

IN THE
SUPREME COURT OF OHIO

NUGENT TYRA,	:	NO.
Plaintiff-Appellant,	:	15-0119
vs.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate
JULIE TYRA	:	District
Defendant-Appellee.	:	Court of Appeals Case Number C140211

MEMORANDUM IN SUPPORT OF JURISDICTION

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IN THE
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NUGENT TYRA, : NO.
Plaintiff-Appellant, :
vs. : MEMORANDUM IN SUPPORT
JULIE TYRA : OF JURISDICTION
Defendant-Appellee. : Court of Appeals
: Case Number C140211

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST**

Appellant states that this case involves a substantial constitutional question as well as questions of great general or public interest. Specifically, Appellant states that this case involves three issues that are issues of first impression for the Ohio Supreme Court.

First, Appellant contends that The First District Court of Appeals denied him due process by basing its decision on alleged facts for which there was no direct testimony, facts that the appellate court distorted, although perhaps unintentionally, and alleged facts which the evidence at trial contradicted.

Secondly, The First District Court of Appeals fashioned new standards for affidavits in domestic relations courts by stating that “Mr. Tyra’s affidavit violated the most basic requirement for an affidavit: it failed to state that it was made based on the personal knowledge of the affiant.” The appellate court is requiring domestic relations affidavits to comply with civil rules regarding summary judgments. The Ohio Supreme Court would have to revise its standard domestic relations forms, as would most counties, if this were to become the general rule across the state. Such a standard for affidavits is detrimental to courts and litigants.

Third, The First District Court of Appeals indicates that there are different standards for plain error: one for litigants represented by counsel and another for litigants appearing pro se. This is contrary to every single other District Court of Appeals. *Household Finance Industrial Loan Co. of Iowa v. Pierce*, 2012-Ohio-3501, C.A. 24909, (2nd Dist.), *Tretola v. Tretola*, 2014-Ohio-5484, 8-14-12 (3rd Dist.), *State v. Bennington*, 2013-Ohio-3772, 12CA956, (4th Dist.), *McCandlish v. McCandlish*, 2013-Ohio-5066, 13-CA-37 (5th Dist.), *HSBC Bank USA NA v. Beins*, 2014-Ohio-56, L-13-1067, (6th Dist.), *In re Guardianships of I.T.A.*, 2012-Ohio-1689, (7th Dist.), *Gurish v. Bureau of Motor Vehicles*, 2012-Ohio-4066, 98060, (8th Dist.), *Murphy-Kesling v. Kesling*, 2009-Ohio-2560, 24176, (9th Dist.), *Raccuia v. Kent State University*, 2010-Ohio-3014, 10AP-71, (10th Dist.), *Latina v. Ciora*, 2014-Ohio-2887, 2013-L-112, (11th Dist.), *Cat-The Rental Store v. Jeff Sparto D.B.A. J. Sparto Excavating*, 2002-Ohio-614, CA2001-08-024, (12th Dist.) As matter of fact, it is contrary to previous case law from The First District Court of Appeals. See *Arkwright Mut. Ins. Co. v. Toler*, 1st Dist. Hamilton No. C-020589, 2003-Ohio-2202 and *Parallel Homes, L.L.C. v. Stephens*, 2014-Ohio-840, both of which state that pro se litigants are bound by the same rules and procedures as those litigants who retain counsel.

In addition to these three issues of first impression for The Ohio Supreme Court, The First District Court of Appeals, ignoring the Ohio Rules of Evidence, defined “hearsay” as “a statement offered in evidence to prove the truth of the matter asserted.” This definition describes nearly all testimony and is not in accordance with the evidence rules.

Finally, The First District Court of Appeals found that evidence presented in a civil case was plain error although the evidence was not objected to and was not disputed. This appears to be in direct conflict with the Ohio Supreme Court Case of *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596 and rulings by all the other Courts of Appeals.

