

IN THE SUPREME COURT OF OHIO

Barbara Andersen, et al.,)	CASE NO. 2015-0393
)	
Relators,)	
vs.)	
)	
The City of Cleveland,)	RESPONDENT'S MOTION
)	TO DISMISS RELATORS'
Respondent.)	ORIGINAL ACTION AND
)	COMPLAINT
)	

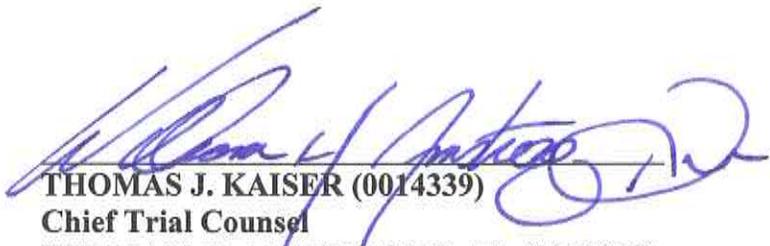
**RESPONDENT'S MOTION TO DISMISS RELATORS' ORIGINAL ACTION
AND COMPLAINT**

The City of Cleveland, by and through counsel, hereby moves this honorable Court to dismiss the Relators' Original Action and Complaint and deny all claims for relief. Relators' Original Action and Complaint lack subject matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. The grounds for Respondent's Motion are more fully set forth in the attached Memorandum in Support, which is hereby incorporated by reference.

Respectfully submitted,

BARBARA LANGHENRY (0038838)
Director of Law

By:



THOMAS J. KAISER (0014339)
Chief Trial Counsel
WILLIAM H. ARMSTRONG, JR. (0059919)
Assistant Director of Law
Room 106—City Hall
601 Lakeside Avenue E.
Cleveland, Ohio 44114-1077
(216) 664-3584
(216) 420-8291 Fax
warmstrong@city.cleveland.oh.us

Counsel for Respondent
City of Cleveland

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of Respondent's Motion to Dismiss Relators' Original Action and Complaint was served via U.S. Mail and the Clerk of Court's e-filing system on May 4, 2015 to:

Barbara Andersen
3802 Bosworth Rd.
Cleveland, Ohio 44111

Relator (Pro se)

Michael McCarthy
3802 Bosworth Rd.
Cleveland, Ohio 44111

Relator (Pro se)



William H. Armstrong, Jr.
Counsel for Respondent
City of Cleveland

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT OF FACTS

This case comes before the Court on an original action by Relators Barbara Andersen and Michael McCarthy (the “Relators”), against the City of Cleveland (the “City”) “for its abdication of building and housing code enforcement and its false prosecution and conviction concerning proper site grading and easement use.” Relators’ Original Action and Complaint at 0.

Relators’ complaint, styled as an original action, actually arises out of a 2013 Eighth District decision. The City of Cleveland moves this honorable Court to take judicial notice of the filings and opinions in the Eighth Appellate District case of *City of Cleveland v. Andersen*, 8th Dist. Cuyahoga No. CA 13 99688, 2013-Ohio-4710 as detailed below. See *City of Cleveland v. Andersen*, 8th Dist. Cuyahoga No. CA 13 99688, 2013-Ohio-4710, attached as Attachment A. The case was heard on appeal from *City of Cleveland v. Andersen*, 2012 CRB 18789. The City also requests that the Court take judicial notice of *Cleveland v. McCarthy*, 197 Ohio App.3d 616, 2011-Ohio-6753 (8th Dist. 2011), Attachment B, on appeal from *Cleveland v. McCarthy* 2009 CRB 010462, as many of the same arguments were raised in that case as well and it was cited in the Complaint. The Court has acknowledged the need for a court, on occasion, to take judicial notice of undisputed facts. *Brown v. City of Cleveland*, 66 Ohio St. 2d 93, 98, 420 N.E.2d 103, 107 (1981). This includes judicial notice of a document filed in another court ‘not for the truth of the matters asserted in other litigation, but rather to establish the fact of such litigation and related filings. *State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 236, 2007-Ohio-6057, 877 N.E.2d 968 (citing *Kramer v. Time Warner, Inc.* (C.A.2,

1991), 937 F.2d 767, 774). Furthermore, although it is true that determination upon a motion to dismiss cannot rely on allegations or evidence outside the complaint, courts are free to consider memoranda, briefs, and oral arguments on legal issues through judicial notice in determining whether a complaint should be dismissed, and this material is not considered to constitute matters outside the pleadings that would necessitate a summary-judgment determination. See *Scott v. Cleveland*, 112 Ohio St. 3d 324, 328, 2006-Ohio-6573, 859 N.E.2d 923 (internal citations omitted) A court can take judicial notice of prior proceedings for the purposes of determining questions of subject matter jurisdiction and res judicata. *Hundley v. Vectren Energy Delivery Of Ohio, Inc.*, 2nd Dist. Montgomery No. 19870, 2003-Ohio-6237. In the instant case, the City of Cleveland asks the Court only to take judicial notice of documents cited to in the Relators' Original Action and Complaint.

Relator Barbara Andersen ("Andersen") owns the property located at 3802 Bosworth Road Cleveland, Ohio. Relators' Original Action and Complaint at 1. On January 11, 2012, the City inspected the property at 3802 Bosworth Road and found excavated land which compromised the neighbor's fence. See Amended Brief of Appellee City of Cleveland at pg. 2, attached as Attachment C. The Department of Building and Housing issued a violation notice on January 12, 2012. See *Id.* The violation notice was subsequently appealed to the Board of Building Standards. See *Id.* After hearing the matter, the Board of Building Standards denied Andersen's appeal on February 15, 2012. See *Id.*

On January 29, 2013 the case was brought to trial before the Cleveland Municipal Housing Court. See *Id.* On February 26, 2013, the court issued a Judgment Entry, (See

Id.) that stated that the City had met its burden on four (4) counts. See *Id.* at pg. 3-4. See *Id.* at pg. 4. Andersen filed a Notice of Appeal from the decision on March 21, 2013. The Eighth District affirmed the municipal court on October 24, 2013. See exhibit A. Under Appellate Rule 4, the right of appeal to the Ohio Supreme Court extinguished December 9, 2013. S.Ct.Prac.R. 6.01(A)(1); S.Ct.Prac.R.6.01(A)(3).

II. LAW AND ARGUMENT

A. The Relators' Complaint fails for lack of subject matter jurisdiction and therefore must be dismissed with all claims for relief denied.

Under Section 2(B)(1), Article IV of the Ohio Constitution, the Court has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so admitted. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 450, 2011-Ohio-4101, 953 N.E.2d 329. Neither the Rules of Civil Procedure nor statutes can expand the Supreme Court's original jurisdiction and require it to hear an action not authorized by the Ohio Constitution. *State ex rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St. 2d 120, 63 Ohio Op. 2d 199, 296 N.E.2d 544 (1973).

The instant original action does not fall into one of the explicitly stated categories in Article IV. Furthermore, the instant case does not qualify as a "cause for review." Thus, the Court is without original jurisdiction and should dismiss the Relators' Original Action and Complaint and deny all claims for relief. See *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 133 Ohio St. 3d 561, 565, 2012-Ohio-4837, 979 N.E.2d 1193, (finding that the Court did not have original jurisdiction over claims for declaratory

judgment; see also *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 3, 640 N.E.2d 1136, (finding that the Court did not have original jurisdiction in prohibitory injunction).

B. The Relators' Complaint should be dismissed for failure to attach an affidavit specifying the details of the claim.

The Relator's Original Action and Complaint fails to comply with Supreme Court Rule of Practice 12.02 (B)(1) and therefore should be dismissed with prejudice and all claims for relief should be denied.

The Supreme Court Rules of Practice govern the procedure and form of documents in all original actions before the Court. See S.Ct.Prac.R. 12.01 (A)(2)(a). Therefore, any and all of the Court's Rules are binding on the parties to this original action. Under S.Ct.Prac.R. 12.02 (B)(1), "[a]ll complaints * * * shall be supported by an affidavit specifying the details of the claim, and may be accompanied by a memorandum in support of the writ." (emphasis added).

The only case interpreting this rule is inapplicable to the instant case because in that case affidavits were filed with the complaint, *State ex rel. Commt. for Charter Amendment Petition v. Maple Hts.*, 140 Ohio St. 3d 334, 337, 2014-Ohio-4097, (reviewing whether the affidavits were made with personal knowledge). Ample case law exists interpreting the rule under its identical predecessor. Effective June 1, 1994, S.Ct.Prac.R. (X)(4)(B) was renumbered. The language in S.Ct.Prac.R. 12.02 (B) was retained in its entirety. The only change to the Section was its numbering. Failure to comply with S.Ct. Prac.R. X(4)(B), and through S.Ct.Prac.R. 12.02 (B) as renumbered, warrants dismissal of the original action. See *State ex rel. Evans v. Blackwell*, 111 Ohio St. 3d 437, 442, 2006-Ohio-5439, 857 N.E.2d 88. In fact, the Supreme Court has "routinely dismissed original actions, other than habeas corpus, that were not supported

by an affidavit expressly stating that the facts in the complaint were based on the affiant's personal knowledge." *Id* at 443 (citing *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050; *State ex rel. Tobin v. Hoppel*, 96 Ohio St.3d 1478, 2002-Ohio-4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St.3d 324, 750 N.E.2d 167). In the instant case, no affidavit was filed at all.

Furthermore, Relators' pro se status before the Court does not save the Relators from dismissal with prejudice. In an original action, such as the instant case, "pro se litigants * * are held to the same standard as litigants who are represented by counsel." *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas*, 123 Ohio St. 3d 124, 124, 2009-Ohio-4688, 914 N.E.2d 402 (quoting *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, 800 N.E.2d 25; *Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (2001).

Therefore, due to the Relators' failure to comply with S.Ct.Prac.R. 12.02 (B)(1), Relators' Original Action and Complaint should be dismissed with prejudice and all requests for relief should be denied.

C. The Relator's Original Action and Complaint is barred under the doctrine of res judicata.

Res judicata bars Relators' Original Action and Complaint through issue and claim preclusion. The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). See *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226, 228; see also *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 254 N.E.2d 10; *Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062 (1989); 46 American Jurisprudence 2d (1994) 780, Judgments, Section 516. "A final

judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.” *Norwood v. McDonald*, 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67 (1943), paragraph one of the syllabus. The parties are co-owners of the home and therefore are in privity. Privity is also found through the two underlying suits. Furthermore, “[i]t has long been the law of Ohio that ‘an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit’.” *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 443 N.E.2d 978, 986 (1983) (quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388 (1986)) (“We also declared that ‘[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.’”).

Through Relators’ own admissions, many of the issues brought forth in the Original Action and Complaint are barred by res judicata. Issue preclusion bars each of the claims that were already litigated. These barred claims include: resolution of the matters with the City of Cleveland, Municipal Housing Court and Eighth District Appeals Court, See Relators’ Original Action and Complaint at pg. 1; issues regarding improper site grading, *Id*; misrepresentations of the law, regulations and physical facts, *Id*. at 6; and willful ignorance and negligence of proper application of City codes, *Id*. at 8. All other issues, including but not limited to allegations of false prosecution and conviction, *Id* at 0; the failure to dispatch a credible assessor, *Id* at 9; impropriety of influence, *Id* at 13; and due process considerations regarding a fair hearing, *Id* at 30, are barred by claim

preclusion, as they could have and should have been raised in the appropriate actions before the previous courts.

