

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Theodore K. Marok, III,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-744
The Ohio State University,	:	(Ct. of Cl. No. 2006-06736)
Defendant-Appellee.	:	(REGULAR CALENDAR)

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DECISION

Rendered on June 12, 2012

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*Theodore K. Marok, III*, pro se.

*Michael DeWine*, Attorney General, *Kristin S. Boggs* and *Craig S. Rapp*, for appellee.

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APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶ 1} Plaintiff-appellant, Theodore K. Marok, III, appeals from a judgment of the Court of Claims of Ohio overruling plaintiff's objections to the magistrate's decision following a trial on the issue of liability only, adopting the magistrate's decision, and entering judgment for defendant-appellee, The Ohio State University ("OSU"), on plaintiff's claims of breach of contract, negligence, and unjust enrichment. Because the Court of Claims did not exercise its discretion in determining whether to resolve plaintiff's objections to the magistrate's decision based on the court's own video and audio recording of the trial, we reverse.

**I. Facts and Procedural History**

{¶ 2} Plaintiff filed a complaint "for monetary damages & injunctive relief," against defendant. *Marok v. The Ohio State Univ.*, 10th Dist. No. 07AP-921, 2008-Ohio-

3170, ¶ 2. According to the complaint, plaintiff was a student at OSU and was pursuing a Bachelor's degree until OSU dismissed him as a student on December 24, 1999. *Id.* After filing an answer to the complaint, OSU filed a motion for judgment on the pleadings, seeking judgment based on the applicable statute of limitations. *Id.* at ¶ 3. OSU later added its assertion that res judicata barred plaintiff's complaint to the extent the complaint could be interpreted to assert a cause of action related to certain student loans OSU administered. *Id.* at ¶ 5.

{¶ 3} On October 3, 2007, the Court of Claims granted OSU's motion for judgment on the pleadings, concluding either the statute of limitations, res judicata, or both barred plaintiff's claims. *Id.* at ¶ 7. Plaintiff appealed, assigning nine errors, the first two of which asserted the court erred in granting OSU judgment on the pleadings based on the statute of limitations and res judicata. We agreed, reversed the judgment of the Court of Claims, and remanded for further proceedings. *Id.* at ¶ 14.

{¶ 4} On remand, the Court of Claims ordered the trial bifurcated, with the liability phase of the trial scheduled for November 2 and 3, 2009. The liability trial began before a magistrate as scheduled, and the magistrate issued a decision on May 3, 2011, recommending judgment for OSU.

{¶ 5} On May 17, 2011, plaintiff filed five motions in the Court of Claims, only one of which is significant to resolving this appeal: a motion regarding alternative technology under Civ.R. 53. Plaintiff's motion sought to have the court use its own video and audio recordings of the trial before the magistrate, as opposed to a written transcript of the proceedings, to review plaintiff's objections to the magistrate's decision. On May 19, 2011, the Court of Claims filed an entry denying as moot plaintiff's first four motions. As to his Civ.R. 53 motion, the court stated that "[p]laintiff's motion for leave to view the court's recording of the trial is GRANTED, such that plaintiff may view the recording at the court." (Emphasis sic.)

{¶ 6} Plaintiff followed his May 17 motion regarding alternative technology with a June 15, 2011 "Affidavit of the Evidence." In it, he asked the court "to accept the attached Affidavit of the Evidence to complete its review of the magistrate's recommendations as this court has already granted leave to use alternative technology or manner of reviewing the relevant evidence." (Emphasis sic.) Attached to the June 15 motion is plaintiff's

certification stating plaintiff took part in the liability trial, "[t]he court of claims recordings and evidence are held safe by the clerk of courts, [and] they are true to the best of my knowledge."

{¶ 7} In reviewing plaintiff's objections to the magistrate's decision, the Court of Claims specifically observed "that plaintiff has not filed a transcript of the proceedings held before the magistrate in support of such objections." (Judgment Entry, 2.) The court further noted that "the recording referred to in plaintiff's affidavit is not a transcript of proceedings pursuant to Civ.R. 53(D)(3)(b)(iii)." (Judgment Entry, 2.) It likewise pointed out that, "although Civ.R. 53(D)(3)(b)(iii) allows a party to submit an affidavit of evidence in lieu of a transcript where the transcript of proceedings is 'not available,' plaintiff has made no showing of unavailability." (Judgment Entry, 3.) Because plaintiff provided the court with neither a transcript of all the evidence nor an affidavit, the court limited its review "to the four corners of the magistrate's decision and to whether the magistrate erred as a matter of law." (Judgment Entry, 3.)

{¶ 8} Based on its review of the magistrate's decision, the Court of Claims concluded the statute of limitations barred plaintiff's contract claim, the doctrine of res judicata barred plaintiff's claims regarding his student loans, the doctrine of economic loss barred recovery based on his theory of negligence, and the existence of contracts between the parties precluded his claim of unjust enrichment. Accordingly, the Court of Claims entered judgment for OSU.

## **II. Assignments of Error**

{¶ 9} Plaintiff assigns the following 16 errors on appeal:

Assignment of Error 1 Court failed to make a finding on this, the sole point of contention between the parties.

Assignment of Error 2 Trial court committed error when it misinterpreted Plaintiff's Complaint.