STATEMENT OF THE CASE

A Complaint for Divorce was filed in the Tyra v. Tyra case on August 24, 2011. Magistrate Stuart Newberry of the Hamilton County Domestic Relations Court conducted the trial on March 19, 2013. Magistrate Newberry issued his decision on May 24, 2013. Both parties filed objections. The Honorable Jon H. Sieve ruled upon those objections and the Decree of Divorce was journalized on March 21, 2014. Mrs. Tyra timely filed a Notice of Appeal on April 18, 2014. The First District Court of Appeals issued its decision on December 26, 2014. Mr. Tyra timely files this Notice of Appeal and Memorandum in Support of Jurisdiction.

STATEMENT OF THE FACTS

Throughout the actual trial, Mrs. Tyra was *pro se* and counsel represented Mr. Tyra. After trial and before appeal, two separate attorneys represented Mrs. Tyra at different times.

Pretrial, Magistrate Newberry gave each party one and one half hours to present his or her case. At Mr. Tyra's request, the magistrate allowed witnesses' direct testimony to be presented by affidavit so long as the witness was present for cross examination as a way to present the case within the time period allotted.

Plaintiff, Mr. Tyra, presented his testimony via an affidavit. Defendant, Mrs. Tyra, initially objected to the presentation of the affidavit. Once the court explained to Mrs. Tyra that she would have an opportunity to cross-examine Mr. Tyra on his statements in the affidavit, she did not place any further objections even though she was invited to do so by the magistrate.

In her objections, Mrs. Tyra did not object to the admission of the affidavit. She raised this issue for the first time on appeal. The First District Court of Appeals determined that the

procedure of a witness testifying to the accuracy of his affidavit in lieu of testifying to each and every fact was plain error as it related to pro se litigants.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I: the Court of Appeals erred and denied Appellant due process by basing its decision on facts that The Court of Appeals alleges to be true but which alleged facts The Court distorted, alleged facts that are absent from the record, and alleged facts that have been disproven by the record in the case.

The First District Court of Appeals stated that Mr. Tyra's entire case-in-chief consisted of his stating his name and address and his authentication of an affidavit drafted by his attorney. There is no direct evidence in the record to indicate who drafted the affidavit that Mr. Tyra testified was true and accurate to the best of his knowledge.

The First District Court of Appeals stated in its decision that the affidavit was provided for the first time to Mrs. Tyra at the hearing. Again, there no direct evidence in the record to indicate that this statement is true. Even if it was the first time that Mrs. Tyra saw the affidavit, the parties had filed their respective affidavits regarding property, had an opportunity to engage in the discovery process and spent approximately 6 hours in the courtroom with one another attempting to settle the case (T.p. 8/28/12, p. 9) and Mrs. Tyra was sent stipulations to correct and sign. (T.p. 3/19/13, p. 14, lines 13-20) Mrs. Tyra was aware of Mr. Tyra's views regarding the values of property and what he was seeking.

The First District Court of Appeals found that Mrs. Tyra had only five minutes to review the ten-page document. That is the amount of time that Mrs. Tyra requested and that the amount of time she was granted. (T.p. 3/19/13, p. 19, lines 20-24). Toward the end of those 5 minutes, the magistrate also asked her if she needed more time, which she apparently received. (T.p. 3/19/13, p. 20, lines 16-17)

The Court of Appeals stated that Mrs. Tyra was afforded less than one hour to cross-examine Mr. Tyra. Each party was given one and one half hours at his or her disposal in accordance with the magistrate's instructions. Mrs. Tyra utilized one-half hour of her time by being 30 minutes late for the hearing. (T.p. 3/19/13, p. 38, lines 15-23). Mr. Tyra finished his case in less than his assigned 90 minutes and Mrs. Tyra was given an extra 10 minutes without objection from Mr. Tyra. (T.p. 3/19/2013, p. 102, lines 24-25). Mrs. Tyra called Mr. Tyra in her case in chief. When she was finished examining him, she indicated that she was "good." From the context, it appeared as if she's was saying that she was good as it related to the amount of time she was given. (T.p. 3/19/13, p. 111, lines 17-20). Thereafter, Mr. Tyra took the stand in rebuttal and Mrs. Tyra was given another 2 minutes and 51 seconds to ask a few more questions. Her total amount of time was one hour 12 minutes and 51 seconds. (T.p. 3/19/13, p. 128, lines 15-23) This, of course, doesn't include the extra 30 minutes that she was assessed because she was late to court.