Relators' Original Action and Complaint requests a fair hearing and uniform enforcement and application of law and regulation in its ad damnum clause. See *Id.* at 30. These issues, as well as the underlying claims referenced above, were brought before the Eighth District in 2013. If, however, Relators had any disagreement with the decision of the Eighth District, their only recourse was through timely appeal to this Court prior to December 9, 2013. "To perfect an appeal or right [sic], the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed." S.Ct.Prac.R. 6.01 (A)(1). "The time period designated in this rule for filing a notice of appeal is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal* * *." S.Ct.Prac.R. 6.01 (A)(3).

Furthermore, the Respondents did not file 2506 administrative appeals of the Board of Building Standards and Appeals decisions. Consequently, they did not exhaust their administrative remedies. A party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court.

Noernberg v. Brook Park, 63 Ohio St.2d 26, 29, 406 N.E.2d 1095 (1980), citing *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 96 N.E.2d 414 (1951). Therefore, all claims are barred by res judicata or are otherwise time-barred and this honorable Court is without jurisdiction to hear the claims.

III. CONCLUSION

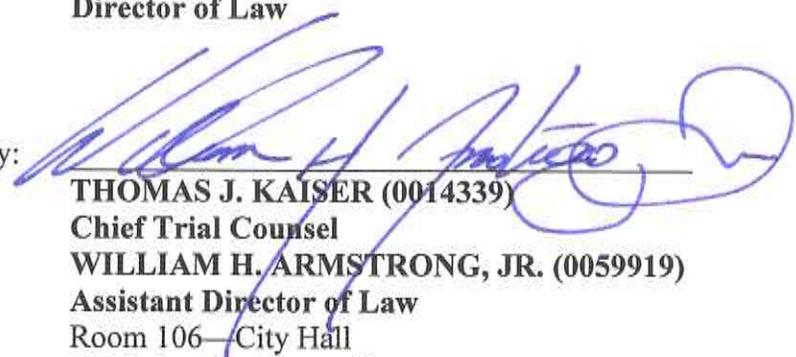
Relators' Original Action and Complaint lack subject matter jurisdiction, fail to comply with the Supreme Court Rules of Practice, and are barred under the doctrine of res judicata. Consequently, the Relators' Original Action and Complaint should be dismissed with prejudice and all requests for relief should be denied.

WHEREFORE, the City of Cleveland respectfully moves this Honorable Court for an Order dismissing the Relators' Original Action and Complaint, with prejudice, together with such other and further relief that are just and proper.

Respectfully submitted,

BARBARA A. LANGHENRY (0038838)
Director of Law

By:



THOMAS J. KAISER (0014339)
Chief Trial Counsel
WILLIAM H. ARMSTRONG, JR. (0059919)
Assistant Director of Law
Room 106—City Hall
601 Lakeside Avenue E.
Cleveland, Ohio 44114-1077
(216) 664-3584
(216) 420-8291 Fax
warmstrong@city.cleveland.oh.us

Counsel for Respondent
City of Cleveland

CERTIFICATE OF SERVICE

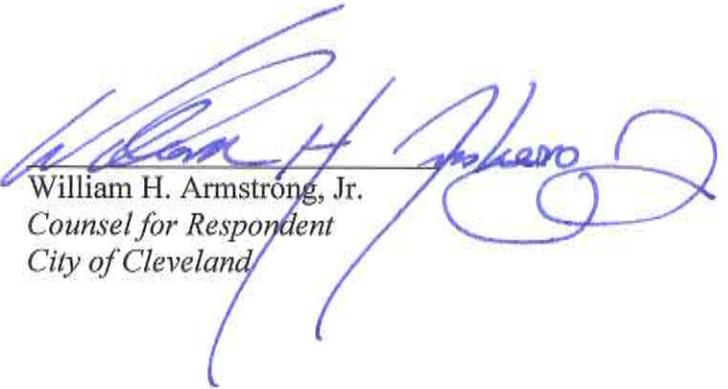
I certify that a true and accurate copy of Respondent's Motion to Dismiss Relators' Original Action and Complaint was served via U.S. Mail and the Clerk of Court's e-filing system on May 7, 2015 to:

Barbara Andersen
3802 Bosworth Rd.
Cleveland, Ohio 44111

Relator (Pro se)

Michael McCarthy
3802 Bosworth Rd.
Cleveland, Ohio 44111

Relator (Pro se)



William H. Armstrong, Jr.
*Counsel for Respondent
City of Cleveland*

COUNTY OF CUYAHOGA)
STATE OF OHIO)

:SS

AFFIDAVIT

I, William H. Armstrong, Jr., in the capacity of Assistant Director of Law and as attorney for the Respondents, make this affidavit and being first duly sworn state as follows:

1. Attachment 1 is an accurate and complete copy of the Journal Entry and Judgment of the Eighth Appellate District Court of Appeals, Cuyahoga County, for Case CA -13- 99688.
2. Attachment 2 is an accurate and complete copy of the Journal Entry and Judgment of the Eighth Appellate District Court of Appeals, Cuyahoga County, for Case CA -11- 96004.
3. Attachment 3 is an accurate and complete copy of the Amended Brief of Appellee City of Cleveland for for Case CA -13- 99688.

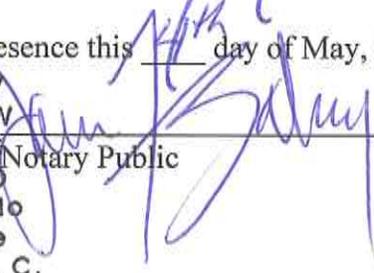
FURTHER, AFFIANT SAYETH NAUGHT.


WILLIAM H. ARMSTRONG, JR.

Sworn to before me and subscribed in my presence this 4th day of May, 2015.



JAMES F. SABREY
ATTORNEY AT LAW
NOTARY PUBLIC
STATE OF OHIO
My Comm. Has No
Expiration Date
Section 147.03 R. C.


Notary Public

[Cite as *Cleveland v. Anderson*, 2013-Ohio-4710.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99688

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

BARBARA ANDERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Housing Court
Case No. 2012 CRB 018789

BEFORE: Celebrezze, P.J., S. Gallagher, J., and Rocco, J.

RELEASED AND JOURNALIZED: October 24, 2013

FOR APPELLANT

Barbara Anderson, pro se
3802 Bosworth Road
Cleveland, Ohio 44111

ATTORNEYS FOR APPELLEE

Barbara A. Langhenry
Law Director
Katherine S. Zvomuya
Assistant Director of Law
City of Cleveland
Department of Law
601 Lakeside Avenue
Room 106
Cleveland, Ohio 44114-1077

FRANK D. CELEBREZZE, JR., P.J.:

{¶1} Defendant-appellant, Barbara Anderson, appeals the judgment of the Cleveland Municipal Housing Court finding her to be in violation of numerous Cleveland Codified Ordinances. After a careful review of the record and case law, we affirm the judgment of the lower court.

I. Factual and Procedural History

{¶2} Appellant owns the property located at 3802 Bosworth Road, Cleveland, Ohio. On January 11, 2012, Cleveland building inspector Rhonda Derrett inspected the property and found that appellant had excavated a swale along the property line dividing the subject property from the adjacent property. The inspector found that the excavation was unsupported and was compromising the neighbor's fence. On January 12, 2012, the Department of Building and Housing issued violation notice V12001419. The violation notice was appealed to the Board of Building Standards. On February 15, 2012, the Board of Building Standards denied the appeal and remanded the matter to the Department of Building and Housing for further action. Appellant did not appeal the decision of the Board of Building Standards.

{¶3} On May 29, 2012, the city of Cleveland filed a complaint against appellant in the Cleveland Municipal Housing Court. The complaint charged appellant with failing to comply with the order of the Director of Building and Housing in violation of Cleveland Codified Ordinances ("CCO") 3103.25(e); failure to comply with a stop-work order in violation of CCO 3103.07(a); failure to obtain a permit for a retaining wall and

excavation in violation of CCO 3105.01(a); failure to keep approved plans at the work site in violation of CCO 3105.05; work not in accordance with stamped plans in violation of CCO 3105.04(a)(2); failure of person causing excavations to prevent movement of earth of adjoining properties in violation of CCO 3125.01(a)(1); failure to protect permanent excavations by permanent means where necessary to prevent the movement of the earth of adjoining properties in violation of CCO 3125.01(b)(1); and failure to provide positive drainage on excavation so as to prevent a nuisance from being created in violation of CCO 3125.01(d)(1).

{¶4} Having given appellant until February 11, 2012, to comply with the listed violations, the city charged appellant with 102 days of non-compliance, running until the city's reinspection of the property on May 24, 2012. Under CCO 3103.99(a), each day out of compliance constituted a separate offense.

{¶5} On January 29, 2013, the matter proceeded to a bench trial. On February 26, 2013, the Cleveland Municipal Housing Court issued a judgment entry and opinion. In its opinion, the trial court found that the city, by testimony and documentary evidence, demonstrated beyond a reasonable doubt, that

(1) the defendant was the owner of the property during at least the period from January 11, 2012 through May 24, 2012,

(2) the property was inspected on January 11, 2012,

(3) as of that date, the city's inspector observe a swale had been excavated along the property line dividing the subject property from the adjacent property,

(4) the swale excavation was unsupported,

- (5) the edges of the swale were eroding such that the fence posts on the adjacent property had become exposed and earth from the adjacent property was falling into the swale,
- (6) no permits had been pulled for excavation or a retaining wall,
- (7) the violation notice was sent to defendant and delivery was confirmed,
- (8) the property was reinspected on May 24, 2012,
- (9) as of that date, the swale had not been filled in,
- (10) the edges of the swale had continued to erode,
- (11) no permits had been pulled,
- (12) no retaining wall had been constructed, and
- (13) the violations had not been corrected.

{¶6} On application of these findings of fact to the charges brought against appellant, the trial court reached the following conclusions:

- (1) appellant was (a) the responsible party, (b) was ordered to correct a violation, (c) was given notice, and (d) failed to correct said violations as of reinspection on May 24, 2012, a period of 102 days;
- (2) appellant was responsible for the excavation of the swale and failed to prevent movement of the earth of adjoining properties in violation of CCO 3125.01(A)(1);
- (3) that the swale excavation was permanent and was not protected by permanent means as necessary to prevent the movement of the earth of adjoining properties in violation of CCO 3125.01(B)(1); and
- (4) appellant failed to provide positive drainage of the swale excavation and in doing so created the nuisance conditions of standing water and ongoing erosion in violation of CCO 3125.01(D)(1).

{¶7} The trial court determined that the city failed to meet its burden on the remaining charges. Having found appellant guilty on four charges over a period of 102 days each, the trial court sentenced appellant to a term of two years community control. As part of the community control sentence, appellant was required to pay a fine of \$5,000, with 10 percent due on March 26, 2013, and the remainder suspended, pending code compliance.

{¶8} Appellant now brings this timely appeal, pro se, raising one assignment of error for review:

I. Barbara Andersen was denied due process by the Court's failure to dispatch an expert/engineer to perform a Uniform Assessment or recognize the parcel in its entirety as prescribed by ORC 1515.01(H)(1) and Ohio's "Uniformity Clause" Art. 2, Sec. 26. As a result, the Court placed undue weight on the City's inspections and testimony and failed to evoke the "Reasonable Use Rule," thus violating the appellant's property rights in not allowing reasonable use of easement in its entirety and the privilege of CCO 3125.01(d)(1) positive drainage OAC 1804.3 Site Grading and rights of "Easement."

