C. 3745.12. (Magistrate's Decision, 6, 10.) In addition to finding Bonner's testimony credible and adequate to establish the costs associated with the cleanup, the magistrate concluded the testimony of Ingram and Bonner constituted evidence sufficient to prove "there was a spill 'that require[d] emergency action to protect the public health or safety or the environment' as set forth in R.C. 3745.12(A)(1)." (Magistrate's Decision, 8.) To support his conclusion, the magistrate cited both the OEPA witnesses' testimony claiming they "personally observed spilled fuel oil in Swisher Creek," as well as Bonner's testimony "that it was urgent to respond to the spill" because "otherwise the fuel oil spill would proceed downstream and cost even more to cleanup." (Magistrate's Decision, 8.)

{¶7} Defendant timely filed objections to the magistrate's decision in conformity with Civ.R. 53. Among his objections were challenges to several of the decision's findings of fact regarding various aspects of Bonner's testimony. In particular, defendant asserted

Bonner's testimony did not speak to the findings purportedly based on that testimony. On December 3, 2010, the trial court issued a judgment overruling defendant's objections and adopting the magistrate's decision. The court acknowledged several of defendant's objections concerned the magistrate's factual findings, but the court ruled that because defendant did not file a transcript or an affidavit of the relevant evidence presented at the hearing, the court was required to accept the magistrate's findings of fact and review only the conclusions of law.

II. Assignments of Error

{¶8} On appeal, defendant assigns four errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT MISCONSTRUED ITS APPLICATION AND INTERPRETATION OF O.R.C. § 3745.12, IN ADOPTING THE MAGISTRATE'S CONCLUSION THAT "ALTHOUGH FEDERAL LAW REQUIRES AS A CONDITION OF RECOVERY PROOF THAT THE MATERIAL RELEASED WAS A HAZARDOUS SUBSTANCE, R.C. 3745.12 IMPOSES NO REQUIREMENT."

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT MISCONSTRUED ITS APPLICATION OF OHIO RULE OF EVIDENCE 803(6) WHEN IT ADOPTED THE MAGISTRATE'S FINDING THAT THE TESTIMONY OF STATE ACTOR CHARLES BONNER WAS "SUFFICIENT TO ESTABLISH THE COSTS" OF THE CLEANUP.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT MISCONSTRUED ITS APPLICATION OF OHIO RULE OF EVIDENCE 803(8) WHEN IT ADOPTED THE MAGISTRATE'S FINDING THAT THE TESTIMONY OF STATE ACTOR CHARLES BONNER WAS "SUFFICIENT TO ESTABLISH THE COSTS" OF THE CLEANUP.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY OVERRULING DEFENDANT'S OBJECTIONS ON THE BASIS THAT DEFENDANT HAD NOT FILED A TRANSCRIPT OR AN AFFIDAVIT AS TO THE EVIDENCE PRESENTED AT THE HEARING.

III. Fourth Assignment of Error – Objections and Transcript

{¶9} Because defendant's fourth assignment of error resolves this appeal, we first address it. Defendant contends the trial court abused its discretion when it overruled his objections because he failed to file a supporting transcript of the proceedings before the magistrate. Defendant points out that the record reflects he submitted the necessary transcript within 30 days of the filing of his objections, as Civ.R. 53 requires.

{¶10} On November 9, 2010, defendant timely filed objections to the magistrate's decision; 28 days later, on December 6, the court reporter filed the trial transcript with the clerk of courts, three days after the trial court rendered its decision overruling defendant's objections. Although the trial court's decision acknowledged defendant's objections "raise[d] multiple objections to the Magistrate's factual findings," it concluded that because "Defendant has not filed a transcript or an affidavit as to the evidence presented at the hearing, the Court is required to accept the Magistrate's findings of fact and review only his conclusions of law." (Decision and Entry, 4-5.)

{¶11} Civ.R. 53(D) places upon the reviewing court the ultimate authority and responsibility over an appointed magistrate's findings and rulings. *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 1993-Ohio-177. Under Civ.R. 53(D)(4)(d), a trial court must conduct an independent review of any issue of fact or law that the magistrate has determined when an appropriate objection to the magistrate's decision is timely filed. Civ.R. 53(D)(4)(d);

Knauer v. Keener (2001), 143 Ohio App.3d 789, 793 (interpreting the same provision, formerly Civ.R. 53(E)(3)(b)). " [T]he trial court should not adopt challenged [magistrate's] findings of fact unless the trial court fully agrees with them—that is, the trial court, in weighing the evidence itself and fully substituting its judgment for that of the [magistrate], independently reaches the same conclusion.' " *McCarty v. Hayner*, 4th Dist. No. 08CA8, 2009-Ohio-4540, ¶17, quoting *DeSantis v. Soller* (1990), 70 Ohio App.3d 226, 233.

{¶12} To fulfill its obligation to conduct an independent review when objections contest the magistrate's decision as being contrary to the evidence, "a trial court must review the transcript." *Hill v. Hill* (Nov. 16, 2000), 10th Dist. No. 00AP-385; see also *Haverdick v. Haverdick*, 11th Dist. No. 2010-T-0040, 2010-Ohio-6256, ¶16. If the "objecting party fails to provide the court with a transcript of the magistrate's hearing or other relevant material" to support the objections, the "trial court may properly adopt a magistrate's factual findings without further consideration." *Lincoln Savings & Loan Assn. v. Damron*, 4th Dist. No. 02CA4, 2003-Ohio-2596, ¶23; see also *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418 (stating that "absent a transcript or appropriate affidavit as provided in the rule, a trial court is limited to an examination of the referee's conclusions of law and recommendations, in light of the accompanying findings of fact only unless the trial court elects to hold further hearings").