The First District Court of Appeals refers to Mr. Tyra's affidavit as a "lengthy and unfamiliar document." There is no direct testimony in the record to indicate that the document was unfamiliar to Mrs. Tyra. As matter fact, she had been sent stipulations and was asked to simply cross off the things that she did not agree with. (T.p. 3/19/13, p. 14, lines 13-20) Mrs. Tyra also spent an hour and a half in counsel's office discussing the case, although nothing was actually accomplished. (T.p. 3/19/13, p. 13, lines 17-23) Further, she asked several questions regarding statements made in the affidavit. (T.p. 3/19/13, pps. 22-51) She was able to scrutinize the affidavit to such an extent that she noticed a missing asset, 529 college funds that were set up for the children. (T.p. 3/19/13, p. 51, lines 19-24)

In this case, *Tyra v. Tyra*, 2014 Ohio 5732 - 2014, The First District Court of Appeals

stated as follows:

Admission of the affidavit also violated Mrs. Tyra's right to meaningful cross-examination. As an even cursory review of the transcript of the "proceeding" demonstrates, it is nearly impossible to cross-examine a witness about a document with which the examiner is unfamiliar, especially when the witness did not even prepare the document. And, of course, the rule about "leading" a witness is jettisoned when the attorney drafts the witness's testimony.

From the above, it is clear that Court of Appeals relied on the above five alleged facts in reaching its decision that the affidavit, to which Mrs. Tyra did not object and to which Mrs. Tyra filed no objection, was plain error. It is patently unfair and denial of due process for a Court of Appeals to distort the record in the case and make its decision based on those distortions. Such a violation of fundamental fairness is a denial of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

In *In re F.M.*, 2009-Ohio-6317, 93255, Court of Appeals of Ohio, Eighth District, Cuyahoga County (December 3, 2009) and in *K. Ronald Bailey & Associates Co. L.P.A. v. Jeremy*, 2014-Ohio-3273, E-12-081, Court of Appeals of Ohio (July 25, 2014), appellate courts found that the trial courts had made substantive errors. Those Courts of Appeals either corrected the factually incorrect "findings" and the ultimate decision or remanded the matter to the trial court so the trial court could make its own corrections. These are examples of actual plain error and the appellate courts took appropriate corrective action. Mr. Tyra asks this court to correct the misstatements of fact made by The First District Court of Appeals and make the appropriate decision or remand the matter for reconsideration.

PROPOSITION OF LAW II: The First District Court of Appeals erred in determining that Mr. Tyra's affidavit violated the most basic requirement for an affidavit by failing to state that it was made based on the personal knowledge of the affiant.

In *Tyra v. Tyra*, *supra*, The First District Court of Appeals stated as follows:

{¶13} Mr. Tyra's affidavit failed even to comport with the standards for admission of an affidavit in those instances where affidavits *are* properly considered. Rather, it violated the most basic requirement for an affidavit: it failed to state that it was made based on the personal knowledge of the affiant. *See* Civ.R. 56(E); *First Place Bank v. Adkins*, 6th Dist. Lucas No. L-12-1095, 2012-Ohio-5987, ¶ 13.

Civ.R. 56(E) refers to affidavits used in summary judgments. This case did not involve a summary judgment; it involved a property trial in a domestic relations case. If The Court of Appeals decision in *Tyra v. Tyra*, *supra*, is allowed to stand, the standard domestic relations forms of most counties and the standard domestic relations forms promulgated by The Ohio Supreme Court will not be acceptable. The affirmation of The Ohio Supreme Court affidavits for domestic relations cases state as follows:

I, (print name), swear or affirm that I have read this document and, to the best of my knowledge and belief, the facts and information stated in this document are true, accurate and complete. I understand that if I do not tell the truth, I may be subject to penalties for perjury.

