

ORIGINAL

IN THE SUPREME COURT OF OHIO

MICHELLE L. ROTHWELL, PLAINTIFF-
APPELLEE

Case Number 13-0052

13-0980

V.

On Appeal From Pickaway County, Court
Of Appeals Fourth District

MARK E. ROTHWELL, ET AL,
DEFENDANTS-APPELLANTS

Appeal Case Number 12 CA 0006
Trial Court Case Number 2009 DV 335

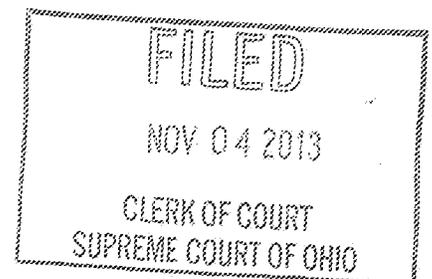
APPELLANT MARK E. ROTHWELL, ET AL, MOTION FOR RECONSIDERATION, OF
THE SUPREME COURT OF OHIO'S REFUSAL TO ACCEPT JURISDICTION

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**MOTION FOR RECONSIDERATION OF THE SUPREME COURT
OF OHIO'S REFUSAL TO ACCEPT JURISDICTION**

Appellants by and through Council, hereby respectfully move this Court to Reconsider this Court's decision to deny jurisdiction and hear this important case of great public interest and import, upon the merits.

Appellants move that jurisdiction be granted. This motion is made pursuant to Rule 18.02(B) (1) of the Rules of Practice of the Supreme Court of Ohio and the accompanying Memorandum. Further, the Statement of the Case and Facts and the Arguments set forth in Appellants' Memorandum in Support of Jurisdiction which Appellants filed previously is incorporated herein,

MEMORANDUM IN SUPPORT

"This Court has invoked the Reconsideration procedures set forth in Supreme Court Practice Rule 18.02(B) (1) to correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 83 Ohio St.3d 539, 541 697 N.E.2d 181 (1998) quoting *State ex rel. Huebner v. Jefferson Village Council*, 75 Ohio St.3d 381,383,662 N.E.2d 339 (1995). This appeal should be heard because it involves a great public interest. Public interest is something in which the public, the community at large, has some interest by which their legal rights or liabilities are affected. *State ex rel. Ross v. Guion* (1959), 82 Ohio Law Abs. 1, 161 N.E.2d 800, 803, citing *State ex rel. Freeling v. Lyon* (1917), 63 Okl. 285, 165 P. 419, 420.

This case fulfills those requirements of importance in applying judicial fairness to Appellants and others similarly situated in cases before the Trial Court, Fourth District and throughout Ohio. The key presented to this Court is that the Trial Court made erroneous rulings throughout the Magistrate conducted hearing, mistakes in math misapplied clear Ohio Revised Code provisions, the Courts recording of the multiple day hearings but then the Court concealed from Appellants the Courts long known (multiple cases beyond and including Appellants) loss of many electronic recordings and then has acted subsequent to base the Trial Courts failure to review the timely filed Appeal of the Magistrates report upon Appellants failure to have a hearing transcript (a transcript repeatedly and timely ordered by Appellant but impossible of creation by the Court, unbeknown to Appellants, and concealed from Appellant as unavailable until well into the Court of Appeals processes) was solely the Courts failures and failed disclosures of the transcript “not being available”.

Upon finally being informed by the Trial Court (by Affidavit of the Trial Courts Reporter to the Court of Appeals that no transcript was possible, due to malfunction) Appellant did attempt to recover the matter seeking by Motion with the Court Of Appeals to supplement the record and provide alternate means for review, which Motion was granted by the Magistrate for the Court of Appeals, then overruled by the Administrative Judge of the Fourth District Court of Appeals and Judge-Husband of one of the two Magistrates for the Trial Court (the two Magistrates, including the Judges wife and the Appeals Judge were long and well versed in the transcripts not being possible of creation as they dealt with multiple other cases caught and acknowledged) when the Motion to Supplement was overruled and Appellants were denied having any Judicial review of the Trial Courts Magistrates proposed order which was never subject to any Judicial review. The Magistrates errors the failure to account for all marital property and assets, the duplicitous listing of assets and

liabilities (and in different manners being dealt with) have never been correctable solely because the Trial Court did not come clean and disclose that many cases transcripts and recordings were not available because the Court had no back up data base and had no way to make a transcript of the multiple day final hearing of Appellants important case.