II. Law and Analysis

{¶9} In her sole assignment of error, appellant argues that the trial court denied her due process by failing to dispatch an expert engineer to perform a uniform assessment or recognize the parcel in its entirety, as prescribed by R.C. 1515.01(H)(1) and Ohio's Uniformity Clause. Appellant further asserts that "the trial court placed undue weight on the city's inspections and testimony and failed to invoke the 'Reasonable Use Rule.'"

{¶10} Initially, we note that, to the extent appellant challenges the sufficiency or weight of the evidence supporting the trial court's decision, she has failed to include the

trial transcript for our review and, in its absence, we presume the regularity of the proceeding below. *In re Guardianship of Muehrcke*, 8th Dist. Cuyahoga Nos. 85087 and 85183, 2005-Ohio-2627.

{¶11} With respect to appellant's contention that the trial court erred in failing to order a uniform assessment, as defined under R.C. 1515.01(H)(1), of the subject property and its adjacent lots, we note that Chapter 1515 relates to the powers and responsibilities of Ohio's Soil and Water Conservation Commissions, and therefore is inapplicable to the instant matter. Under the circumstances presented in this case, the trial court had no obligation to order a uniform assessment of the relevant properties.

{¶12} Furthermore, to the extent appellant argues that the excavation of the swale was necessary to remedy the improper drainage of her neighbor's property, we note that this court has not been presented with any evidence to support such an allegation, nor was the neighboring property an issue before the trial court. Moreover, the condition of the neighboring property did not negate appellant's own duty to comply with the relevant provisions of the Cleveland Codified Ordinances.

{¶13} Accordingly, without addressing the reasonableness of appellant's conduct, we find no merit to appellant's contention that the "Reasonable Use Rule," as developed in *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp.*, 62 Ohio St.2d 55, 402 N.E.2d 1196 (1980), should render her conduct harmless. In our view, the doctrine is not intended to be used as a defense to criminal charges, and appellant has presented this court with no case law to hold otherwise.

{¶14} Finally, we find no merit to appellant's argument relating to her belief that she was entitled to excavate the swale based on an alleged right to an easement on the neighboring property. Appellant has presented no evidence establishing the existence of an easement, and there is no documentation in the record to support the existence of such a property right.

{¶15} Based on the foregoing, appellant's sole assignment of error is overruled.

{¶16} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Housing Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
KENNETH A. ROCCO, J., CONCUR

[Cite as *Cleveland v. McCarthy*, 197 Ohio App.3d 616, 2011-Ohio-6753.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96004

CITY OF CLEVELAND,

APPELLEE,

v.

McCARTHY,

APPELLANT.

**JUDGMENT:
VACATED AND REMANDED**

Criminal Appeal from the
Cleveland Municipal Housing Court
Case No. 2009 CRB 010462

BEFORE: Kilbane, A.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: December 29, 2011

ATTORNEYS:

Barbara Langhenry, Interim Director of Law, City of Cleveland, and Katherine S. Zvomuya, Assistant Director of Law, for appellee.

Brian R. McGraw, for appellant.

MARY EILEEN KILBANE, Administrative Judge.

{¶ 1} Defendant-appellant, Michael McCarthy, appeals his convictions for violating the housing code of plaintiff-appellee, the city of Cleveland. Finding merit to the appeal, we vacate McCarthy's convictions and remand this case for further proceedings.

{¶ 2} McCarthy and Barbara Anderson were co-owners of a house located at 3802 Bosworth Road in Cleveland, Ohio. In October 2008, the city of Cleveland Department of Building and Housing ("the board") sent McCarthy and Anderson a notice that they had violated several sections of the housing code. The violations were listed as follows: the exterior property area contains unlicensed motor vehicles (Cleveland Codified Ordinances (C.C.O.) 369.18); the exterior property area contains wrecked, dismantled, or inoperative motor vehicles (C.C.O. 369.18); the exterior masonry front steps are in need of repair and pointing (C.C.O. 369.13); the exterior step handrail is broken, deteriorated, and/or missing (C.C.O. 369.13); the exterior wall siding is loose, deteriorated, broken, and/or missing (C.C.O. 369.15); the premises shall be maintained free of any debris, material, or condition

that may create a health, accident, or fire hazard, or which is a public nuisance (C.C.O. 369.18); the garage walls and garage door are deteriorated and/or broken (C.C.O. 369.19); the exterior walls are not maintained weather resistant (C.C.O. 369.15); and the garage is in need of painting (C.C.O. 369.15).

{¶ 3} In April 2009, the city filed a complaint against Anderson for failing to rectify the violations. McCarthy's name was not listed on the complaint. In May 2009, Anderson entered a plea of no contest. Thereafter, the housing court issued numerous continuances at Anderson's request so she could remedy the violations.

{¶ 4} On April 24, 2009, which was prior to Anderson's no-contest plea, the board issued a notice of violation to McCarthy for a swale he had dug between his house and the neighbor's house and ordered him to fill in the swale.¹ McCarthy built the swale in order to prevent water from entering his property. However, the swale was too close to the neighbor's fence, which caused the fence to lean and its posts to come out of the ground. On May 28, 2009, McCarthy filed an appeal from the violation issued by the board with the City's Board of Building Standards and Building Appeals ("Building Appeals").

{¶ 5} Following a hearing, Building Appeals decided on August 19, 2009, that McCarthy could have a swale between the properties, but he was ordered to backfill the area where the swale was compromising the neighbor's fence. McCarthy also had to move the swale 12 inches from the property line. McCarthy did not appeal this order to the court of common pleas.

¹A swale is a grassy depression in the ground designed to collect storm-water runoff.

{¶ 6} On January 12, 2010, the housing court held a hearing on the violations against Anderson. Both Anderson and McCarthy attended this hearing. At the beginning of the hearing, the court asked McCarthy to identify himself. McCarthy introduced himself and stated that he was “the one doing the work on the house.” He then asked the court to be substituted as the defendant because Anderson’s work schedule made it difficult for her to appear before the court. McCarthy advised the court that his name was listed on the deed. The following exchange then took place:

COURT: Mr. McCarthy, typically how this works is if the complaint is amended then it will be amended to your name. I’ll ask you if you object? If you say no then we’ll proceed. Then I’ll ask you for your plea, and the plea would be the same as Ms. Anderson’s plea. Typically that’s what happens. Otherwise, the City won’t move to amend it to your name. So if you plead not guilty and want a trial then they won’t move to amend it. Am I outlining that right?

[CITY]: Yes, your Honor. I would not want to go back—we’ve been dealing with this case and to go back to trial—if he wants to take on the responsibility, but he does have a right to plead guilty, not guilty or no contest.

COURT: Right he does. So how would you like to proceed? Do you want to go under that basis? McCarthy, do you have any questions?

McCARTHY: No.

* * *

COURT: The City moves to amend the complaint into your name, sir. Do you object?

McCARTHY: No.

COURT: Without objection, how do you plead?

McCARTHY: I’m not exactly sure, but there are issues at the property and it needs to be fixed.

COURT: You have the choice of three pleas, guilty, not guilty or no contest?

McCARTHY: No contest.

COURT: When you enter a plea of no contest, it is not an admission of guilty, but is an admission that the violations existed; and you give up your right to a jury trial; right against self-incrimination; your right for compulsory process, and your right to have the City prove your guilt. Do you understand your rights?

McCARTHY: Yes.

COURT: And do you wish to move forward without an attorney?

McCARTHY: Yes.

{¶ 7} Following this hearing, the court held numerous other hearings to obtain a status update on McCarthy's repair of the property. At these hearings, McCarthy's main focus was that he believed the swale between his property and his neighbor's property should not have to be filled in, an issue that was not relevant to the citations to which he pled no contest. The court explained that Building Appeals had held that McCarthy could keep the swale, but he had to backfill the area around the neighbor's fence posts and move the swale 12 inches away from the property line.

{¶ 8} At the April 27, 2010 hearing, McCarthy continued to argue that his trench was not causing the neighbor's fence problems. The record indicates that McCarthy had stopped making repairs to the house and the debris had again accumulated in the yard. The court ordered him to comply and backfill the swale or be imprisoned. McCarthy had until May 11, 2010, to comply. Then the court, on its own motion, continued the matter to May 18, 2010.

{¶ 9} At the May 18, 2010 hearing, the inspector stated that when he observed the property on May 17, 2010, the garage still needed painting, piles of debris were still in the yard, there were missing bricks on the steps, the siding had not been repaired, and no backfilling of the swale had occurred. The court found that McCarthy was not in compliance, imposed a \$2,000 fine, and ordered McCarthy to serve 60 days at the Warrensville House of Corrections, 58 days of which were suspended.

{¶ 10} McCarthy now appeals, raising the following single assignment of error for review.

ASSIGNMENT OF ERROR ONE

McCarthy was denied due process by the Court's failure to arraign him and explain the nature of the charges and the possible penalties in violation of [Crim.R. 5 and 10]. As a result, the pre-plea procedure was fatally defective and resulted in McCarthy being ignorant of his basic rights.

{¶ 11} McCarthy argues that his no-contest plea was defective because the court failed to comply with Crim.R. 5 and 10. Specifically, he argues that he was not advised of (1) the nature of the charges to which he was pleading, (2) his right to have appointed counsel, (3) his right to remain silent, and (4) his right to request a jury.

{¶ 12} Crim.R. 5(A) governs initial appearances and preliminary hearings and requires the trial court to inform the defendant

(1) [o]f the nature of the charge against him; (2) [t]hat he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and pursuant to Crim.R. 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel; (3) [t]hat he need make no statement and any statement made may be used against him; (4) [o]f his right to a preliminary hearing in a felony case, when his initial appearance is not pursuant to indictment; (5) [o]f his right, where appropriate, to a jury trial.

{¶ 13} Crim.R. 10 governs arraignments and requires that when a defendant does not have counsel and is called upon to plead, the court must determine that the defendant understands his rights, including the right to counsel, the right to reasonable continuance to secure counsel, the right to appointed counsel under Crim.R. 44, and the right to remain silent.²

{¶ 14} “The Crim.R. 5(A) and Crim.R. 10 requirements that the accused be informed of his right to counsel applies to misdemeanor prosecutions that, as in the present case, could result in incarceration. *State v. Wellman* [(1974), 37 Ohio St.2d 162, 309 N.E.2d 915], paragraph one of the syllabus * * *. Compliance with Crim.R. 5 is mandatory, and a trial court’s failure to comply with the rule ‘invalidates the entire proceeding.’ *State v. Boerst* (1973), 45 Ohio App.2d 240, 241, [343 N.E.2d 141]; *Cleveland v. Whipkey* (1972), 29 Ohio App.2d 79, [278 N.E.2d 374] * * *.” *Middletown v. McIntosh*, Butler App. No. CA2006-07-174, 2007-Ohio-3348, ¶ 6.

{¶ 15} In the instant case, the transcript of McCarthy’s initial appearance reveals that the court failed to comply with Crim.R. 5 and 10. On January 12, 2010, Anderson and McCarthy appeared before the housing court regarding the violations to which Anderson had pled no contest. McCarthy introduced himself and asked the court to be substituted as the defendant because Anderson’s work schedule made it difficult for her to appear before the court. Without advising McCarthy of the charges against him, the court stated:

²Crim.R. 44(B), governing counsel in petty offenses, provides that “[w]here a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.”