Domestic relations courts across the state would be greatly harmed if all affidavits had to be based on the personal knowledge of the affiant. Most litigants rely on hearsay when they testify as to the amount of money they have in the bank. They do not actually go to the bank and count the money in their account. It is common for domestic relations attorneys to refrain from objecting to documents that convey values of bank accounts, pension plans, cars, homes and other such assets. This is so for three reasons. First, if an attorney objects to the other party introducing such documents, that attorney can be certain that the other party will object to his or her documents. Secondly, it would be virtually impossible for poor or even middle-class citizens to obtain a contested divorce if everything had to be proven by expert witnesses: it would simply be too expensive. Third, it is permissible for owners of property to testify as to the value of their own property. *Okos v. Okos* (2000), 137 Ohio App.3d 563. Many owners rely on documents that

they receive in the mail or online to determine the value of most everything that they have. As demonstrated in the trial transcript, Mr. Tyra submitted such backup documents for some of the items in the affidavit that Mrs. Tyra questioned. (T.p. 3/19/13, p. 53, line 11 to p. 54, line 22) Further, the magistrate prompted Mrs. Tyra to object to any portion of the affidavit that she thought was improper when Mr. Tyra offered the affidavit into evidence through counsel (T.p. 3/19/13, p. 81, line 1 to p. 83 line 25) Mrs. Tyra did not object.

PROPOSITION OF LAW III: The First District Court of Appeals erred in defining “Hearsay” as a statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C).

In *Tyra v. Tyra*, supra, The First District Court of Appeals states as follows:

“Hearsay” is a statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Under this definition, it is clear that Mr. Tyra’s affidavit, admitted at the hearing as his initial direct examination, constituted hearsay. The question that remains, therefore, is whether its admission rose to the level of plain error.

The First District Court of Appeals misstates Ev.R 801 (C). If the above were the true definition of hearsay evidence, almost no testimony would be admissible at trial. Most all statements made under oath at trial are offered into evidence to prove the truth of the matter asserted. Ev.R 801 (C) actually says:

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter.

Mr. Tyra was the declarant when he testified that the affidavit is true and accurate to the best of his knowledge. Mr. Tyra was also available for cross examination. Therefore, his testimony was not hearsay.

PROPOSITION OF LAW IV: The First District Court of Appeals erred by declaring that that the admission of Mr. Tyra’s affidavit was plain error.

In the case at hand, Mr. Tyra is the declarant and he is testifying at trial. Therefore, his statement that his affidavit is true and accurate to the best of his knowledge is not hearsay. The First District Court of Appeals suggests that the contents of the affidavit were written by Mr. Tyra's attorney and, for that reason, hearsay is involved. There is nothing in the record to indicate who wrote the affidavit. There are many possible scenarios. Mr. Tyra could have written the affidavit, himself. Mr. Tyra may have written down the facts and an attorney may have put his statements into an affidavit form and/or made certain changes in sentence structure and grammar. Mr. Tyra and an attorney may have collaborated in the writing of the affidavit. In any event, the actual facts had to come from Mr. Tyra. There is no other way that an attorney would be able to know what the facts were unless they were made up out of whole cloth. If they were made up of whole cloth, the attorney should clearly be reported to a grievance committee. And, surely, Mrs. Tyra would have noticed such problems and would have complained to the court and/or objected.

One may believe that the affidavit was prepared by someone else because one of the first questions asked of Mr. Tyra was "Did you read that document?" (T.p. 3/19/13, p. 21). However, it is equally reasonable to believe that this question was asked to make certain that Mr. Tyra's statements had been properly transcribed. It is no different than court reporters giving advance copies of their transcripts to the litigants to make certain that the court reporter made no errors in transcribing the testimony.