Perhaps the failure of the Court (Magistrate) having a recording of the 2009 filed case and multiple days of hearing and Motions for the Magistrate to review is itself is likely a significant cause for the Magistrates errors and disjointed proposed order.

Leading the basis for Reconsideration and why the Trial Courts never Judicially reviewed Magistrates error laced proposed decision are:

Appellant will not add exhibits nor add prior filings within this Reconsideration. Instead Appellant would merely ask that the Court look simply to the Trial Court Docket and the timely filed Objections to the Magistrates proposed order. The filing details everything that needs corrected.

Certainly the Court cannot review all such filings in all cases before the Court's docket. But the case before this Court now is unusual and it has never been judicially reviewed as is required.

The errors objected to have never been reviewed solely due to the Trial Courts deliberate actions and deceptions regarding the ordered transcript that the Court alone made unavailable and never was forthright in admitting until well into the Court of Appeals proceedings. A transcript (ordered) was never capable of being prepared. Appellant nor counsel should ever have had any of the angst or appeals required as the Trial Courts duty to long before disclose that the transcript was not possible, should have prevailed. Such forthright communication never has materialized despite the eventual required Affidavit of the Court Reporter offered long into the Court of Appeals process finally made clear.

ORC § 3105.171 (B) social security should not be utilized as a marital asset. The Trial Court used Appellants potential future Social Security benefits as an asset and provided same to Appellee and did not afford any balancing of Appellees Social Security potential benefits as offset.

ORC § 3105.171 (G) In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided and shall specify the dates it used in determining the meaning of "during the marriage."

The magistrate failed to make such written findings of fact and specify the dates used in making the determination of marital property. This is a critical oversight and or omission as the real estate was a mix of premarital and marital property. Debts for various real property assets were a complex of

mortgaged and not mortgaged properties. These complexities needed adjustment to each of the property parts to demonstrate the asset allocation debt and values. This too was not done.

ORC § 3105.171 cannot consider as asset of marriage The house of Appellant owned prior to marriage as premarital asset. The Trial Court may have allocated a portion of such asset as marital upon the facts and law but no such consideration was made. Then the Court did not take into account mortgage amounts due and owing upon a secondary property financed through multiple property leveraging.

ORC § 2301.20 requires the recording of actions, preservation of records ... there was a daily confirmed recording of each day and part of the Final Hearing before the Magistrate but then the Trial Court “lost” many such audio recordings, many cases. A transcript was never possible. Several other cases were discovered to be absent any possible transcript and the Trial Court ordered retrials. Appellants were unaware that these problems plagued the Trial Court but Appellee counsel stated before the Court of Appeals in oral arguments that she was fully aware that no transcript was possible because the system had failed to maintain recorded hearings.

ORC § 2301.23 ... requires the furnishing of a transcript or electronic testimony as requested Appellant sought verbally, then in multiple writings to the Trial Court and Reporter (as Local Rule 9 only requires, a written request) then by Motion (a Motion as final alternative action because while the local rules only require the request in writing the criticism of Appellant counsel was that no

Motion had been filed) which process started before the Magistrates proposed order was ever written and well before it was ever to be needed. The transcript was sought early because Appellant wanted it. It was not yet needed and may never have been needed but Appellant wanted the transcript. The Court Reporter nor Court ever responded, never. The Court knew the transcript was impossible of creation and rather than informing Appellant obfuscated (deceived) Appellant never disclosing the Trial Court created failures until the Court of Appeals case was filed and the time to provide the now reordered (as art of the Appeals paper work process) and then after a long period of time transpired the Court Reporter by Affidavit stated that no transcript was possible.

