

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHELLE ROTHWELL, :

PLAINTIFF-APPELLEE, : Case No. 13-0980

vs. : Court of Appeals Case No. 12CA6

MARK E. ROTHWELL, ET AL :

DEFENDANTS-APPELLANTS :

MEMORANDUM CONTRA APPELLANTS' MEMORANDUM
IN SUPPORT OF JURISDICTION

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**EXPLANATION WHY THIS CASE IS NOT OF PUBLIC
OR GREAT GENERAL INTEREST**

It should be noted that a discretionary appeal to the Ohio Supreme Court will only be granted if there is a substantial Constitutional question or if the case involves issues of public or great general interest. Appellant does not assert that a substantial Constitutional question is involved in this case. Appellant only asserts that this case involves issues of public or great general interest. Public or great general interest has been discussed as involving 'novel questions of law or procedure that appeal not only to the legal profession but also to this court's collective interest in jurisprudence'. *Noble v. Colwell* (1989), 44 Ohio St. 3d 92.

This case clearly does not involve issues of public or great general interest. In the case at bar, the Fourth District Court of Appeals properly affirmed the Decision of the Pickaway County Common Pleas Court, Division of Domestic Relations and its issuance of a Decree of Divorce between Appellant, Mark Rothwell and Appellee, Michelle Rothwell and, further, denied Appellant's Motion to Certify a Conflict and for Reconsideration and En Banc Consideration.

Despite Appellant's assertions that he made sure that the trial court's recording system was working each day, the record does not support same. The fact is that Appellant failed to request that the final trial before the Trial Court Magistrate be recorded or that a court reporter be present. No requests for same are contained in the record.

Appellant asserts that the lack of a recording of the proceedings in this case and lack of a transcript somehow hampered his ability to have his objections reviewed. This assertion is without merit. Appellant failed to comply with Civ.R. 53(D)(3)(b)(iii) and App.R. 9(C) by not providing the trial court and appellate Court with a transcript of the trial court proceedings or an affidavit or statement of the evidence.

Appellant made no effort to submit an Affidavit of the Evidence pursuant to Civ. R. 53(D)(3)(b)(iii). Appellant filed his full objections but did not file or request a copy of the transcript. Appellant did not file such a request until December 20, 2011, well after the Trial Court had issued its Decision and Entry overruling Appellant's objections. On appeal, Appellant also failed to provide a Statement of the Evidence pursuant to App. R. 9(C).

Appellant insists that there is a need to clarify what processes are required for judicial review of a case in the absence of a trial transcript. Such processes already exist and are well-established. The Rules of Superintendence of the Courts of Ohio, the Ohio Rules of Civil Procedure, the Ohio Rules of Appellate Procedure and applicable case law set forth, with overwhelming clarity, what processes are required for judicial review of a case when a transcript is not available together with those processes and procedures for the taking of the record, *upon request of a party to do so*, and alternatives available to a party when a transcript is not available.

The fact of the matter is that Appellant absolutely failed to avail himself of the alternatives provided for in instances where no transcript is available. The lower courts' ability to review Appellant's case was limited by Appellant's failure to request and provide a trial transcript and by his failure to provide an Affidavit of the Evidence pursuant to Civ. R. 53(D)(3)(b)(iii) and, on appeal, App. R. 9(C). The fact remains, however, that an appropriate judicial review took place in accordance with applicable rule and law.

This case involves a simple matter of one litigant's failure to follow long-established, applicable court rules, legal procedure and law for use in instances where a transcript is not available. This is not a case of first impression. This case does not have unique facts or circumstances. This case is not one of substantial public or general interest. Appellee respectfully asserts that jurisdiction must be denied.

BRIEF RESPONSE TO APPELLANT'S STATEMENT OF THE FACTS

Given the extreme inaccuracies set forth by Appellant in his Statement of the Case and Facts, Appellee requests leave to respond briefly. Appellee submits that any purported "facts" submitted by Appellant are merely unsubstantiated "excuses" as to why Appellant failed to provide the trial court and the appellate Court with a trial transcript. Such purported "facts" are not part of the record and, therefore, should be inadmissible for consideration by this Honorable Court.

As pertains to the instant appeal, the only relevant facts are: those facts as contained in the Magistrate's Decision containing Findings of Fact and Conclusions of Law; the fact that the record is devoid of any request in advance of the trial that a record be made; the fact that the record is devoid of any request on the part of Appellant to order or obtain a trial transcript until December 20, 2011, some 36 days after filing his Objections; the fact that Appellant made no request for transcript or any indication that he would order a transcript on the face of his Objections or in any other document except for his December 20, 2011 request; the fact that Appellant states in his Motion for Leave to Have Transcript Ordered filed December 20, 2011, that "Defendants (sic) Objections are not fact based. While it may be stated that fact and legal objections are so intertwined that all Objections are fact and law based, counsel for Defendant and Defendant had determined and viewed that the Objections are matters of a non-fact basis. There is not a difference of and/or about facts...Again these are all exhibit based and not transcript requiring matters" (Emphasis added). See pp. 2-3 of Motion filed December 20, 2011.