As was noted by Judge Patrick Dinkelacker in his *Tyra* dissent,

In the context of criminal proceedings, the Ohio Supreme Court has held that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend

or explain it." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 113.

In *State v. Lang*, supra, Lang was sentenced to death for murder. During the trial, expert witness Michelle Foster's DNA testimony suggested that Lang was the source of certain DNA even though she could not testify that he was the source "to a reasonable degree of scientific certainty." The admission of Ms. Foster's testimony suggesting that Lang was the source the DNA under these circumstances was not in accordance with Evid.R. 702(C). However, Lang failed to object to the DNA evidence at trial, raising the issue of its admissibility for the first time on appeal. The Ohio Supreme Court found that the DNA testimony did not result in plain error. In supporting its decision, the Ohio Supreme Court noted that Lang failed to object and failed to offer evidence challenging the DNA. In the case at bar, Mrs. Tyra also failed to object and also failed to offer evidence challenging the value of the parties' property and other statements made in Mr. Tyra's affidavit relative to property, the only issues which are on appeal. If generally inadmissible evidence is allowed to stand in a murder trial where there was no objection and no evidence offered to challenge the objectionable testimony, surely it should be allowed to stand in a domestic relations property division trial. After all, The Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15.

Finally, the affidavit had 34 statements regarding property values, debts and payments Mr. Tyra made. These statements are all admissible pursuant to *Okos v. Okos* (2000), 137 Ohio App.3d 563. Eight statements involved family history, such as birth dates, a marriage date and a separation date. These statements are included in the required filings made by the parties during the process of their divorce. Approximately 25 of the statements in the affidavit related to Mr.

Tyra's views of his interactions with Julie and other information regarding his beliefs about Julie. If Julie had disagreed with any of these above items, she had every opportunity to do so. She was not restricted in her cross examination at all.

Some of the statements in the affidavit regarded Mr. Tyra's requests of the court. For example, he asked the court to find that "during the marriage" be defined as being from as being from November 30, 2002, to July 8, 2011. Mr. Tyra asked the court to order Mrs. Tyra to return his business cards. He asked the court to order that Mrs. Tyra keep the marital residence in good, sellable condition and to get his name off the mortgage within six months. Mr. Tyra also asked that Mrs. Tyra be ordered to pay the court costs, that Mrs. Tyra be ordered to pay a portion of his attorney fees, that each party pay his or her own individual tax liabilities and/or receive our own individual tax refunds for 2012 and thereafter. Finally, Mr. Tyra stated in his affidavit how he wanted the property divided. Again, Mrs. Tyra was free to cross examine Mr. Tyra on any of these matters and, if she had wished, she could have testified herself regarding those same matters. Of course, she had also been given the opportunity to submit an affidavit of her own if she had so desired. The magistrate also gave both parties an opportunity to submit closing arguments and, in those closing arguments, Mrs. Tyra had an opportunity to address her desires regarding property division.

PROPOSITION OF LAW V: The First District Court of Appeals erred by suggesting that a different standard for plain error when litigants appear with an attorney as opposed to when litigants appear pro se.

In the *Tyra* case, The First District Court of Appeals stated that:

{¶16} ...And while pro se litigants are generally held to the same standards as parties represented by counsel, that presumes a judicial process where the rules are assiduously followed. It seems patently unfair to hold Mrs. Tyra to a higher standard than the judicial officers entrusted with ensuring she received a fair trial.

By its above statement, The First District Court of Appeals suggests that pro se litigants should not be bound by the same rules and procedures as those litigants who retain counsel. The First District Court of Appeals suggests that this equality should only exist if the rules of the judicial process “are assiduously followed.” Pro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel. *First Resolution Invest. Corp. v. Coffey*, 2007-Ohio-6827. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. *Arkwright Mut. Ins. Co. v. Toler*, 1st Dist. Hamilton No. C-020589, 2003-Ohio-2202, ¶ 10.