The failure of affording Appellants due process rights is solely the creation of the Trial Courts failures, denying Appellant Judicial review of a very flawed and ORC non-compliant Magistrates error ridden proposed order. Appellant complied in every manner and process in seeking the Trial Courts review and correction of the flaws and ORC violations in the Magistrates proposed order. And what did the Trial Court do? The Trial Court stated that no transcript was provided the Court, no transcript was ordered, both incorrect but in very different ways. The transcript was ordered multiple times in compliance with the local rules BUT no matter because the ordering the Trial Court long previous knew the transcript was not ever going to be available. The Trial Court "lost" Appellants recordings and refused to disclose same.

This Trial Court and Court of Appeals processes are a perversion of the rights of Appellant and a betrayal of the public interests and trust..

The Court of Appeals being led by the husband of one of the two Magistrates of this Trial Court knew full well that no transcript was ever possible (as it is now learned that was common talk and known by all local folks but concealed from Appellant and Appellant counsel, or at best just not shared through the near eight (8) months Appellant was seeking the transcript, and this same Appeals Judge even then overruled the Appeals Magistrate who had granted Appellants request to supplement the record since there was not transcript possible, denying Appellant the ability to supplement the absent transcript with other documents and information that would demonstrate Appellants claims. This secret knowledge unshared has been a publically visible and known stain upon these two Courts.

If this seems fair to anyone, it could not and does not, not in the public blogosphere and internet is it perceived as fair, the public reviewing and discussing the events does not see it that way. If the Judge of the Court of Appeals has since recused himself from Pickaway County cases, as has been stated, thereby in the future avoiding the impropriety of determining cases involving the Magistrates (one his wife) and Trial Court that employs his wife, wherein there is clearly personal self-interests, why has this not required some hindsight evaluation regarding decisions impacting Appellants. There are many self-interest to consider, many of them in fact, and interests that are inappropriate in/as part of the Court Of Appeals steps that were taken to support the Trial Court regarding the absence of a transcript that are clearly in conflict with Appellants interests in having Judicial review of the case at bar. It is accurate that public interests are inherently intertwined with allowing and requiring a fair impartial Judiciary and having a transcript or allowing Appellant to supplement the record in such absence, which was denied.

Appellant's case must be reheard de novo before the Trial Court, recorded, and determined according to law.

The 2010 appellate case from the Second District Court of Appeals, IN THE MATTER OF THE ESTATE OF JULIA STANFORD , Deceased, 2010-Ohio-569, No. 23249, Court of Appeals Second District, Montgomery County is assistive. The facts are similar in nature to the instant case, similar that is, without the Montgomery County Court being as the Pickaway Trial Courts was by its own deceptive concealment of the transcripts lack of availability for a period nearly eight (8) months in the subterfuge.

The Stanford Appellant after an adverse ruling from the Trial Court, Probate Court, filed objections to the magistrate's decision in a timely manner. As did Appellant in the case at bar. He also filed for an extension of thirty days so that he could request a transcript and file additional objections. This request was granted. He also filed a form, generated by the court, to, he thought, request and have the transcript produced by the court reporter. This request was filed with the clerk of court's office and was also filed with the court reporter, in person.

The Stanford attorney (Hale) assumed, wrongly, that the transcript would then be produced by the court reporter and filed with the court, for its use and review on his objections. However, a month later, the trial court filed an entry overruling all of Mr. Hale's objections to the magistrate's decision, because no transcript had been filed with the court. Because of a technical issue, this same ruling

was issued again by the court about 45 days later. In that second ruling, the court noted that almost sixty days had elapsed since the objections had been filed, and no transcript had ever been filed. According to the civil rule, no independent review could take place without the transcript.

Mr. Hale then filed a Motion for new trial, stating that he had indeed, filed for and requested a transcript of the proceedings, at the same time he had filed his objections.

The court in Stanford, states Mr. Hale's sole assignment of error as follows: "DID APPELLANT COMPLY WITH RULEFOR THE REQUEST OF TRANSCRIPT AND SHOULD THE MAGISTRATE'S DECISION DUE TO A LACK OF TRANSCRIPT BE DENIED? SHOULD HE BE ALLOWED TO 'FILE' THE CD-ROM AND HAVE THE LOWER COURT HEAR HIS OBJECTIONS?" ... at page 570.