COURT: Mr. McCarthy, typically how this works is if the complaint is amended then it will be amended to your name. I'll ask you if you object? If you say no then we'll proceed. Then I'll ask you for your plea, and the plea would be the same as Ms. Anderson's plea. Typically that's what happens. Otherwise, the City won't move to amend it to your name. So if you plead not guilty and want a trial then they won't move to amend it. * * *

* * *

COURT: So how would you like to proceed? Do you want to go under that basis? McCarthy, do you have any questions?

McCARTHY: No.

* * *

COURT: The City moves to amend the complaint into your name, sir. Do you object?

McCARTHY: No.

COURT: Without objection, how do you plead?

McCARTHY: I'm not exactly sure, but there are issues at the property and it needs to be fixed.

COURT: You have the choice of three pleas, guilty, not guilty or no contest?

McCARTHY: No contest.

COURT: When you enter a plea of no contest, it is not an admission of guilty, but is an admission that the violations existed; and you give up your right to a jury trial; right against self-incrimination; your right for compulsory process, and your right to have the City prove your guilt. Do you understand your rights?

McCARTHY: Yes.

COURT: And do you wish to move forward without an attorney?

McCARTHY: Yes.

{¶ 16} Upon review of the record, we find that the trial court did not comply with the mandates of Crim.R. 5 and 10 at the time of McCarthy's initial appearance. Here, the court failed to advise McCarthy of (1) the numerous charges against him, (2) his right to counsel before accepting his plea, and (3) that McCarthy need make no statement and that any statement made might be used against him. The court further failed to ensure that McCarthy fully understood and was intelligently relinquishing his right to counsel.

{¶ 17} Additionally, we find that the trial court did not comply with the mandates of Crim.R. 11(E) in that before accepting McCarthy's no-contest plea, the trial court did not inform McCarthy of the effects of the guilty, not-guilty, and no-contest pleas.³

{¶ 18} As a result of the trial court's failure to satisfy these requirements, the entire proceeding against McCarthy is invalid. See *McIntosh*, 2007-Ohio-3348, at ¶ 14, citing *Boerst*, 45 Ohio App.2d 240, 343 N.E.2d 141. See also *State v. Thompson*, 180 Ohio App.3d 714, 2009-Ohio-185, 907 N.E.2d 329, ¶ 18.

{¶ 19} Based on the foregoing, McCarthy's sole assignment of error is sustained.

{¶ 20} Accordingly, the judgment is reversed. McCarthy's convictions are vacated, and this cause is remanded for further proceedings consistent with this opinion.

Judgment accordingly.

³Crim.R. 11(E) provides that "[i]n misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty. The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule."

JONES, J., concurs.

BLACKMON, J., dissents.

PATRICIA ANN BLACKMON, Judge, dissenting.

{¶ 21} I respectfully dissent from the majority opinion. I agree that McCarthy was never arraigned or subject to a preliminary hearing during which the complaint would have been read to him. Nonetheless, immediately after accepting his plea, the court went through the list of violations with McCarthy to ascertain the status of repairs. McCarthy never argued that the violations did not exist. In fact, he was the party responsible for undertaking the repairs prior to the plea being entered. For 16 months after the plea, McCarthy engaged in conversations with the court regarding the violations and never stated that he was innocent of any of them. The only violation that McCarthy contested was the swale between the property lines; however, this was not the result of the no-contest plea, but was the result of an order from Building Appeals. Accordingly, under the unusual facts of this case, I do not believe that McCarthy was prejudiced by the court's failure to formally advise him of the violations to which he pled. I would find no reversible error and affirm.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
ASSIGNMENTS OF ERROR.....	1
ISSUES PRESENTED.....	1
STATEMENT OF FACTS.....	2-3
STATEMENT OF THE CASE.....	3
LAW AND ARGUMENT.....	4-10
A. Because Andersen failed to file a complete record, this Court must assume the regularity of the proceedings in the trial court and the sufficiency of evidence to support the trial court's decision.....	4-5
B. Cleveland presented evidence beyond a reasonable doubt that Andersen was in violation of excavating the earth to cause a public nuisance.....	5-7
C. Appellant relies on a definition for an easement in granting use and enjoyment of another without a formal legal document.....	8-9
D. Andersen Relies on Case Law that is not Applicable to this case.....	9-10
CONCLUSION	10-11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Acevedo v. Dover Elevator Co.</i> , 2004-Ohio-3958 (2004 Ohio App. 8 Dist.)(unreported),	4
<i>Ali v. Varga</i> , 2005-Ohio-3156 (2005 Ohio App. 8 Dist. (unreported)).....	5
<i>Baltz v. CMHA</i> , 2003-Ohio-6619 (2003 Ohio App. 8 Dist. (unreported)).....	4
<i>Corrigan v. Illuminating Company</i> , 122 Ohio St. 3d 265, 910 N.E. 2d 1009.....	9
<i>Frush Farms v. Village of Holgate</i> , 442 P. Sup.2d 470.....	9
<i>Ham v. Park</i> (1996), 110 Ohio App.3d 803.....	9
<i>In re Guardianship of Susan Muehrcke</i> , 2005-Ohio-2627, 2005 Ohio App. 8 Dist.(unreported).....	4
<i>Kilroy v. B.H. Lakeshore Company</i> , 11 Ohio App.3d 357.....	4-5
<i>Knapp v. Edwards Laboratories</i> (1980), 610 Ohio St.2d 197, 199.....	4
<i>McGlashan v. Spade Rockledge Terrace Condo Development Corp.</i> , 62 Ohio St. 2d 55, 402 N.E. 2d 1196.....	9-10
<i>Natsis v. Natsis</i> , 2002-Ohio-7058 (2002 Ohio App. 8 Dist. (unreported)).....	6
<i>Season Coal Company, Inc. v. City of Cleveland</i> (1984), 10 Ohio St.3d 77, 80.....	5
<i>Spostl v. Navratil</i> (1991), 72 Ohio App.3d 493.....	4
<i>State v. DeHass</i> (1967), 10 Ohio St.2d 230, ¶1 of Syllabus.....	5
<i>State v. Wolfe</i> 1986 WL 11959 (1986 Ohio App. 8 Dist.(unreported)).....	4
<i>Wells v. Spirit Fabricating, Ltd.</i> (1996), 113 Ohio App.3d 282.....	4

<u>Rules</u>	<u>Page</u>
C.C.O. 3125.01(a)(1).....	2
C.C.O. 3125.01(b)(10).....	3
C.C.O. 3125.01(d)(1).....	3
App. R. 9(C).....	4
App. R. 12(A)(2).....	5
Ohio Jur. 3d Easements.....	8
O.R.C. 1515(H)(1).....	8

I. ASSIGNMENTS OF ERROR

Andersen's Assignment of error:

Barbara Andersen was denied due process by the court's failure to dispatch an expert/engineer to perform a Uniform Assessment or recognize the parcel in its entirety as prescribed by ORC 1515.01(H)(1) and Ohio's "Uniformity Clause" Art.2 Section 26. As a result, the Court placed undue weight on the City's inspections and testimony and failed to evoke the "Reasonable Use Rule," thus violating the Appellant's property rights in not allowing reasonable use of easement in its entirety and the privilege of CCO 3125.01(d)(1) positive drainage OAC section 1804.3 Site Grading and rights of "Easement."

II. ISSUES PRESENTED

Because Andersen failed to file a complete record, this Court must assume the regularity of the proceedings in the trial court and the sufficiency of evidence to support the trial court's decision.

Cleveland presented evidence beyond a reasonable doubt that Andersen was in violation of excavating the earth to cause a public nuisance.

Appellant relies on a definition for an easement in granting use and enjoyment of another without a formal legal document.

Andersen relies on case law that is not applicable to this case.

III. STATEMENT OF THE FACTS

Appellant Barbara Anderson ("Andersen") owns the property located at 3802 Bosworth Cleveland, Ohio. On January 11, 2012, Inspector Derrett inspected the property at 3802 Bosworth. At the property the inspector found excavated land which compromised the neighbor's fence. The Department of Building and Housing issued violation notice V12001419 on January 12, 2012. The violation notice was appealed to the Board of Building Standards. The Board of Building Standards denied the Appellant in the resolution February 15, 2012. The Board of Building Standards remanded the property to the Department of Building and Housing for further action.

On May 24, 2012 Inspector returned to the property to determine if the violation notice issued January 12, 2012 was corrected. The violations still remained at the property. The inspector prepared the summons for court upon determination the excavation of land remained. From August until January multiple pre-trials were held at the Cleveland Municipal Housing Court.

On January 29, 2013 this case was brought to trial. At trial Cleveland presented testimony from Rhonda Derrett, an inspector from Building and Housing. She testified the swale was dug on this property without any proper permits. She also testified the swale was compromising the fence of the neighboring property.(R.3 Journal Entry 2/26/2013)

On February 26, 2013, the Cleveland Municipal Housing Court issued a Judgment Entry. (R.3 Journal Entry 2/26/2013) This Judgment Entry states the City has met its burden of proof beyond a reasonable doubt that Andersen was responsible for the excavation of the swale and failed to prevent movement of earth of adjoining properties

in violation of C.C.O. 3125.01(a)(1) as charged in Count 5. (R.3 Journal Entry 2/26/2013) The Court also found that the City met its burden of proof on count 6 in violation of 3125.01(b)(10), and count 7 in violation of C.C.O. 3125.01(d)(1). (R.3 Journal Entry 2/26/2013) Further, the Court found that the City met its burden of proof beyond a reasonable doubt by demonstrating that defendant was (a) the responsible party, (b) was ordered to correct the violations in counts 5, 6 and 7, (C) was properly given notice, and (d) failed to correct said violation as of the re-inspection on May 24, 2012. (R.3 Journal Entry 2/26/2013) Andersen filed an appeal upon receipt of this Judgment Entry.

On March 21, 2013, Andersen filed her Notice of Appeal. (R.2)

IV. STATEMENT OF THE CASE

On June 26, 2012, Andersen plead Not guilty. (R.8) The Housing Court held a bench trial on January 29, 2013. (R.1) On February 26, 2013, the Housing Court found Andersen in violation of CCO 3103.25(e) in charge 1, CCO 3125.01(a)(1) in charge 5, CCO 3125.01 (b)(1) in charge 6, CCO 3125.01(d)(1) in charge 7. (R.3 Journal Entry 2/26/2013) As such, the Housing Court ordered Andersen to remediate the code violations. (R.3 Journal Entry 2/26/2013) On March 21, 2013, Andersen filed her Notice of Appeal. (R.2)

V. LAW AND ARGUMENT

A. Because Andersen failed to file a complete record, this Court must assume the regularity of the proceedings in the trial court and the sufficiency of evidence to support the trial court's decision.

Andersen did not file a transcript or a Rule 9(C) statement of the evidence.

Consequently, this Court cannot review Andersen's Assignments of Error. Therefore, this Court must overrule Andersen's assignments of errors and enter judgment in Cleveland's favor.