Appellant further states as follows in his Memorandum of Defendant Contra Plaintiff's Objections to the Motion for Leave to Order Trial Transcript filed January 3, 2012: "In the instant case Defendant had predicated all Objections upon and based solely and exclusively

upon the admitted Exhibits...All Defendant (sic) Objections are solely Exhibit based...Defendant does not believe that any such testimonial evidence is relevant nor does any testimonial evidence reflect(s) upon the issues presented in Defendants (sic) Objections." (Emphasis added). See pp. 2-3 of Memorandum filed January 3, 2012.

These statements contained in Appellant's own pleadings and properly a part of the record for current consideration show, as a fact and without doubt, that Appellant never had any intention of ordering the trial transcript in that he believed the trial court could simply review trial Exhibits to decide the matter. Apparently Appellant did not realize that the trial Exhibits are a part of the transcript. Due to Appellant's failure to timely request a trial transcript or even attempt to present an affidavit of the evidence at the trial court or appellate court level, Appellee respectfully requests that this Honorable Court decline to accept jurisdiction to hear this case.

ARGUMENT IN RESPONSE TO THE PROPOSITIONS OF LAW

RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 1: A most critical aspect of the judicial process is the requirement that a verbatim record be created for virtually all judicial activity. The "record" must be created and then maintained by the trial court. This failure is a Procedural Due Process Denial to Appellant.

Appellant asserts that the trial court is *required* to create a verbatim record of all judicial activity. Appellee respectfully disagrees.

In *Franklin v. Franklin*, 2012 Ohio 1814 (Tenth District), Husband argued that the trial court erred when it failed to make a record of the proceedings, thereby hampering the court's ability to review the proceedings. The appellate court disagreed. Husband presented no authority for the proposition that a domestic court is required to make a record of the final hearing before issuing a decree. Sup.R. 11(A) addresses the recording of court proceedings and provides that "[p]roceedings before any court and discovery proceedings may be recorded by stenographic means, phonographic means, photographic means, audio electronic recording devices, or video recording systems." The rule clearly does not require every proceeding to be recorded. See

Levengood v. Levengood, 5th Dist. No. 1998AP100114, 2000 Ohio App. LEXIS 2425 (June 7, 2000) (Sup.R. 11 does not require every proceeding to be recorded).

As the court in *Levengood* pointed out, the Staff Notes to Sup.R. 11(A) provide that "[i]n civil matters, there is no obligation to record the proceedings before the court. However, the court must provide a means of recording the proceedings in a civil matter upon the request of a party." In *Franklin*, Husband did not contend that any such request was made by any party. Therefore, it was found that the trial court did not err when it failed to record the proceedings, and Husband's assignment of error was overruled. In the instant case, despite Appellant's self-serving "assertions" that he requested a recording of the proceedings, the record establishes that Appellant made no such request for a record pursuant to Sup. R. 11(A).

As a trial court is not required to record proceedings absent a request by one of the parties to do so, Appellant was not denied due process.

RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 2: Where there is absolutely no maintained record of oral testimony to review is it even a matter capable of review or must the Court instead refer the matter for a full rehearing?

Pursuant to applicable law, set forth below, a matter is capable of being reviewed by the trial court and the appellate court when there is no record of oral testimony; a full rehearing is not required.

Trial Court Review

When ruling on objections, with or without a transcript or affidavit, *Civ. R. (53)(D)(4)* provides that the trial court "may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter."

However, "in cases where the objecting party fails to provide a transcript or affidavit, the trial court is limited to an examination of the [magistrate's] conclusions of law and recommendations, in light of the accompanying findings of fact only *unless the trial court elects*

to hold further hearings." *Weitzel v. Way*, 2003 Ohio 6822 (Ohio Ct. App., Summit County Dec. 17, 2003); 2003 Ohio App. LEXIS 6153 at *P18 citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418, 680 N.E.2d 1305. In addition, "regardless of whether a transcript has been filed, the trial judge always has the authority to determine if the [magistrate's] findings of fact are sufficient to support the conclusions of law drawn therefrom [and] come to a different legal conclusion if that conclusion is supported by the [magistrate's] findings of fact." *Weitzel* at P18, citing *Wade*, 113 Ohio App.3d at 418, quoting *Hearn v. Broadwater* (1994), 105 Ohio App.3d 586, 664 N.E.2d 971.