Hale in his appeal, essentially contends that the trial court erred in concluding that he failed to file a transcript of the magistrate's decision. Hale contended that when he requested the transcript from the court reporter that it would be then filed with the court. Apparently, neither he nor his attorney were ever informed by the court reporter, the clerk of court's office, or the court itself, that the transcript had never been filed, prior to the court ruling on his objections.

This fact scenario is eerily similar to the instant case, but absent actual known and deliberate deceptions and subterfuge. In the instant case Appellant through his counsel requested on multiple

separate occasions, by telephone then in several writings delivered to the Clerk of Courts and Court Reporters office and by telephone follow-up to these leaving message, seeking a transcript of the proceedings before the magistrate that lasted over four separate days. Then by Motion and then eventually by forms that were part of the Court of Appeals filings and required processes. Only after all these approximately eight months did the Trial Court disclose the transcript had all along been impossible of provision, it was not Appellant not Appellant counsel error or fault.

Also, like the facts in Stanford, Appellant, timely filed objections to the magistrate's decision. Appellant, like Mr. Hale, had sought the transcript being produced and that it would be filed by the court reporter with the court. Coordinating with the Trial Courts decision on Appellants objections. However, also like Stanford, the Trial Court rendered its decision, denying all objections, for the reason of a lack of a transcript. In fact, the wording used by the Judge in Stanford, in denying the objections, is almost word for word, the same as the Trial Court used in the instant case, denying Appellant objections. In the trial court Decision and Entry, filed on November 29, 2011, the court states in pertinent part, "It is noted that a transcript of the final hearing was not requested by the Defendant. Lacking a transcript, this Court will rely only on the findings of fact outlined in the Magistrate's Decision and the evidence contained in the file." See Decision and Entry, Vol. 27, Page 162. (emphasis added.) The Trial Courts deception and concealment of what only the Court and insiders knew and was long concealed from Appellant counsel is a denial of due process, is in fact far worse and of great public interest.

Unlike the instant case in Stanford, the ability to produce the transcript existed. In the instant case, which is unbelievably egregious and shocking to one's sense of justice and fair play, the transcript was not ever capable of production by the court reporter.

In Stanford, the court states, "absent the type of procedural error alleged in this case before us, we would have to affirm the trial court's decision....." at p.571. The court goes on to cite Montgomery County Common Pleas Court Local Rule 11.1(A) which provides, "that proceedings before a magistrate may be recorded by stenographic or other electronic means approved by the court. " Subsection (B) of Loc. R. 11.1 further indicates that: "Any interested person may request a transcription of an electronic recording from the court stenographer. The person making the request shall pay the cost of the transcription." At p. 571. A procedural error did exist in the instant case and it was solely created by the Court itself, unbeknownst to Appellant. This Trial Court procedural error is at the heart of this appeal.

In the instant case, the local rules of Pickaway County are very similar in nature and wording. They provide for magistrate's hearings being recorded in some manner, which the hearings indeed, were every day recorded and checked each day and every restart of each hearing break and restart, in this case. Also, under Local Rule 17.01, it states, "All requests for transcripts shall be made in writing. The Court Reporter shall have the authority to require a deposit in such amount as is deemed necessary to cover the cost of preparation, unless otherwise ordered by the Court.

The Ohio Supreme Court requires of Trial Courts secure and proper back up procedures for Court recordings and proceedings. No such systems were utilized by Pickaway County and seem not to have been instituted even after the system that broke down was discovered to have become unreliable and Appellants have been denied their Judicial Review, Appeal and due process.

Appellant through counsel followed this rule to the letter. Requesting the transcript, in writing, delivering it to not only to the clerk of court's office, delivering it directly to the Clerk of Courts office as is local practice but then also delivered to the court reporter, Ms. Malott, office who is also, the Trial Court's Secretary and within the Court chambers. So, as in Stanford, the transcript was properly requested, thus ending the Appellant's required duty under both the applicable civil rule and local rules.

The court in Stanford states succinctly when it writes, "These rules do not, however, answer the question posed by Hale, which pertains to the procedure to be followed when the CD-ROM is in the possession of the court reporter. "at p.572. (emphasis added.). Directly in contrast to the instant case, the question is now posited, "what possible procedure or rule is to be followed when the Trial Court and court reporter affirmatively deceives and withholds the fact that no record exists and no transcript can be produced and in fact leads the party to believe that a record will be produced, but never is produced?"