Mrs. Tyra did not properly preserve any of the alleged errors of which she now complains. Mrs. Tyra objected only once because she believed that she would not have an opportunity to cross examine the witness. (T.p. 3/19/13, p. 18, lines 15-23) After it was explained to Mrs. Tyra that she would have an opportunity to cross-examine the witness, she did not place any further objections. Mrs. Tyra must accept the result of her own mistake.

In reversing the trial court’s decision, The First District Court of Appeals is indicating that the magistrate who heard this case did not assiduously follow the rules of a judicial process. This contention is incorrect. The magistrate conducted the hearing, not with a sense of judicial activism, but in a fair-minded fashion. He listened to the testimony and objections. He ruled on the objections that were presented, nothing more and nothing less. That is in accordance with the rules of judicial process. Mrs. Tyra knew that she could object and she knew how to object. (T.p. 3/19/2013, p 18). She simply chose not to object once it was explained that she could cross examine Mr. Tyra. (T.p. 3/19/13, p. 81, line 1 through p. 83, line 25)

Mrs. Tyra was represented by two different attorneys at two different times during the

time that objections could have been filed. She fired the first attorney. The second attorney filed an appearance and filed a supplemental objection long after she filed her appearance. She subsequently withdrew that supplemental objections. The trial judge assiduously adhered to the rules of judicial process. He ruled on the objections filed and still standing, nothing more and nothing less. Both the trial magistrate and the trial judge assiduously followed the judicial process. It is inappropriate for The First District Court of Appeals to overrule its own previous decisions, ignore the rulings of every other District Court of Appeals and fashion distinct rules for a finding of plain error, one for litigants represented by counsel and another, more lenient rule, for pro se litigants.

CONCLUSION

Appellant states that this case involves substantial constitutional questions and questions of great general or public interest. Appellant Nugent Tyra respectfully requests that this Court accept jurisdiction to hear this matter.

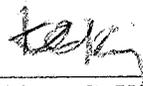
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon Jeffrey M. Rollman, Attorney for Defendant/Appellee, by regular US mail, by mailing a copy to his office at 5740 Gateway Blvd., Suite 202, Mason, OH 45040. this 22nd day of January, 2015.



Kathleen C. King, #0032257

Appendix

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

NUGENT TYRA,	:	APPEAL NO. C-140211
	:	TRIAL NO. DR-1101775
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
JULIE TYRA,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas, Domestic Relations
Division

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 26, 2014

*The Farrish Law Firm and Kathy C. King, for Plaintiff-Appellee,
Rollman & Handorf, LLC, and Jeffrey M. Rollman, for Defendant-Appellant.*

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} In three assignments of error, defendant-appellant Julie Tyra (hereafter, “Mrs. Tyra”) appeals the trial court’s decree of divorce entered in this case. In the proceeding below, a trial was conducted wherein affidavits completely replaced direct testimony. We conclude that the procedures employed seriously affected the basic fairness and the legitimacy of the judicial process, and by so doing amounted to plain error. As a result, we reverse the judgment of the trial court.

**Protracted Litigation Concludes
in Limited Property Trial**

{¶2} Mrs. Tyra and Nugent Tyra (hereafter, “Mr. Tyra”) were married on November 30, 2002. The couple had three children, who have lived primarily with Mrs. Tyra since the couple separated in 2011. By the time the parties reached the final pretrial hearing on February 12, 2013, only issues relating to the property division remained pending. Also, by the time of the final pretrial hearing, Mrs. Tyra was proceeding pro se.

{¶3} At the pretrial hearing, the magistrate informed the parties that each side would have 90 minutes to present evidence. At that point, counsel for Mr. Tyra suggested that the parties be allowed to submit their initial round of direct examination by way of affidavit to “speed things up.” Mrs. Tyra did not object at the time.

{¶4} Mrs. Tyra did object to the procedure prior to the commencement of trial, and asked, “How am I supposed to cross examine a piece of paper.” The magistrate replied that she had the witness in front of her.