{¶13} Civ.R. 53(D)(3)(b)(iii) requires the party objecting to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), to support the objection with 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). "The objecting party shall file the transcript or affidavit with the court

within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause." Civ.R. 53(D)(3)(b)(iii). See also Loc.R. 99.05, Franklin County Court of Common Pleas, General Division (providing that the "transcript must be filed with the Trial Judge by the moving party within 30 days after the filing of the objections unless the Trial Judge, in writing, extends the time for inability of the reporter to complete the transcript of the testimony").

{¶14} Addressing the parameters of Civ.R. 53(D)(3)(b)(iii), Ohio appellate courts repeatedly have recognized a trial court errs in ruling on a party's objections to a magistrate's factual findings without allotting the party the requisite 30 days to obtain the necessary transcript. *Haverdick* at ¶17, 23; *DeFrank-Jenne v. Pruitt*, 11th Dist. No. 2008-L-156, 2009-Ohio-1438, ¶12 (concluding "[t]he municipal court's decision to overrule [appellant]'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"); *Bawab v. Bawab*, 8th Dist. No. 96217, 2011-Ohio-5256, ¶28 (determining "the trial court improperly overruled [defendant]'s objections to the magistrate's factual finding without allowing him the thirty days in which to obtain and file a transcript of the hearing before the magistrate that Civ.R. 53(D)(3)(b)(iii) permits"); *Cavo v. Cavo*, 4th Dist. No. 05CA14, 2006-Ohio-928, ¶26; *Lincoln v. Callos Mgt. Co.*, 2d Dist. No. 23848, 2010-Ohio-4921, ¶10.

{¶15} Similarly, the trial court erred here when it overruled defendant's objections before the 30 days allowed under the rule expired, and then adopted the magistrate's decision without considering defendant's timely filed transcript. *Haverdick* at ¶16-17. By the same decision, defendant was denied "the opportunity afforded by Civ.R.

53(D)(3)(b)(iii) to seek leave of court to supplement his objection after a transcript was timely filed." *Bawab* at ¶28.

A. *Notice under Civ.R. 53(D)(3)(b)(iii)*

{¶16} Although defendant filed the transcript with the court 28 days after filing his objections, he did not explicitly give notice to the trial court that he was in the process of procuring a transcript. Many of the pertinent cases regarding Civ.R. 53(D)(3)(b)(iii) comment favorably on the objecting party's providing notification to the trial court that a transcript would be forthcoming. See, e.g., *Bawab* at ¶24; *Haverdick* at ¶19; *In re B.B.*, 8th Dist. No. 95872, 2011-Ohio-2928, ¶11. To the extent the OEPA contends notice is required, its contentions are not persuasive.

{¶17} Initially, the cases concerning notice are fact-specific, some of which were decided when former Civ.R. 53 did not "specify a time for filing the supporting transcript," causing courts to interpret "the rule as affording litigants a 'reasonable time in which to secure a transcript.' " *DeFrank-Jenne* at ¶13 (stating Civ.R. 53 "unambiguously grants a litigant thirty days in which to file a transcript in support of objections," so 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"). Effective July 1, 2006, Civ.R. 53 "was modified to allow the objecting party thirty days to submit supporting evidence." *Id.* at ¶12-14. Had notification been a requirement, the amended rule easily could have included a provision to that effect but did not. Although a party may act prudently in notifying a trial court that the transcript was requested, the rule does not require notification.

B. Requirement to Seek Leave under Civ.R. 53(D)(3)(b)(iii)

{¶18} The OEPA contends that, where defendant filed his objections prior to the date on which a transcript was prepared, the trial court did not abuse its discretion in overruling his objections without considering the submitted transcript, because defendant "never sought leave in this case to supplement based upon the availability of the transcript of proceedings, either contemporaneous with or after he filed his objections." (State's brief, 11.)

{¶19} Civ.R. 53(D)(3)(b)(iii) provides that "[i]f a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections." Consistent with the language of the rule, the staff note to Civ.R. 53 states that "[t]he last sentence of Civ.R. 53(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared." Here, defendant never had the opportunity to seek leave, as the trial court overruled his objections before the transcript was filed even though defendant met his obligation to provide the trial court with a transcript in a timely manner.

{¶20} Accordingly, we sustain defendant's fourth assignment of error and remand this matter to the trial court to rule on defendant's properly filed objections to the magistrate's findings of fact and, as necessitated by those rulings, to reconsider defendant's objections to the magistrate's conclusions of law. Further, because the trial court's action denied defendant the opportunity Civ.R. 53(D)(3)(b)(iii) affords to seek leave of court to supplement his objections after the transcript was timely filed, defendant

on remand will have the opportunity to seek leave to supplement his objections based upon the transcript.

IV. First, Second, and Third Assignments of Error

{¶21} Given our disposition of defendant's fourth assignment of error, his first, second, and third assignments of error are moot.

V. Disposition

{¶22} Having sustained defendant's fourth assignment of error, rendering moot his first, second, and third assignments of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision.

*Judgment reversed and
cause remanded.*

KLATT and TYACK, JJ., concur.