Stanford continues and details the procedure used for a transcript in an appellate case, stating, “Typically, in appellate cases, attorneys file a precise with the Trial Court Clerk, requesting the court reporter to prepare the written transcript of the proceedings.” At p.572. In the instant case, the Appellant did file with the appellate court, a formal request again for the transcript, still without knowledge that the transcription could not possibly be produced. It was finally at this late juncture in the proceedings that the court reporter, Ms. Malott, “confessed” in a Sworn Affidavit to the appellate court, that because of a recording malfunction, she could not produce any transcript of the proceedings. As stated previously, this was over seven-eight months duration after the first request was made by the Defendant-Appellant and almost an entire year after the hearing had begun.

Finally, in its decision sustaining Mr. Hale’s assignment of error and reversing and remanding, the Court again succinctly came to the point, “By (it) could reasonably lead one to believe that he or she has complied with the duty to order the transcript.” at p. 572 (emphasis added.)

“Accordingly, the trial court erred in concluding that Hale had failed to file the transcript.” At pp. 572,573.

In its Decision and Judgment Entry, the Court of Appeals for the Fourth Appellate District states on Page three of its decision, “A review of the record reveals that Appellant did not request or file a copy of the transcript in conjunction with the filing of his objections.” This is not an accurate review of the events that transpired following the hearing before the Magistrate. As previously stated, the Appellant requested the transcript in writing on multiple separate occasions and at a time in conjunction with his filing of objections all in compliance with the Local Rule. Appellant counsel was repeatedly misled and deceived, more than once, that the transcript not only existed, but would

that it would be forthcoming soon. But all of that deception was prelude to the truth that the Trial Court was acting to deceive.

The Appellate Court than, states at Page three, "Further, in the absence of a transcript, Appellant also failed to file an affidavit of the evidence pursuant to Civ. R. 53(D) (3) (b) (iii). Obviously, since the Appellant was "led to believe" that a transcript existed and was being produced; no affidavit of evidence would be needed or required at that time or ever, if the transcript was provided. Nearly the entire opinion of the Appellate Court relies and is based on the wrong assumptions that: 1) Defendant-Appellant failed to request a transcript or obtain said transcript prior to the decision rendered by the trial court, and 2) that the Defendant- Appellant failed to file an affidavit of evidence in absence of a transcript. But truth is that no transcript was ever capable of provision and Appellant had been drawn through time until the Appellate process when the Court stopped blaming Appellant and or counsel a fessed up: "There aint never going to be any transcript, you caught us in blaming Appellant and Appellants counsel for our own Courts failures and that we were getting tired of dealing with case after case where Court systems were the fault of rehearing and retrial after retrial so when we could make it look like you were to blame and you appealed and we had to put in writing that no transcript was possible, well you caught us at the deceptions."

As the Court of Appeals for the Second District correctly held in Stanford, the actions of the court reporter and other court personnel, reasonably lead the Appellant and his Attorney to believe that he had complied with the rules for requesting a transcript and that he was going to be provided with said transcript.

Contained on page 6 of the Fourth District's opinion is the following statement, "Although not raised by Appellant, we additionally note Civ. R. 53(D)(7), which is entitled, "Recording of proceedings before magistrates, "states that "[e]xcept as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court." Our research reveals that the local rules of the Pickaway County Court of Common Pleas, Domestic Relations Division, did not expressly require the recordation of the proceedings in issue, but instead simply state under Rule 16.02, with respect to magistrates, "[a]ll referenced proceedings shall conform to the requirements of Ohio Civil Rule 53." Further, while this Court's own rules provide in App.R. 9(A)(2) that "[t]he trial court shall ensure that all proceedings of records are recorded by a reliable method," App.R. 9(B) (4) contemplates situations in which "no recording was made." The Appellate court then concludes with this statement, on page 9 of the opinion, "In light of the foregoing, because there was no clear mandate to make a recording of the proceedings we cannot conclude that the trial court erred." (emphasis added.) This logic is circumspect at best.