{¶5} Mr. Tyra’s entire case-in-chief consisted of his stating his name and address and his authentication of an affidavit drafted by his attorney. The affidavit

was provided for the first time to Mrs. Tyra at the hearing, and she was permitted just five minutes to review the ten-page document. Mrs. Tyra was then afforded less than one hour to cross-examine Mr. Tyra about the lengthy and unfamiliar document.

{¶6} There was no indication at the hearing that Mr. Tyra had prepared the document. His attorney asked him only if he “had read” the document. And a review of its contents makes abundantly clear that it was written by a lawyer, not by Mr. Tyra.

{¶7} At the conclusion of the hearing, the magistrate took the matter under submission and later issued a decision. While both parties filed objections to the decision of the magistrate, Mrs. Tyra did not object to the use of Mr. Tyra’s affidavit at the hearing. After ruling on the objections, the trial court issued a decree of divorce.

**Admission of Affidavit Testimony
was Plain Error**

{¶8} In her first assignment of error, Mrs. Tyra claims that it was plain error for the trial court to admit Mr. Tyra’s affidavit at the final hearing on the property division. Specifically, she contends that the affidavit constituted inadmissible hearsay. We agree.

{¶9} “Hearsay” is a statement offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Under this definition, it is clear that Mr. Tyra’s affidavit, admitted at the hearing as his initial direct examination, constituted hearsay. The question that remains, therefore, is whether its admission rose to the level of plain error.

{¶10} Generally speaking, the failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal. See *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 436-437, 659 N.E.2d 1232 (1996). In 1997, the Supreme Court of Ohio recognized the limited possibility for plain error in the civil context, but the court cautioned that

the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss v. Davidson, 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099 (1997).

{¶11} Despite this undeniably stringent standard, Mrs. Tyra is entitled to appellate review in this case. As the dissent acknowledges, the admission of the affidavit patently violated the hearsay rule. Moreover, the wholesale admission of what was unquestionably inadmissible evidence *did* impugn the fairness, integrity, and public reputation of the judicial process. The trial court, in permitting the witness simply to ratify the contents of an affidavit that had been prepared before trial, abdicated its function of ensuring that only competent evidence be admitted.

{¶12} But the violence done to the fundamental rules of trial procedure did not stop there. Admission of the affidavit also violated Mrs. Tyra's right to meaningful cross-examination. As an even cursory review of the transcript of the "proceeding" demonstrates, it is nearly impossible to cross-examine a witness about a document with which the examiner is unfamiliar, especially when the witness did

not even prepare the document. And, of course, the rule about “leading” a witness is jettisoned when the attorney drafts the witness’s testimony.

{¶13} In the context of motion proceedings, courts have often condemned the use of competing affidavits to decide cases on their merits. *See, e.g., Wiley v. Cleveland*, 8th Dist. Cuyahoga No. 62543, 1993 Ohio App. LEXIS 2628 (May 20, 1993) (trial court’s attempt to conduct trial by affidavit in summary-judgment proceedings called “unacceptable”); *Gluck Ins. Agency v. Schuler*, 7th Dist. Mahoning No. 90 C.A. 110, 1991 Ohio App. LEXIS 3240 (July 3, 1991) (trial court should not conduct a “little trial” by affidavits in deciding a summary-judgment motion); *O’Hearn v. Riegert*, 12th Dist. Butler No. CA86-01-005, 1986 Ohio App. LEXIS 9222 (Nov. 24, 1986) (questioning the trial court’s ability to weigh conflicting affidavits in Civ.R. 60(B) proceedings). The courts in these cases have explicitly recognized the inherent deficiencies in the use of affidavits to resolve issues of credibility.

{¶14} To make matters worse, Mr. Tyra’s affidavit failed even to comport with the standards for admission of an affidavit in those instances where affidavits *are* properly considered. Rather, it violated the most basic requirement for an affidavit: it failed to state that it was made based on the personal knowledge of the affiant. *See* Civ.R. 56(E); *First Place Bank v. Adkins*, 6th Dist. Lucas No. L-12-1095, 2012-Ohio-5987, ¶ 13.