The appellant bears the duty to provide a transcript for appellate review. *Knapp v. Edwards Laboratories* (1980), 610 Ohio St.2d 197, 199. This is so because the appellant bears the burden of showing error by referring to the record. *Id.* Furthermore, in the absence of a record, this Court has nothing to review and must presume the regularity of the proceedings and the presence of sufficient evidence to support the trial court's decision. *Id.* Moreover, allegations raised in an appellate brief are not sufficient to overcome the presumption of regularity in a trial court's proceedings. *Id.* This Court has consistently followed this principle. *Sposit v. Navratil* (1991), 72 Ohio App.3d 493; *Kilroy v. B.H. Lakeshore Company* (1996), 11 Ohio App.3d 357; *Wells v. Spirit Fabricating, Ltd.* (1996), 113 Ohio App.3d 282; *Ham v. Park* (1996), 110 Ohio App.3d 803; *State v. Wolfe* 1986 WL 11959 (1986 Ohio App. 8 Dist. [unreported, copy attached]); *Natsis v. Natsis*, 2002-Ohio-7058 (2002 Ohio App. 8 Dist. [unreported, copy attached]); *Baltz v. CMHA*, 2003-Ohio-6619 (2003 Ohio App. 8 Dist. [unreported, copy attached]); *Acevedo v. Dover Elevator Co.*, 2004-Ohio-3958 (2004 Ohio App. 8 Dist. [unreported, copy attached]); *In re Guardianship of Susan Muehroke*, 2005-Ohio-2627

(2005 Ohio App. 8 Dist. [unreported, copy attached]); *All v. Vargo*, 2005-Ohio-3156 (2005 Ohio App. 8 Dist. [unreported, copy attached]).

For example, in *Kilroy v. B.H. Lakeshore Company*, 11 Ohio App.3d 357, the appellant failed to provide a verbatim transcript of the proceedings or a 9(C) or 9(D) statement of evidence. *Id.* at 362. Consequently, this Court held that the appellant could not prevail on the appellant's assignments of errors. *Id.* This Court held that it was constrained to follow the directives of App. R. 12(A)(2) that states the court may disregard any assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based. *Id.* Thus, because Andersen failed to provide a transcript or a statement of the evidence, this Court must presume the regularity of the trial court's decisions, overrule Andersen's assignments of error, and enter judgment in Cleveland's favor.

B. Cleveland presented evidence beyond a reasonable doubt that Andersen was in violation of excavating the earth to cause a public nuisance.

The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, ¶1 of Syllabus. The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Season Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. In *Season Coal Company*, the Ohio Supreme Court stated that an appellate court should not substitute its judgment for that of the trial

court when competent and credible evidence exists supporting the findings of fact and conclusions of law. *Id.*

Additionally, in *Natsis v. Natsis*, this Court held that when it is obvious from the magistrate's report that the magistrate relied extensively on oral testimony whose credibility only the magistrate was able to assess, the trial court has to defer to the magistrate's factual determination. *Natsis v. Natsis*, 2002-Ohio-7058 (2002 Ohio App. 8 Dist. [unreported, copy attached]). This is so because the magistrate, by viewing the witnesses and hearing their testimony, is in a superior position to determine the weight and credibility of the evidence. *Id.*

In this case, the Trial Court was the only one who heard the testimony of the witnesses. The Trial Court was the only one who could determine the weight and credibility of the evidence. Likewise, this Court must also presume the regularity of those findings and the sufficiency of the evidence. Consequently, this Court must overrule Andersen's Assignments of Error and grant judgment in Cleveland's favor.

Furthermore, Cleveland presented evidence beyond a reasonable doubt that Andersen has an illegal swale at her property. Andersen did not prove that she had a legal swale that did not compromise the neighbor's fence, as directed by the Board of Building Standards.

Cleveland introduced the testimony of Inspector Rhonda Derrett. Ms. Derrett testified to the conditions located at the 3802 Bosworth property. Ms. Derrett testified that Andersen was responsible for the excavation of the swale and failed to prevent movement of earth of the adjoining property. (R.3 Journal Entry 2/26/2013) Ms. Derrett also testified Andersen failed to protect the excavation by permanent means as was

necessary to prevent the movement of the earth of adjoining properties. (R.3 Journal Entry 2/26/2013).

Andersen did not present credible testimony to counter Cleveland's. Andersen presented the testimony of Michael McCarthy, her co-owner, who built the illegal swale. Mr. McCarthy testified the swale was constructed to provide ongoing drainage of the subject property and the adjacent property to prevent water from pooling around the foundation. (R.3 Journal Entry 2/26/2013). Therefore, the Trial Court correctly concluded that Mr. McCarthy's testimony was insufficient to prove the swale was correctly made.

The Trial Court was the only one to hear the testimony of both parties' witnesses. Consequently, the Trial Court was the sole person to determine the credibility and weight of the testimony. This Court must defer to those determinations. Moreover, because there is no transcript or Rule 9(C) statement of the evidence, this Court must presume regularity in the trial court proceedings and the sufficiency of the evidence to support the trial court's decision. Finally, Cleveland presented evidence beyond a reasonable doubt that Andersen built a swale that did not comply with City of Cleveland's Codified Ordinance. Andersen did not present evidence that he had a built a legal swale. Therefore, this Court must overrule Andersen's assignments of error and grant judgment in favor of Cleveland.

C. Appellant relies on a definition for an easement in granting use and enjoyment of another without a formal legal document.

Andersen argues there is an easement per se between the yards of neighbors.

"The basic definition of an easement is that it is the grant of use on the land of another. It is a property interest; it is an impingement on one's right to the exclusive use and enjoyment of his or her property." (Ohio Jur. 3d Easements) An easement does grant another person's rights of use on a property. (Ohio Jur.3d Easements) However, this type of easement would be documented in a legal document. In the case at hand, Andersen has never presented any evidence showing she has an easement on the neighbor's property.

Andersen's sole argument for this easement on her neighbor's property is to correct the negative drainage. Andersen argues she is given a right to have this easement on her neighbor's property to correct the negative drainage of water.

Andersen sites to ORC 1515(H)(I) as reason why the City should perform a uniform assessment of the land between two private properties. However this section pertains to soil and water conservation commissions.(ORC 1515.01) This section does not relate to a uniform assessment of two private property owners. The property assessment in this case would be conducted by a licensed engineer, hired by the property owner who is changing the property.

In this case, appellant chose to dig a swale like ditch along her property line. Andersen would need to hire an engineer to determine the property line and the proper dimensions of installing a swale. Instead Andersen argues the City should perform

engineer services for personal property issues with her neighbor. Andersen did not prove the existence of the easement. Neither did Andersen prove that the City must provide the land survey. Indeed, the City is not required to do so. Consequently, the alleged existence of the easement and the Trial Court's failing to order the assessment are not valid defenses to the criminal charges.

D. Andersen Relies on Case Law that is not Applicable to this case

In *Corrigan*, the Court held "R.C.4905.26 specifically confers exclusive jurisdiction upon PUCO to determine whether any service provided by a public utility is in any respect unjust, unreasonable, or in violation of the law." *Corrigan v. Illuminating Company*, 122 Ohio St. 3d 265, 910 N.E. 2d 1009. This case has very little to do with personal property rights between property owners. Andersen is not a utility which has an easement thru legislature. (R.C.4905.26)

In *Fruth Farms*, the court discusses the rights with an easement versus the rights of the servient estate. *Fruth Farms v. Village of Holgate*, 442 F. Sup.2d 470. The case at hand does not involve a written easement. Andersen argues there is an easement since her property has a negative grade or drainage.

Andersen relies on *McGlashan* to argue the digging of this swale was reasonable a reasonable use of the property. In *McGlashan*, the court does describe the reasonable-use doctrine. However, the court explained that the reasonableness of the invasion must be balanced by the gravity of the harm caused by the interference. *McGlashan v. Spade Rockledge Terrace Condo Development Corp.*, 62 Ohio St. 2d 55, 402 N.E. 2d 1196.

The court stated, " a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to detriment of others." *McGlashan* citing Torts 2d 146 Section 833. This case is distinguished from the case at hand by being a civil matter. In the case at hand, Andersen violated the Cleveland Codified Ordinances. Andersen was aware of the deterioration to her neighbor's fence due to this excavation of soil and earth. Andersen continues extracting soil from underneath the neighbor's fence. There is no reasonableness on the part of Andersen. The reasonable use doctrine is a tool for the resolution of civil disputes. It is not intended to be a defense to criminal charges. Therefore, this Court must overrule Andersen's assignments of error and grant judgment in favor of Cleveland.

VI. CONCLUSION

Andersen did not file the required transcript or Rule 9(C) statement of evidence. Consequently, this Court must presume the regularity of the trial-court proceedings and the presence of sufficient evidence to support the trial court's decision. Therefore, this Court must overrule Andersen's assignments of errors and grant judgment in favor of Cleveland.

This Court must defer to the findings of the trial court. This deference is even more imperative when Andersen has failed to provide a transcript or a Rule 9(C) statement. Cleveland presented evidence beyond a reasonable doubt that Andersen has failed to correct the violation notice issued for 3802 Bosworth Avenue. Furthermore,

Andersen did not present credible testimony that the violations were corrected.

Therefore, this Court must overrule Andersen's assignments of errors and grant judgment in favor of Cleveland.

Respectfully submitted,

BARBARA LANGHENRY (8038838)
Director of Law

By

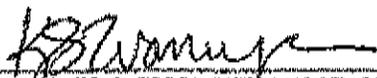


KATHERINE S. ZVOMUYA (0075877)
Assistant Director of Law
Room 106—City Hall
601 Lakeside Avenue E.
Cleveland, Ohio 44114-1077
(216) 664-3559
(216) 420-8291 Fax
kzvomuya@city.cleveland.oh.us

ATTORNEYS FOR CLEVELAND

VII. CERTIFICATE OF SERVICE

I certify that I sent a copy of Cleveland's Amended Brief to Barbara Andersen, 3802
Bosworth Cleveland, Ohio 44111 on June 11th, 2013.


KATHERINE S. ZVOMUYA (0075877)
Attorney for Cleveland

Westlaw

Page 1

Not Reported in N.E.2d, 2004 WL 1688532 (Ohio App. 8 Dist.), 2004 -Ohio- 3958
 (Cite as: 2004 WL 1688532 (Ohio App. 8 Dist.))

RE
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County,
 Luz Maria ACEVEDO, Plaintiff-appellant

v.
 DOVER ELEVATOR CO., et al., Defendants-appellees.

No. 83987.
 Decided July 29, 2004.

Background: Elevator passenger, who allegedly was injured when elevator failed to stop evenly, brought negligence action against elevator company. The Court of Common Pleas, Cuyahoga County, granted a verified motion to enforce settlement agreement filed by elevator company, and passenger appealed.

Holding: The Court of Appeals, Sean C. Gallagher, J., held that, in the absence of a transcript, elevator passenger failed to portray error in the trial court's decision.

Affirmed.

West Headnotes

Appeal and Error 30  **611**

30 Appeal and Error
30X Record

30X(F) Making, Form, and Requisites of Transcript or Return

30k611 k. Effect of Failure to Make Transcript or Return. Most Cited Cases

In the absence of a transcript, elevator passenger, who allegedly was injured when elevator failed to stop evenly, failed to portray error in the trial court's decision granting a verified motion to en-

force settlement agreement filed by elevator company; passenger failed to file a transcript of the hearing, which the record reflected was held on the motion to enforce the settlement agreement, and therefore, appellate court was unable to review whether there was any evidence presented to support passenger's claims of error.

Civil appeal from Common Pleas Court, Case No. CV-483927.C. Douglas Ames, Esq., Joseph A. Moro, Esq., Heller, Maas, Moro & Magill Co., Youngstown, OH, for plaintiff-appellant.

Peter L. Ney, Esq., Chad E. Willits, Esq., Rendigs, Fry, Kiely & Dennis, Cincinnati, OH, for defendants-appellees.