The hearings before the Magistrate were recorded. They were sought to be recorded. Magistrate and counsel verified each day each return from break that actual recordings were made. It is not remotely arguable that oopps. While the Trial Court assured they were recorded, in fact were recorded, oooppps, we did not mean it, and while the litigants could have hired a stenographer or service we deceived them into believing that a recording was being made every day and of every minute of the case hearings and events because it was in fact recorded.

There was no need for a mandate the hearing in the instant case, conducted by the magistrate was properly recorded and followed to the letter, Ohio Civil Rule 53 and Local Rule 16.02. Appellant relied on that recording, only to later find, it was detrimental, according to the convoluted ruling of the Appellate Court to support the family members working in the Trial Court that had been frustrated by the rehearings of cases and Motions that were reordered when litigants learned of the failures of the Trial Courts recording systems. The Appellate Court then uses a blame Appellant process that Appellant should have filed an affidavit of evidence, in essence to make up for the lack of a transcript. Again, all parties at the hearing knew the Trial Court hearing was properly recorded. The Fourth District then on page 8 of their opinion, further states, somewhat incredibly, the following, "Our review of the record indicates that the four day hearing held before the magistrate was not recorded. Based upon the affidavit of the court reporter, it appears there was a malfunction with the recording equipment." Then they state, "...Appellant does not claim that either party requested that the proceedings be recorded." Why, why would either party need to request that the proceedings be recorded when they were obviously being recorded, every day, right before their eyes ears and everyone present was aware. Every day, prior to beginning the hearing, the magistrate tested the recording equipment to make sure it was in good working order. This was witnessed by all present in court, all four days of the hearing.

Without a transcript how in any reasoned manner could the Court of Appeals conclude that no one requested the hearing be recorded? From what insight does the Court soothsay these imaginary beliefs? No counsel in the case has ever wagered a position that the matter was not sought to be recorded and that it was in fact and indeed RECORDED. The Court of Appeals creates a false

statement upon false beliefs and supposes what in fact is a continuing perversion of denying Appellant due process, a judicial review of the case and correcting of a grievously errant proposed magistrates decision.

Stanford should be followed in the instant case. The logic is sound as it applies directly to the instant case.

Appellant's procedural due process rights were grossly violated by the Courts in question. No one received a complete and fair hearing in front of the magistrate; did not receive a fair and independent review by a Judicial officer, the Trial Court; and did not receive a full and fair review of the appeal, facts and ORC required elements.

At every stage of the proceedings, Appellant was deprived of his constitutional rights without his knowledge, until it was held to be too late.

Appellants Propositions of Law and error should be sustained and this case remanded to the trial court for a new and fair trial on the merits.

ARGUMENT

Appellant counsel in filing with the Ohio Supreme Court attempted to be clear and précis in the presentation of case and case details. That effort however has required and resulted in the requirement that this Motion for Reconsideration be filed. Such efforts are require to permit

Appellant have required due process protections and to have his case reviewed by a Judicial Officer to afford the many ORC violations contained in the hearing process and incomplete allocation of the debts and assets of the marriage be corrected. **Most clearly as may be presented in the Reconsideration this, Court need allow review of the preceding as well as the clearly superior clarities of the following:**

Proposition of Law No. 1:

Have the Appellant's procedural and substantive due process rights, guaranteed under the United States Constitution and Ohio Constitution, been violated by the Trial Court, when a verbatim record was not made, as required by Ohio Civil Rule 53, Supreme Court rules of Superintendence, and Local Rules and as a result, should a re-hearing on the merits have been proper and ordered by the trial court?

Ohio Rule of Civil Procedure 53 (D) (7), entitled "Recording of proceedings before a magistrate," states, "Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court."(Emphasis added.) Rule 11 of the Rules of Superintendence for the Courts of Ohio, entitled, "Recording of Proceedings," provides in Section (A), Recording Devices, "Proceedings before any court and discovery proceedings may be recorded by.....electronic recording devices....." Finally, Local Rule 16.02 of the Pickaway County Common Pleas Court entitled, "Magistrates" states, "All referenced proceedings shall conform to the requirements of Ohio Civil Rule 53."