Assignment of Error [ ] 3 Trial court committed error when it allowed obvious false statements from Doug Folkert and Deborah Terry and violations of federal and state law in its courtroom.

Assignment of Error [ ] 4 The trial court committed error when it acknowledged harassment by the defendant but not its federal violation of law.

Assignment of Error [5] Court committed error ignoring remedial protections under federal Law.

Assignment of Error [6] Court committed error when it failed to recognize spoliations of Plaintiff[']s incomplete student records.

7th Assignment of Error 7th Objection—Paragraph 5 Misapplication of the Law.

8th Assignment of Error Trial Court committed error when it failed to apply "continuing violation" doctrine.

9th Assignment of Error Trial Court committed error Allowing the continuous violations of federal and state law.

10th Assignment of Error Trial court committed error when it found res judicata bar existes [sic].

11th Assignment of Error 11th Objection—Paragraph 11 Sentence Misapplication of the facts And Law.

12th Assignment of Error Trial court abused its discretion when it found Judgment in favor of the Defendant when judgment neither comporting with the record, nor reason.

12th Assignment of Error Trial Court committed error when it found a prior valid judgment on merits existed.

13th Assignment of Error Trial court committed error when it allowed Defendant to disobey a court orders [sic].

14th Assignment of Error Trial court committed error when it found transcript was available at the time of Clarks Review of the magistrate's errors.

15th Assignment of Error Trial court committed error holding Defendant[']s obligations ended in 2000.

16th Assignment of error Tr[ial] court committed error when it overruled Plaintiffss [sic] objections.

### **III. Civ.R. 53**

{¶ 10} Although plaintiff assigns a plethora of errors, his fourteenth and sixteenth assignments of error, in the context of Civ.R. 53, resolve the appeal. Civ.R. 53(D)(3)(b)(i)

provides that "[a] party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." If a party objects to a factual finding, "whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii)," the objection "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). The rule further provides that "[w]ith leave of court, alternative technology or manner of reviewing the relevant evidence may be considered." Civ.R. 53(D)(3)(b)(iii). Pursuant to Civ.R. 53(D)(3)(b)(iii), plaintiff requested "[l]eave for this court to use its own video and audio recordings to review the trial." (Plaintiff's May 17, 2011 motion.)

{¶ 11} OSU responds that the rule does not support plaintiff's request, as the rule permits the court to use alternative technology only if a transcript is unavailable. Although Civ.R. 53(D)(3)(b)(iii) provides that a party may use an affidavit to support its factual objections if a transcript is not available, no similar qualifying language is present in the following sentence that allows alternative technology to be used for reviewing the relevant evidence if the court so permits. *See Tewalt v. Peacock*, 3d Dist. No. 17-10-18, 2011-Ohio-1726, ¶ 24 (concluding that "[a]lthough the DVD is not in the record, it appears, based upon the trial court's description of the DVD's contents, that it contained the same testimony that would have appeared in the transcript, had it been filed" and thus "is an acceptable form of 'alternative technology,' as defined in Civ.R. 53(D)"). Rather, the alternative technology in the form of the recording satisfies the transcript requirement set forth in Civ.R. 53(D). *Id.*

{¶ 12} The Court of Claims, however, apparently misconstrued the purpose of plaintiff's motion. Although plaintiff entitled his motion as one seeking "[l]eave for the court to use Alternative technology" and requested leave "for this court to use its own video and audio recordings to review the trial," the court, in granting plaintiff's motion, stated "plaintiff may view the recording at the court." (May 19, 2011 Entry.) In view of the court's decision to "grant" plaintiff the leave requested, plaintiff followed with a certification assuring the court that the recording of the trial using the court's video and audio technology was true to the best of his knowledge.

{¶ 13} Because the Court of Claims seems to have misunderstood the purpose of plaintiff's motion, it did not consider its using alternative technology in place of a transcript but rather deemed objections to the magistrate's factual findings to lack the support Civ.R. 53 requires. Nor can we say any error is harmless, since the magistrate's factual findings are significant to determining whether res judicata and the statute of limitations bar plaintiff's claim.

{¶ 14} In the final analysis, the leave plaintiff sought concerning alternative technology in lieu of a transcript is authorized under Civ.R. 53. *Tewalt* at ¶ 26 (concluding the trial court's consideration of the DVD cured *Tewalt*'s failure to file the transcript and was a proper exercise of its discretion, absent a transcript). Although the Court of Claims purported to grant plaintiff's motion, it did not consider the recording in lieu of a transcript. In light of the central role the magistrate's factual findings served in the Court of Claims' decision to overrule plaintiff's objections, we are compelled to reverse the judgment of the Court of Claims, and remand this matter to that court. On remand, the Court of Claims should reconsider plaintiff's motion, determine whether it will grant plaintiff leave to have the court use the court's recordings in lieu of a transcript, and then resolve the objections accordingly.

{¶ 15} Plaintiff's fourteenth and sixteenth assignments of error are sustained to the limited extent indicated, rendering moot his remaining assignments of error.

#### **IV. Disposition**

{¶ 16} Having sustained plaintiff's fourteenth and sixteenth assignments of error to the limited extent indicated, rendering moot his remaining assignments of error, we reverse the judgment of the Court of Claims of Ohio and remand this matter for further proceedings consistent with this decision.

*Judgment reversed and  
cause remanded.*

BROWN, P.J., and DORRIAN, J., concur.

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