SEAN C. GALLAGHER, J.:

*1 ¶ 1 This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

¶ 2 Appellant Luz Maria Acevedo ("Acevedo") appeals from the decision of the Cuyahoga County Court of Common Pleas that granted a verified motion to enforce settlement agreement filed by appellee Thyssenkrupp Elevator ("Thyssenkrupp"), f.k.a. Dover Elevator Company. For the reasons adduced below, we affirm.

¶ 3 The following facts give rise to this appeal. Acevedo filed an action against Dover Elevator Company and Thyssenkrupp alleging that she sustained various personal injuries as a result of an elevator incident that occurred on October 16, 1997 at Cleveland Hopkins International Airport. Acevedo was a passenger on an elevator which allegedly failed to stop evenly and resulted in Acevedo falling from her wheelchair. The original action was filed in the Mahoning County Court of Common Pleas and was subsequently transferred to Cuyahoga County Court of Common Pleas, case

Not Reported in N.E.2d, 2004 WL 1688532 (Ohio App. 8 Dist.), 2004 -Ohio- 3958
(Cite as: 2004 WL 1688532 (Ohio App. 8 Dist.))

number CV-414606.

{¶ 4} After Acevedo failed to respond to certain discovery requests, failed to appear for her deposition, and otherwise failed to comply with discovery requests and orders, Thyssenkrupp filed a motion for summary judgment. Thereafter, Acevedo voluntarily dismissed her action, and subsequently refiled her complaint as case number CV-483927.

{¶ 5} After Thyssenkrupp filed a motion to dismiss and request for sanctions against Acevedo, the parties orally agreed to settle the case for \$1,000. Thyssenkrupp's counsel confirmed the parties' agreement to settle the case in a letter dated May 20, 2003. On May 21, 2003, Thyssenkrupp's counsel sent a final entry of dismissal with prejudice and full and final release to Acevedo's counsel. Despite repeated attempts to communicate with Acevedo's counsel regarding the status of the closing documents, Thyssenkrupp's counsel received no response.

{¶ 6} Thyssenkrupp filed a verified motion to enforce settlement agreement and request for sanctions. Following a hearing, the trial court granted the motion. Acevedo has appealed the trial court's ruling, raising one assignment of error for our review:

{¶ 7} "The trial court[s] ruling granting defendant-appellee's motion to enforce settlement was an abuse of discretion unsupported by law."

{¶ 8} We first address the standard of review applicable to rulings on a motion to enforce settlement. Because it is an issue of contract law, Ohio appellate courts "must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law. The standard of review is whether or not the trial court erred." *Continental W.-Condo. Unit Owners Ass'n v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 660 N.E.2d 431. Accordingly, the question before us is whether the trial court erred as a matter of law in granting

the motion to enforce.

*2 {¶ 9} Acevedo argues that she neither signed nor agreed to the settlement amount as evidenced by the lack of a signed agreement. This argument is without merit because a signed, written agreement is not required to have a valid settlement. As the Supreme Court of Ohio has held:

{¶ 10} "It is preferable that a settlement be memorialized in writing. However, an oral settlement agreement may be enforceable if there is sufficient particularity to form a binding contract. Terms of an oral contract may be determined from words, deeds, acts, and silence of the parties.

{¶ 11} "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.

{¶ 12} "To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear, and if there is uncertainty as to the terms then the court should hold a hearing to determine if an enforceable settlement exists. * * *"

{¶ 13} *Kostelnik v. Halper* (2002), 96 Ohio St.3d 1, 3-4, 770 N.E.2d 58 (internal quotes and citations omitted).

{¶ 14} In this case, Thyssenkrupp's verified motion to enforce set forth that Acevedo agreed to accept its settlement offer of \$1,000. A letter sent by Thyssenkrupp's counsel was attached to the verified motion and specified that under the agreement, Acevedo was to provide a final entry of dismissal and full and final release of all claims, including settlement, indemnification and confidentiality

Not Reported in N.E.2d, 2004 WL 1688532 (Ohio App. 8 Dist.), 2004 -Ohio- 3958
(Cite as: 2004 WL 1688532 (Ohio App. 8 Dist.))

agreements. The letter also indicated that Acevedo was to provide a written release of the Medicare/Medicaid lien, that interest would not accrue on the agreed settlement amount, and that the defendants would pay statutory court costs only.

{¶ 15} Acevedo's counsel does not dispute that on May 19, 2003, counsel was under the impression that Acevedo would agree to settle for \$1,000. Although Acevedo asserts in her brief that she never agreed to the terms of the settlement, there is nothing in the record to support this assertion. Moreover, there is no evidence in the record indicating that Acevedo's counsel did not have authority to settle her claim.

{¶ 16} Furthermore, Acevedo has not filed a transcript of the hearing, which the record reflects was held on the motion to enforce the settlement agreement. We are therefore unable to review whether there was any evidence presented to support Acevedo's assertions. See *Miller-Finocchioni v. Mentor Landscapes & Supply Co.* (1993), 90 Ohio App.3d 815, 821, 630 N.E.2d 785.

{¶ 17} It is an appellant's responsibility to provide the reviewing court with a trial transcript. App.R. 9. Even if a formal transcript was not available, Acevedo had the duty, pursuant to App.R. 9(C), to file a statement of the evidence with this court. Acevedo has not done this.

*3 {¶ 18} A reviewing court is limited to the trial court record. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus. Without a transcript, we must assume regularity in the trial court's proceedings. In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, the Supreme Court of Ohio held:

{¶ 19} "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to pre-

sume the validity of the lower court's proceedings, and affirm."

{¶ 20} In the absence of a transcript, Acevedo has failed to portray error in the trial court's find-

{¶ 21} We reiterate that terms of an oral contract may be determined from "words, deeds, acts, and silence of the parties." *Kosteluk*, 96 Ohio St.3d at 3, 770 N.E.2d 58. In this action, Acevedo was non-responsive to various discovery requests and when she was faced with a motion to dismiss and for sanctions, the record reflects that a settlement agreement was reached. Acevedo failed to respond to communications relating to the closing settlement documents and did not raise any objections to the terms of the settlement agreement. The actions and inactions of Acevedo could reasonably be viewed as an attempt to avoid an oral settlement agreement that had been reached.

{¶ 22} On the limited record before us, we cannot say the trial court erred in the resolution of this matter. Accordingly, we agree with the trial court that a settlement in this case had been reached. The assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J., and ANTHONY O. CALABRESE, JR., J., concur.

N.B. This entry is an announcement of the

Not Reported in N.E.2d, 2004 WL 1688532 (Ohio App. 8 Dist.), 2004 -Ohio- 3958
(Cite as: 2004 WL 1688532 (Ohio App. 8 Dist.))

court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 2004.
Acevedo v. Dover Elevator Co.
Not Reported in N.E.2d, 2004 WL 1688532 (Ohio App. 8 Dist.), 2004 -Ohio- 3958

END OF DOCUMENT

Westlaw

Page 1

Not Reported in N.E.2d, 2005 WL 1490124 (Ohio App. 8 Dist.), 2005 -Ohio- 3156
(Cite as: 2005 WL 1490124 (Ohio App. 8 Dist.))

C
**CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.**

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
Salim H. ALI Plaintiff-appellant
v.
James A. VARGO Defendant-appellant

No. 85244.
June 23, 2005.

Background: Payee of promissory note brought action against payor to enforce the note. The Cleveland Municipal Court, No. 03CV131625, overruled payor's objections to magistrate's decision and entered judgment in favor of payee. Payor appealed.

Holdings: The Court of Appeals, Rocco, J., held that:
(1) payor's failure to provide transcript or a statement of the evidence required affirmance, and
(2) payee's failure to join his former wife as a party did not preclude magistrate from proceeding to trial.

Affirmed.

[1] Appeal and Error 38  907(2)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k906 Facts or Evidence Not Shown by
Record

30k907 In General
30k907(2) k. Failure to Set Forth
Evidence in General, Most Cited Cases
Failure by payor of a promissory note to
provide transcript of trial court proceedings in pay-

ee's action to enforce the note, or a statement of the evidence, required affirmance of trial court's decision in favor of payee; payor had obligation to provide Court of Appeals with an adequate record to evaluate payor's assignments of error, and in its absence Court of Appeals would assume the regularity of the trial court proceedings. Rules App.Proc., Rule 9(A, C).

[2] Justices of the Peace 231  77

231 Justices of the Peace
231IV Procedure in Civil Cases
231k77 k. Parties, Most Cited Cases

Failure by payee of a promissory note to join his former wife as a party to his action to enforce the note against payor did not preclude magistrate from proceeding to trial, despite payor's contention that former wife was an indispensable party because she was also a payee of the note and note was included in divorce settlement, where payor, who was an attorney, did not raise the defense of failure to join an indispensable party until trial, and magistrate found that payor lacked justification for failing to raise it earlier. Rules Civ.Proc., Rules 12(H), 19(A).

Civil appeal from Cleveland Municipal Court, Case No. 03CV131625, Affirmed. Salim H. Ali, Cleveland, Ohio, for plaintiff-appellee.

Mark R. Fryatol, Attorney at Law, Cleveland, Ohio,
James A. Vargo, Attorney at Law, Cleveland, Ohio,
for defendant-appellant.

JOURNAL ENTRY and OPINION
ROCCO, J.

*1 {¶ 1} Defendant-appellant James A. Vargo, an attorney, appeals from the order of the Cleveland Municipal Court that granted judgment to plaintiff-appellee Salim H. Ali on his complaint for money due on a promissory note.

Not Reported in N.E.2d, 2005 WL 1490124 (Ohio App. 8 Dist.), 2005 -Ohio- 3156
 (Cite as: 2005 WL 1490124 (Ohio App. 8 Dist.))

{¶ 2} In his five assignments of error, Vargo asserts that the municipal court lacked jurisdiction to consider Ali's complaint, that Ali's claim was barred by the doctrines of res judicata and collateral estoppel, that the order against him is reversible because a necessary party was not joined in the action, that the magistrate abused her discretion in the admission of evidence, and that the judgment in Salim's favor is unsupported by the weight of the evidence.

{¶ 3} Upon a review of the limited record on appeal, this court agrees with none of Vargo's assertions. His assignments of error, therefore, are overruled.

{¶ 4} The record reflects Ali instituted this action in December 2003 seeking payment on a promissory note. Ali claimed Vargo had executed the note in August 2000 in exchange for a loan in the amount of \$2000, and that Vargo had failed to make any payments on the debt.

{¶ 5} Vargo's answer stated a general denial of the claim, and raised affirmative defenses as follows: 1) failure to state a claim; 2) full satisfaction of the loan as of October 19, 2001; and, 3) frivolous action.

{¶ 6} The case was assigned to a magistrate for a hearing. The record reflects the hearing took place on February 19, 2004. On May 27, 2004 the magistrate filed a report in which she recommended judgment in favor of Ali on his complaint. The magistrate set forth the relevant testimony and evidence presented at the hearing in her "Findings of Fact."

{¶ 7} In pertinent part, as to Ali's claim, the findings state that: Vargo had done some legal work for Ali's wife Melinda prior to her marriage to Ali; after the marriage, Ali was making payments to Vargo on Melinda's debt; on August 10, 2000 Ali obtained a cash advance on a credit card and used the money to loan Vargo \$2000 so Vargo "could pay his taxes;" Vargo executed a promissory note

evidencing the debt owed; and the promissory note was made payable to both Ali and Melinda.