Thus the Ohio Civil Rules, the Rules of the Superintendence of the Courts, and even the Local Rules of the Trial Court in the instant case, provide for the recording of the proceedings in open court

before the magistrate. So was the case in the instant matter. All four days of the hearing were in fact recorded by an electronic recording device which was tested and checked every day of the hearing by the Magistrate to make sure it was properly wording. It was determined that the device was working on each day, and thus all parties, counsel and the court assumed that the entire proceedings had been recorded verbatim. This, however, as it later became known, was not the case.

From the date of the last day of hearing, June 10, 2011 until April 11, 2012, the day that the Court Reporter, Ms. Malott, filed a Sworn Affidavit with the Appellate Court, stating that no transcript was available because of recording malfunction, the Appellant and his counsel assumed and were lead to believe that the recording did indeed, exist, and would be transcribed. This was a period of almost eight-nine approaching ten months.

The Appellate Court, in its opinion at page 7, supra, quotes from Appellate Rule 9(B)(4) and 9(C), which states in pertinent part, “If not recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of evidence...” In the instant case, a valid recording was indeed made of the proceedings and the Appellant, in good faith believed that the recording did indeed, exist and was able to be transcribed and further, was led to believe, the court itself, that it was going to be transcribed for use by the court.

The Appellant’s due rights of due process were thwarted by the events which took place, which were wholly outside of his or counsels control. Appellant followed every rule and procedure that could be followed at the appropriate times. The Appellate Court, states in its opinion that the Appellant

“should have” filed either an Affidavit of Evidence or Statement of Evidence. However, when the Appellant attempted to file a Statement of Evidence, it was initially granted and then reversed by Judge Harsha of that Court and husband to one of two magistrates of the; magistrates exhausted by required re-hearings and duplicating case efforts, Trial Court, whose failed record maintenance and back up processes had become a great albatross.

Thus, under Proposition of Law One, the Appellant’s due process rights were violated, when the verbatim record was not produced, after it was properly requested by Appellant. Further, Appellant and Appellant’s counsel were never informed until it was too late, and to make the situation worse for Appellant, Trial Court led Appellant to believe that the verbatim recording did exist, and was in the process of being priced and then transcribed when that was not the case. Thus this lack of knowledge, de facto, prevented Appellant from filing any Affidavit of Evidence with the trial court prior to its final decision on Appellant’s Objections to the Magistrate’s decision. Appellant’s right to an independent and substantive review of his objections never occurred and thus the process lacked due process.

Proposition of Law No. 2:

Have the Appellant’s procedural and substantive due process rights, guaranteed under the United States Constitution and Ohio Constitution, been violated by the Trial Court, where a verbatim record was thought to be made, found not to be capable of being made, and the fact concealed to Appellant, by the Court, and Court personnel during the entire appeal process, thus denying Appellant of any substantive review of the magistrate’s decision and if so, should a re-hearing be granted to Appellant?

In Appellant's extensive review of all existing appellate cases similar to the fact-pattern in the instant case, it is the conclusion that this may be a case of near first impression for this court. However, an appellate court in Ohio has rendered an opinion that is very similar in facts and law to the instant one.

Defendant-Appellant has detailed Stanford pervious herein.

Proposition of Law No. 3:

Have Appellant's procedural and substantive due process rights, guaranteed under the United States Constitution and Ohio Constitution, been violated when, after the trial court, through the court's own personnel is/was fully and throughout the relevant periods aware that no record can/could be produced, proceeds with final judgment, making no required independent judicial review, instead, basing said judgment on Appellant's failure to obtain a transcript, a transcript which did not exist, could not exist, and if so, should a re-hearing on the merits, be granted to Appellant?

Civ. R. 53 (D) (4) (d) provides the following: "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 the objected matters to ascertain that the magistrate has properly determined factual issues and appropriately applied the law". Yazdani-Isfehant v. Yazdani-Isehani, 2012 Ohio 1031, page 3, ¶8 (Fourth Dist. Athens County 2012).