Appellate Court Review

"[Appellate review] of the trial court's findings is limited to whether the trial court abused its discretion in adopting the magistrate's report when the party objecting to a magistrate's report fails to provide a transcript." *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995 Ohio 272, 654 N.E.2d 1254 (1995). *See also Bartell v. Rainieri*, 2005 Ohio 258; 2005 Ohio App. LEXIS 232 (Ohio Ct. App., Summit County Jan. 26, 2005) at *P16.

It is Appellant's duty to provide a record of the trial court's proceedings that is necessary of the resolution of his appeal, even if, through no fault of the Appellant, a verbatim transcript of the proceedings below is unavailable. *Buckley v. Ollila*, 11th Dist. No. 98-T-0177, 2000 WL 263739, *2 (March 3, 2000).

"When the objecting party 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 and may not be attacked on appeal. *Doane v. Doane*, 5th Dist. App. No. 00CA21, 2001 Ohio App. LEXIS 2029, 2001 WL 474267 (May 2, 2001). Accordingly, an appellate court reviews the matter only to analyze whether the trial court abused its discretion in reaching specific legal conclusions based upon the established facts. *Sochor v. Smith*, 5th Dist. No. 00CA00001, 2000

Ohio App. LEXIS 3007 (June 28, 2000).” See *Mayer v. Mayer*, 2012 Ohio 4924, P9 (Ohio Ct. App., Stark County Oct. 22, 2012); See also *Liming v. Damos*, 4th Dist. No. 08CA34, 2009 Ohio 6490 at para. 17.

In the case at bar, the lower courts reviewed the matter, in accordance with the case law set forth herein above. Any limitation of that review was caused by Appellant’s own failure to request a transcript at the time of filing his Objections and failure to provide an Affidavit of the Evidence pursuant to Civ. R. 53(D)(3)(b)(iii) and App. R. 9(C). Hence, in a case where there is no record of oral testimony and the objecting/appealing party has not provided an affidavit/statement of the evidence, case law sets forth how the trial court and appellate courts are to review the matter. As such, under such circumstances the case is undoubtedly “capable” of review. The court is not required to refer the matter for a full hearing in such instances. Appellant’s argument is without merit.

RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 3: The Trial Court is complicit in having created the problem of there being no record of the final hearing and then there being no backup recording the Court cannot demand from Appellant presentation of the impossible transcript as prerequisite to the Trial Court Judge reviewing the Appellants Objections to the Magistrate’s Decisions.

Merriam-Webster Dictionary defines “complicit” as “helping to commit a crime or do wrong in some way.” Appellant did not *file* his request for transcript until December 20, 2011, well after the Trial Court had issued its Decision and Entry overruling Appellant’s objections. Appellant’s failure to properly and timely order a copy of the transcript was not the trial court’s fault.

After learning that a transcript could not be provided, Appellant then failed to file a Statement/Affidavit of the Evidence at the appellate court level. He had the power and means to correct the problem of the lack of a transcript. He failed to do so.

The trial court did not commit a crime or do wrong in some way. There is no “complicity” when a piece of mechanical equipment malfunctions. The Ohio Rules of Civil Procedure and Appellate Procedure clearly contemplate situations in which no recording is made or available at the trial court an appellate court levels.

As eloquently stated in its May 3, 2013 Decision and Entry, page 4, the Fourth District Court of Appeals stated:

“Appellant’s Counsel has used the motion for reconsideration, as well as his other filings, to launch unfounded criticisms against this Court and the trial court. He accuses both courts of altering the record and failing to read or review his objections and other transmitted documents, rather than acknowledging that his own failure to provide the appropriate affidavit of the evidence pursuant to Civ. R. 53(D)(3)(b)(iii) led to the limited ability of the trial court to review the magistrate’s decision.”

Since it is the responsibility of Appellant to provide a transcript, or affidavit of the evidence when a transcript is not available, the Court is well within the law when it demands Appellant to present either the transcript or an affidavit of the evidence in conjunction with deciding issues on objection or appeal. There is no wrongdoing on the part of the Trial Court or Appellate Court in this matter.

RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 4: When the Court and Clerk’s Office takes an active role in permitting a case to proceed after the Court is aware, but Appellant is not aware, that no judicial record exists and no transcript may ever be created must that case and final hearing be considered upon Appeal solely upon the documents presented or possible of presentation at Court of Appeals, as De Novo Trial, or must the Appellate Court refer the case for rehearing.

Appellee incorporates all arguments set forth in Appellee’s Response to Appellant’s Proposition of Law No. 2 and 3 as if fully rewritten.