{¶ 8} As to Vargo's defense, the magistrate's findings state that Vargo made two assertions. First, he asserted he "orally agreed" with Ali and his wife to apply his obligation on the note to Melinda's remaining debt and thereby extinguished his obligation. Second, he asserted the note had been included in the divorce settlement that Ali and Melinda entered into upon their divorce. However, the foregoing assertions were unsubstantiated since Vargo produced no competent evidence to prove them.

{¶ 9} In the "Conclusions of Law," the magistrate's report states that Ali proved his claim; he introduced the original instrument, Vargo admitted he signed it, the note proved Ali was entitled to enforce it, and Ali testified the debt was due and unpaid. On the other hand, Vargo failed to establish by a preponderance of the evidence that he had any affirmative defenses to the claim. The magistrate further concluded that Vargo had waived the defense of failure to join a necessary party.

{¶ 10} Vargo subsequently filed objections to the magistrate's decision; he asserted the magistrate failed to give proper consideration to several arguments he raised at the hearing, including issues of whether the municipal court had subject matter jurisdiction over the complaint, whether Ali's claim was barred by the doctrines of res judicata and collateral estoppel, and whether the complaint was flawed for Ali's failure to join a necessary party. In addition, Vargo asserted the report was erroneous in both its evaluation of the evidence and its discussion of the applicable law.

{¶ 11} On August 26, 2004 the municipal judge overruled Vargo's objections and entered judgment for Ali.

{¶ 12} Vargo thereafter filed a notice of appeal of the judgment pursuant to App.R. 9(C). This court later permitted Vargo to amend his notice of appeal

Not Reported in N.E.2d, 2005 WL 1490124 (Ohio App. 8 Dist.), 2005 -Ohio- 3156
(Cite as: 2005 WL 1490124 (Ohio App. 8 Dist.))

to an appeal brought pursuant to App.R. 9(A).

{¶ 13} Vargo presents the following five assignments of error:

{¶ 14} "I. The lower court erred in hearing the case because it lacked subject matter jurisdiction.

{¶ 15} "II. The lower court erred in rendering judgment because the claim was barred by res judicata and collateral estoppel.

{¶ 16} "III. The lower court erred in failing to require appellee to join necessary and indispensable parties.

{¶ 17} "IV. The lower court erred in accepting irrelevant documents from appellee while refusing to allow appellant to submit documents into evidence.

{¶ 18} "V. The lower court erred in granting judgment to appellee against the manifest weight of the evidence."

[1] {¶ 19} Vargo challenges the municipal court's decision by arguing in his first and second assignments of error that the debt evidenced by the note had been included in the Allis' divorce settlement, and by arguing in his fourth and fifth assignments of error that the magistrate acted improperly in both admitting evidence and considering the evidence.

{¶ 20} His challenge is answered by a lengthy quote from this court's opinion in *Corsaro, Giganti & Assoc. v. Stanley* (Sept. 21, 2000), Cuyahoga App. No. 77201 as follows:

{¶ 21} "In the present case, the record certified to this court is an App.R. 9(A) record and contains the original papers and a certified copy of the journal entries. The court of appeals is bound by the record before it and may not consider facts extraneous thereto. *Paulin v. Midland Mutual Life* (1974), 37 Ohio St.2d 109, 307 N.E.2d 908. Absent a transcript of the proceedings or its alternatives, a

court will presume regularity and the validity of judgment of the trial court. *Ostrander v. Parker-Fallis Insulation* (1972), 29 Ohio St.2d 72, 74, 278 N.E.2d 363; *In re Sublett* (1959), 169 Ohio St. 19, 20, 157 N.E.2d 324; *State v. Wolf* (Oct. 23, 1986), Cuyahoga App. No. 51124, unreported. Allegations raised in an appellate brief are not sufficient to overcome the presumption of regularity in a trial court's proceedings and judgment entered by the court. *State v. Wolf*, [supra]; *Zashin, Rich, Sutula & Monastera Co., L.P.A. v. Offenburg* (1993), 90 Ohio App.3d 436, 629 N.E.2d 1657.

*3 {¶ 22} "It is well-established that the duty to provide a transcript for appellate review falls upon the appellant. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. A review of the amended praecipe filed with the clerk reveals appellant only requested the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries pursuant to App.R. 9(A). The record demonstrates that appellant has not provided this court a transcript of the trial below nor has appellant provided this court with a statement as permitted by App.R. 9(C). Where no transcript of proceedings of the trial is included in the record on appeal and no substitute statement of the evidence is provided and no statement has been filed to indicate that transcript is not needed in order to consider the appeal, the appellant cannot demonstrate the error of which he complains, and the appellate court must affirm. *Farmers Production Credit Assn. v. Stall* (1987), 37 Ohio App.3d 76, 523 N.E.2d 899. A presumption of validity attends the trial court's action. Thus, in the absence of an adequate record, which is the appellant's responsibility, the court of appeals is unable to evaluate the merits of the assignments of error and must affirm the trial court's decision. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 549 N.E.2d 1237. Because appellant failed to request a transcript, we have no alternative but to presume the regularity and validity of the proceedings. *Knapp, supra*; *Wiltsie v. Teamor* (1993), 89 Ohio App.3d 380, 624 N.E.2d 772; *Sas-*

Not Reported in N.E.2d, 2005 WL 1490124 (Ohio App. 8 Dist.), 2005 -Ohio- 3156
(Cite as: 2005 WL 1490124 (Ohio App. 8 Dist.))

arak v. Sasarak (1990), 66 Ohio App.3d 744, 586 N.E.2d 172. See *Shaker v. Allen* (May 16, 1996), Cuyahoga App. No. 69112, unreported.

{¶ 23} "There is nothing in the record before us to support the appellant's claims in the assignments of error and we must presume regularity in the trial court's proceedings and the judgment entered by the court." * * *

{¶ 24} Slip opinion, pages 4-6. See also, *Dintino v. Dintino* (Dec. 31, 1997), Trumbull App. No. 97-T-0047.

{¶ 25} Based upon the foregoing analysis, Vargo's first, second, fourth and fifth assignments of error are overruled.

[2] {¶ 26} Vargo asserts in his third assignment of error that Mellinda Ali was a necessary party to the action pursuant to Civ.R. 19(A), since she was one of the payees. On this basis, he contends the magistrate acted improperly in permitting trial to proceed. His assertion, similarly to his previous ones, already has been addressed by this court in *Mihalic v. Figuero* (May 26, 1988), Cuyahoga App. No. 83921.

{¶ 27} Although " Civ.R. 12(H) [provides] a party may raise the defense of failure to join an indispensable party by late pleading, motion for judgment on the pleadings, or at trial;" nevertheless, a party must "affirmatively present said defense" in a manner calculated to aid the proceedings rather than to circumvent them.

{¶ 28} In this case, citing *Dublin Transportation, Inc. v. Goadel* (1999), 133 Ohio App.3d 272, 727 N.E.2d 938, the magistrate decided Vargo would not be permitted to raise at trial the issue of failure to join a necessary party because he lacked justification for his failure to raise it earlier. *Id.* at 279, 727 N.E.2d 938. Surely, as an attorney, Vargo could have asserted this defense in his answer to the complaint or by motion prior to trial. Under such circumstances, and particularly in the absence

of a transcript of trial, this court cannot now find fault with magistrate's decision. *Mihalic v. Figuero*, supra. See also, *Schlup v. Intermark Internatl.* (Apr. 12, 1989), Summit App. No. 13900.

*4 {¶ 29} Accordingly, Vargo's third assignment of error also is overruled.

The municipal court's order is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, P.J. and COLLEEN CONWAY COONEY, J. concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 2005.

Ali v. Vargo

Not Reported in N.E.2d, 2005 WL 1490124 (Ohio App. 8 Dist.), 2005 -Ohio- 3156

END OF DOCUMENT

Westlaw

Page 1

Not Reported in N.E.2d, 2003 WL 22922343 (Ohio App. 8 Dist.), 2003 -Ohio- 6619
(Cite as: 2003 WL 22922343 (Ohio App. 8 Dist.))

C
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County,
Donna M. BALTZ, Plaintiff-Appellant,
v.
C.M.H.A., Defendant-Appellee.

No. 82641.
Decided Dec. 11, 2003.

Background: Tenant filed application for an order to compel repairs, reduce periodic rent, and money damages. The Cleveland Municipal Court, Housing Division, Cuyahoga County, Nos. 2002-CVG-11722 2002-RD-150, entered judgment for Housing Authority.

Holding: The Court of Appeals, Ann Dyke, J., held that it could not consider tenant's claims on appeal against city Housing Authority, absent a transcript supporting claims.
Affirmed.

West Headnotes

Appeal and Error 30 611

30 Appeal and Error
30X Record

30X(F) Making, Form, and Requisites of
Transcript or Return

30k611 k. Effect of Failure to Make Transcript or Return. Most Cited Cases

Court of Appeals could not consider tenant's claims on appeal against city housing authority, absent a transcript supporting claims. Rules Civ.Proc., Rule 53(B)(3)(b).

Civil appeal from the Cleveland Municipal Court.

Case No.2002-CVG-11722, 2002-RD-150.Donna M. Baltz, pro se, Cleveland, OH, for Plaintiff-Appellant.

Dale S. Bugaj, Esq., C.M.H.A., Cleveland, OH, for Defendant-Appellee.

ANN DYKE, J.

*1 {¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. Plaintiff-appellant Donna Baltz ("appellant") appeals, pro se, from the judgment of the trial court which adopted the report and recommendation of a magistrate of the Cleveland Municipal Court Housing Division finding in favor of the defendant-appellee Cuyahoga Metropolitan Housing Authority ("CMHA"). For the reasons set forth below, we affirm the judgment of the trial court.

{¶ 2} On June 5, 2002 appellant filed an application for an order to compel repairs, reduce periodic rent and money damages with the Cleveland Municipal Court Housing Division. On September 23, 2002, a hearing was held before a magistrate, at which time evidence was presented and testimony was taken. On February 18, 2003, a magistrate issued a report and recommendation. The magistrate recommended that because CMHA exterminated the premises and the appellant failed to show compensable damages, the appellant not recover any monetary award. Furthermore, the magistrate ordered that the monies on deposit be released to CMHA. The trial court adopted the findings of the magistrate.

{¶ 3} The appellant timely filed objections to the magistrate's report and recommendation, asserting that the magistrate failed to consider various facts prior to making his determination. In essence, the appellant's objections disputed the magistrate's findings of fact. CMHA filed a response to the appellant's objections, urging the court to overrule the

Not Reported in N.E.2d, 2003 WL 22922343 (Ohio App. 8 Dist.), 2003 -Ohio- 6619
(Cite as: 2003 WL 22922343 (Ohio App. 8 Dist.))

appellant's objections. On March 7, 2003, the trial court overruled the appellant's objections, finding that the appellant failed to comply with Civ.R. 53(E)(3)(b) by providing a transcript of the proceedings or an affidavit of evidence if a transcript was not available. It is from this ruling that the appellant now appeals, asserting a sole assignment of error for our review.

1

{¶ 4} Appellant essentially contends that the trial court erred in overruling her objections and affirming the determination that sheet was not entitled to recovery.

{¶ 5} Civ.R. 53(E)(3)(b) provides, in relevant part:

{¶ 6} "[a]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available."