Transcript of no the process was ripe and the appeal of the magistrates proposed decision was clear in presenting the mathematical errors duplicates of assets and expenses and debts. The inclusion of social security contrary to ORC provisions and many other detailed items the Trial Court could have made and corrected upon the detailed elements of the timely filed appeal. But now the deliberate actions of the Trial Court require a full rehearing as the integrity required to now have such fact based inquiry would be as a vapor of impure toxins.

“In ruling on objections the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly applied the law.” Significantly Civ. R. 53 “contemplates a de novo review of any issue of fact or law a magistrate has determined when an appropriate objection is timely filed.” Supra, Yazdani-Isfehni, page 3, ¶8 (Fourth Dist. Athens County 2012.)

Gruger v. Diversified Air Systems, 2006-Ohio-3568, (Court of Appeals of Ohio, Seventh District, Mahoning County) presents the following: Appellant asserted that the trial court should not have ruled on the Appellant’s objections before it received and reviewed the transcript of the proceedings. The fact pattern is similar in nature to the instant case, in that the case was heard before a magistrate and the Appellant timely filed objections and also duly requested that a transcript be provided to the trial court for its review. And like the instant case, the trial court made its ruling without the trial transcript and did not make independent review of the magistrate’s decisions.

In its decisions the court stated, “Objections to a magistrate’s decision can be based on questions of law or questions of fact. In this case, appellant raised both fact-based and law-based objections. It argued, among other things, that the magistrate failed to consider many of its exhibits,…….” The trial court ruled on appellant’s objections without waiting for and reviewing the transcript. The court knew that appellant had requested the transcript because it had filed such a request with the court.” Gruger, supra at p. 3569. Further in the opinion, the court states, “However, the court should have waited until the transcript was filed to rule on the alleged errors of fact. The trial court knew that a transcript was in the process of being prepared. ………. The only way the court could properly rule on the fact-based objections was to review the transcript of the evidence.

Other courts have agreed, See Weizel v. Way, 9th Dist. No. 21539, 2003-Ohio-6822 (it was unreasonable for the trial court to review objections without a transcript when it was discovered that a transcript existed and objections clearly challenged the magistrate’s findings of fact, supra at p. 3569. (emphasis added.)

In the instant case, Appellant clearly contends that the trial court and/or its personnel, namely the court reporter and clerk or court, had knowledge that Appellant had requested, per rule, the transcript on multiple separate dates. Appellant filed a motion with the court to have the transcript provided to the Trial Court prior to its ruling on Appellant’s objections. However, the trial court proceeded to make a ruling on Appellant’s Objections, without a transcript of neither the proceedings nor an independent review which is required by the Civil Rules. Clearly, this action is in direct

contravention of the previously cited case law and thus said ruling is erroneous, in contravention of Appellant's due process rights and should be reversed.

This action by the trial court was also an abuse of its discretion. In its own Decision and Entry, the Trial Court states, "It is noted that a transcript of the final hearing was not requested by the Defendant." See Decision supra. It is clear the trial court would not allow any review of the objections without a transcript (a transcript that the trial court itself made impossible to obtain and knew at the time, could not be created, but said information was kept from the Appellant and counsel.) Appellant did request a transcript and was led to believe that one existed and would be produced.

Wherefore: The unrecorded final hearing requires a full new hearing properly conducted and reviewed in a judicial manner according to ORC requirements and Ohio Court Rules. Remanded to the Trial Court for full hearing, is the only fair method for case resolution.



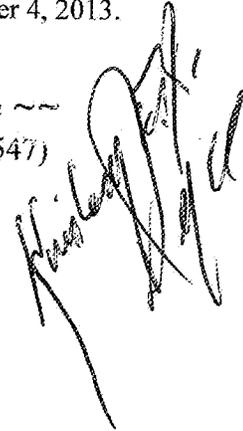
Respectfully submitted,
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CERTIFICATE OF SERVICE

it is hereby certified that a true copy of this Motion For Reconsideration has been provided to Appellee attorney of record by USMail (or personal courier delivery) November 4, 2013.

Jacqueline L. Kemp, Atty.
88 West Mound Street
Columbus, Ohio 43215-5018

~~Kinsley F. Nyce~~
Kinsley F. Nyce (3547)

A handwritten signature in black ink, appearing to read "Kinsley F. Nyce", written over the typed name.