{¶15} The dissent notes that it can find no authority for the proposition that the admission of an affidavit as evidence in a trial setting, during which the affiant is present and subject to cross-examination, would amount to plain error. But this absence of authority should not be construed as approval of the procedure. Rather, it is almost certainly the novelty of the magistrate’s approach that accounts for the

dearth of analogous precedent. As the magistrate himself stated when he ordered the trial by affidavit, “[i]n 31 years I’ve never had that happen * * *.” Far more telling than the lack of authority condemning the practice employed here is the complete lack of any authority authorizing such a departure from the rules of procedure.

{¶16} The dissent suggests that the evident unfairness of the trial was due not to the procedures employed, but to Mrs. Tyra’s lack of diligence in asserting her rights. And while pro se litigants are generally held to the same standards as parties represented by counsel, that presumes a judicial process where the rules are assiduously followed. It seems patently unfair to hold Mrs. Tyra to a higher standard than the judicial officers entrusted with ensuring she received a fair trial.

{¶17} Mrs. Tyra was entitled to a fair trial. What she received was neither fair, nor a trial. We sustain Mrs. Tyra’s first assignment of error.

Remaining Claims Moot

{¶18} In her second assignment of error, Mrs. Tyra contends that it was plain error for the magistrate to hear the merits of the case because he was “involved” in mediation of the case. In her third assignment of error, Mrs. Tyra argues that it was plain error for the trial court to place time limitations on the presentation of evidence for both parties. In light of our disposition of the first assignment of error, these remaining assignments are moot, and we decline to address them.

Conclusion

{¶19} Because the use of an affidavit in lieu of direct testimony at the hearing of this case was plain error, we reverse the decision of the trial court and remand the cause for a new hearing consistent with this opinion.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., concurs.
DINKELACKER, J., dissents.

DINKELACKER, J., dissenting.

{¶20} While this court has not specifically addressed the issue of whether the admission of hearsay can constitute plain error, we have held that the trial court's consideration of evidence not properly before it does not constitute plain error. *Midland Funding LLC v. Farrell*, 1st Dist. Hamilton No. C-120674, 2013 Ohio App. LEXIS 3291 (July 24, 2013). In an action on an account, this court held that a party could not argue for the first time on appeal that the documents constituting the account had not been properly authenticated. *Id.*

{¶21} I have found no authority for the proposition that the admission of an affidavit as evidence in a hearing, during which the affiant is present and subject to cross-examination as to its contents, amounts to plain error. And I simply cannot conclude that the admission of Mr. Tyra's affidavit, when he was present and cross-examined by Mrs. Tyra, challenged the "legitimacy of the underlying judicial process itself." In the context of criminal proceedings, the Ohio Supreme Court has held that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. * * * The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954

N.E.2d 596, ¶ 113. If the availability of the declarant for cross-examination satisfies the constitutional safeguards enshrined in the Confrontation Clause, it is safe to conclude that such a situation would not rise to the level of plain error in a divorce proceeding.

{¶22} The reason that plain error is so rarely recognized in the context of civil litigation is that parties should be required to safeguard their own interests at trial. If there is a problem with how the case is being managed, the aggrieved party's first and best opportunity to address the issue is at the time of its occurrence. This allows the trial court to correct its course when such correction can be most effective.

{¶23} In this case, Mrs. Tyra was told on February 12, 2013, that the parties would be allowed to submit their direct examinations by way of affidavit at the March 19, 2013 hearing. She could have objected to the procedure at that time and given the magistrate the opportunity to adjust. She did not. She did not argue this point to the trial court, which could have reset the matter at the savings of considerable judicial resources. Instead, she waited until after the final decision of the trial court and raised the issue for the first time in this court. The use of an affidavit in this case did not amount to plain error. I dissent.

Please note:

The court has recorded its own entry on the date of the release of this opinion.