When there is no transcript of proceedings and the appealing party has failed to file a Statement of the Evidence pursuant to Civ. R. 9(C), an appellate court is not required to refer the case for rehearing. Again, regarding an appellate court’s review of a case where no transcript or

Civ. R. 9(C) affidavit/statement of the evidence has been provided, case law sets forth how the appellate court is to review the matter.

“[Appellate review] of the trial court's findings is limited to whether the trial court abused its discretion in adopting the magistrate's report when the party objecting to a magistrate's report fails to provide a transcript.” *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995 Ohio 272, 654 N.E.2d 1254 (1995). *See also Bartell v. Rainieri*, 2005 Ohio 258; 2005 Ohio App. LEXIS 232 (Ohio Ct. App., Summit County Jan. 26, 2005) at *P16. In the instant case, no abuse of discretion on the part of the trial court was found.

When a party fails to provide a transcript or statement/affidavit of the evidence, an appellate court must presume regularity of the trial court proceedings as well as the validity of its judgment. *See Pryor v. Pryor*, 4th Dist. No. 09CA3096, 2009 Ohio 6670 at para. 4; *Childers v. Childers*, 4th Dist. No. 05CA3007, 2006 Ohio 1391; *Eastwood v. Eastwood*, 5th Dist. No. 06CA0066, 2007 Ohio 3096 quoting *E. Cleveland v. Dragonette*, 32 Ohio St. 2d 147, 149, 290 N.E.2d 571 (1972) (“Without a transcript or an App. R. 9 substitute, “[a] party, having the duty of instituting the preparation of the record for the purpose of appeal, may not sit idly by and then predicate reversal upon the basis of a ‘silent record.’”)

Appellant’s argument is without merit.

RESPONSE TO APPELLANT’S PROPOSITION OF LAW NO. 5: The Trial Court erred as a matter of law and in conflict with the evidence in the grant of assets and liabilities of the parties in contravention of the evidence presented at final hearing (trial) undisputed assets and the liabilities fairly allocated in accord with the documentary and testimonial evidence presented at the final hearing by fact and expert witnesses. O.R.C. 3105.171; to do otherwise is reversible error.

Appellant complains that the Trial Court Magistrate, whose decision the Trial Court adopted, erred in its division of the parties’ assets and liabilities.

A trial court may properly adopt a magistrate’s factual findings without further consideration when the objecting party fails to provide the court with a transcript of the

magistrate's hearing or other relevant material to support their objections. *See In re Maxwell*, 4th Dist. No 05CA2863, 2006 Ohio 527 at para. 27 citing *Proctor v. Proctor*, 48 Ohio App. 3d 55, 60, 548 N.E.2d 287 (1988), in turn citing *Purpura v. Purpura*, 33 Ohio App. 3d 237, 515 N.E.2d 27 (1986).

In this case, the Trial Court Magistrate issued a Decision with extensive Findings of Fact and Conclusions of Law. Citation to O.R.C. 3105.171 was made. Appellant failed to timely request a transcript and further failed to provide another alternate pursuant to Civ. R. 53(D)(3)(b)(iii). Appellant failed to demonstrate his claimed error to the Trial Court and the Appellate Court. In accordance with law, cited herein above, the Trial Court was limited to an examination of the Magistrate's conclusions of law and recommendations, in light of the accompanying findings of fact. *See Weitzel at *P18*. The Trial Court properly found no error on the part of the Magistrate and the Appellate Court properly affirmed the Trial Court's Decision.

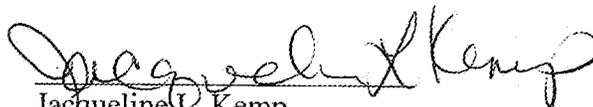
Finally, Appellant seeks to have the case reversed and remanded seeking a new final rehearing by a new judicial officer. Appellant cites no authority to support such a result. Further, such a result would be entirely inappropriate and inequitable and would only serve to reward Appellant for his blatant failure to follow well-established Civil and Appellate Rules that would have corrected the lack of transcript availability issue.

Appellant's argument is without merit.

CONCLUSION

Based upon the foregoing argument and law, this case does not involve matters of public or great interest. Appellee therefore respectfully requests that this Court decline to accept jurisdiction in this case.

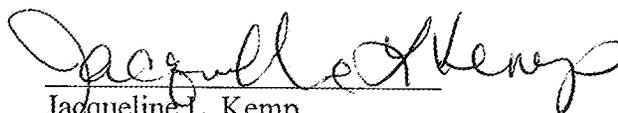
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular United States mail on the 17th day of July, 2013 to Kinsley F. Nyce, Esq., Attorney for Appellant, 550 East Walnut Street, Columbus, Ohio 43215.



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