{¶ 7} Appellant's objections challenged findings of fact reached by the magistrate. Specifically, she challenged the magistrate's findings regarding her landlord's efforts to make various repairs and to eliminate insects in her apartment. The record in this case does not contain any transcript or an affidavit of evidence presented at the hearing. Because appellant failed to support her objections as required by Civ.R. 53(E)(3)(b), the trial court did not err in overruling her objections and thereafter adopting the magistrate's decision. Furthermore, in the absence of a complete and adequate record, a reviewing court has nothing to pass upon and must presume the regularity of the proceedings and the presence of sufficient evidence to support the trial court's decision. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. Appellant's sole assignment of error is without merit.

*2 {¶ 8} The judgment is affirmed.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, P.J., and TIMOTHY E. McMONAGLE, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A) ; Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(F). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 2003.

Baltz v. C.M.H.A.

Not Reported in N.E.2d, 2003 WL 22922343 (Ohio App. 8 Dist.), 2003 -Ohio- 6619

END OF DOCUMENT

Westlaw

Page 1

Not Reported in N.E.2d, 2005 WL 1245623 (Ohio App. 8 Dist.), 2005 -Ohio- 2627
(Cite as: 2005 WL 1245623 (Ohio App. 8 Dist.))

■
**CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.**

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
In re: GUARDIANSHIP OF SUSAN MUEHRCKE

Nos. 85087, 85183.
May 26, 2005.

Background: Guardian of estate of minor child filed a motion to show cause and for sanctions against child's father based on father's failure to reply to numerous verbal and written requests for documentation related to father's settlement of claims with insurance companies. The Common Pleas Court, Cuyahoga County, No. 2001 GDM 54818, granted the motion, found father in contempt, ordered father to pay \$1,500 in sanctions, and granted guardian's application for fees in the amount of \$13,150. Father appealed.

Holding: The Court of Appeals, Christine R. McMonagle, J., held that where no transcript of in-chambers hearing on guardian's motion to show cause and for sanctions was available, and father's appeal did not supply a statement in lieu of transcript to indicate what transpired at the hearing, the Court of Appeals would presume the regularity of the trial court proceedings.

Affirmed.

[1] Contempt 93 ⇌ 66(3)

93 Contempt

93H Power to Punish, and Proceedings Therefor
93k66 Appeal or Error

93k66(3) k. Presentation and Reservation
of Grounds of Review. Most Cited Cases

Father waived his appellate arguments that al-

leged that the trial court erred in finding him in contempt and ordering him to pay sanctions and in finding that guardian of estate of father's child was entitled to fees, where father failed to raise the issues in the trial court.

[2] Appeal and Error 30 ⇌ 907(2)

30 Appeal and Error
30XVI Review

30XVI(G) Presumptions

30k906 Facts or Evidence Not Shown by
Record

30k907 In General

30k907(2) k. Failure to Set Forth
Evidence in General. Most Cited Cases

Where no transcript of in-chambers hearing on guardian of minor child's motion to show cause and for sanctions against father was available, and father's appeal from show cause order and order imposing sanctions did not supply a statement in lieu of transcript to indicate what transpired at the in-chambers hearing, the Court of Appeals would presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision. Rules App.Proc., Rule 9(C).

Civil Appeal from Common Pleas Court, Probate Division, Case No.2001 GDM 54818, Affirmed. Vincent A. Stafford, Gregory J. Moore, Stafford & Stafford Co., L.P.A., Cleveland, OH, for Appellant/Father, (Robert Muehrcke, M.D.).

Richard S. Koblenz, Koblenz & Koblenz, Cleveland, OH, for Appellee/Guardian.

A.J. Lepri, Northfield, OH, for Appellee/Mother, (Laura Muehrcke).

Alan Petrov, Monica A. Sansilone, Cleveland, OH, for Appellee, (Robert V. Housel).

Not Reported in N.E.2d, 2005 WL 1245623 (Ohio App. 8 Dist.), 2005 -Ohio- 2627
(Cite as: 2005 WL 1245623 (Ohio App. 8 Dist.))

JOURNAL ENTRY AND OPINION

MCMONAGLE, J.

*1 ¶ 1) Robert Muchroke, M.D. ("Robert" or "appellant"), appeals from the judgment of the trial court granting the motion to show cause and for sanctions of Richard Koblentz ("Koblentz" or "appellee"), guardian of the estate of Susan Muchroke. Robert also appeals the judgment of the trial court granting Koblentz's application for fees. For the reasons that follow, we affirm.

¶ 2) The record reflects that Robert was involved in a serious automobile accident in November 1996. Following a settlement with the tortfeasor's insurer, he filed claims against his insurer on behalf of his spouse, Laura, and their minor daughter, Susan. In June 2001, a jury awarded \$9,377,252 to Robert, \$1,000,000 to Laura, and \$500,000 to Susan. Subsequently, Robert and Laura settled with the insurance company for \$3,000,000. In addition, to resolve a claim of bad faith on the part of the insurer and a claim for prejudgment interest, the insurer agreed to pay \$2,000,000 to Robert and Susan, and \$50,000 to Susan.

¶ 3) Laura subsequently filed an application seeking to be appointed guardian of Susan's estate, and a separate application requesting approval to settle Susan's claim for \$5,000. Her application was denied and the court appointed Koblentz as guardian of Susan's estate. This court affirmed the probate court's decision on appeal. See *In re Guardianship of Susan Muchroke*, Cuyahoga App. No. 81353, 2003-Ohio-176.

¶ 4) Upon learning that prior to receiving the jury verdict and settlement described above, Robert and Laura had also settled with two other insurers for an additional \$2.5 million, Koblentz filed an application to settle Susan's claim, requesting that the probate court allow him to conduct discovery to learn the total amount of settlement proceeds collected, attorneys' fees earned, and litigation costs expended, in order to determine the proper amount to be awarded to Susan's estate.

¶ 5) Although Koblentz made numerous verbal and written requests for the documentation to be produced prior to Robert's deposition, Robert and his counsel failed to respond or comply with Koblentz's requests. Koblentz subsequently filed a subpoena duces tecum with the probate court, commanding Robert to produce the requested documents on March 16, 2004. After appellant's counsel advised Koblentz that he (counsel) was unable to attend the deposition, Koblentz filed a motion to show cause and for sanctions.

¶ 6) At a hearing in April 2004, the court withheld ruling on the motion to show cause pursuant to a representation from appellant's counsel that the documents would be produced.

¶ 7) Appellant did not produce the documents, but eventually agreed that Koblentz could review documents held by his accountant, Shafek and Associates. Upon review, however, Koblentz determined that the accounting firm did not have many of the requested documents. In addition, the firm indicated that appellant retained control over many of the subpoenaed documents. Koblentz then renewed his demand that appellant comply with the subpoenas, but appellant refused to do so.

*2 ¶ 8) Accordingly, on July 14, 2004, Koblentz filed a renewed motion to show cause and motion for sanctions. On July 29, 2004, the trial court entered an order granting the motion, finding appellant in contempt for failure to comply with the subpoena, and ordering him to pay \$1,500 in sanctions. On the same date, the trial court also granted Koblentz's application for fees in the amount of \$15,150.00, plus costs of \$67.60.

¶ 9) Appellant now appeals from both orders.

[1] ¶ 10) As an initial matter, we note that appellant raises several errors which he did not raise in the trial court. Although not raised as an assignment of error, appellant argues that the trial court erred in finding him in contempt and ordering him to pay \$1,500 in sanctions because a subpoena can-

Not Reported in N.E.2d, 2005 WL 1245623 (Ohio App. 8 Dist.), 2005 -Ohio- 2627
(Cite as: 2005 WL 1245623 (Ohio App. 8 Dist.))

not be used to obtain documents from a party. See Civ.R. 30, 34, and 45(C). With respect to the fee application, appellant argues that Kobientz was delinquent in filing an account as required by R.C. 2109.30 and, therefore, was not entitled to any fees or compensation.

{¶ 11} Appellant did not raise these arguments in the trial court, however. Our review of the record indicates that appellant never filed any objection to either the motion to show cause or the application for fees. It is well settled that an appellate court cannot consider an issue for the first time on appeal. *Stores Realty Co. v. Cleveland* (1975), 51 Ohio St.2d 41; *CCI Props. v. McQueen*, Cuyahoga App. No. 82044, 2003-Ohio-3674, at ¶ 24. By failing to raise the issues in the trial court, appellant waived them for purposes of appeal and, therefore, we need not consider them. *Id.*

[2] {¶ 12} Appellant next contends that the trial court erred in granting the motion to show cause and the application for fees without a hearing. He asserts that the probate court was required to conduct an evidentiary hearing pursuant to R.C. 2705, et seq., regarding the motion to show cause, and a hearing to determine the reasonableness of the requested fees prior to ruling on the guardian's application for fees. See, e.g., *In re Estate of York* (1999), 133 Ohio App.3d 234, 727 N.E.2d 607. He vigorously disputes appellee's assertion that the trial court held a hearing regarding both matters, albeit in chambers and without a court reporter, on July 22, 2004, and contends that the in-chambers proceeding was merely a pretrial proceeding, not an actual evidentiary hearing.

{¶ 13} This court addressed the same issue in *Wells v. Spirit Fabricating Ltd.* (1996), 113 Ohio App.3d 282, 288-289, 680 N.E.2d 1046. In *Wells*,

{¶ 14} the plaintiff argued that the trial court erred in granting the defendant's Civ.R. 60(B) motion for relief from judgment because the defendant had not presented sufficient evidence to support its motion. In considering this argument, we stated:

{¶ 15} "Plaintiff contends that only an in-chambers conference was held on this date and there was no opportunity to present evidence. The appellant bears the burden of providing a transcript when it is necessary to the disposition of any question on appeal. *Rosa Chevrolet v. Adams* (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 564. In the instant case, no transcript of the in-chambers hearing was available. The court in *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 620 N.E.2d 152, was confronted with a similar situation where the parties disputed whether a hearing or conference was conducted by the trial court. The court held that if no transcript is available, appellant must invoke the procedures of App.R. 9(C) or 9(E) to reconstruct what transpired at the proceeding and not having done so, therefore waived any error. *Id.* at 524, 620 N.E.2d 152. See, also, *Kelm v. Kelm* (1992), 73 Ohio App.3d 393, 400, 597 N.E.2d 535. ('Absence of a court reporter does not preclude there having been a hearing. * * * Defendant could have supplied a statement in lieu of a transcript to indicate that which did transpire on that date * * * pursuant to App.R. 9(C)'); *Palmer v. Kaiser Foundation Health* (1991), 64 Ohio App.3d 140, 142, 580 N.E.2d 849 (hearing was held in chambers, but not recorded; no App.R. 9(C) statement was presented; the court held that informal hearing is not improper when the evidentiary witnesses are the lawyers). 'In the absence of all the relevant evidence introduced at the hearing * * *, a reviewing court must indulge the presumption of regularity of the proceedings and the validity of the judgment in the trial court.' *Bates & Springer, Inc. [v. Stalworth]* (1978), 56 Ohio App.2d 223, 229, 382 N.E.2d 1179.] Therefore, we presume sufficient evidence of Spirit's in-chambers defense was presented."

*3 {¶ 16} Likewise, in this case, it was appellant's duty to present us with an adequate transcript of the proceedings below. If, as alleged by appellant, no transcript of the proceedings on July 22, 2004 is available, App.R. 9(C) provides an alternative means for completing the record. Appellant did not avail himself of this method, however.

Not Reported in N.E.2d, 2005 WL 1245623 (Ohio App. 8 Dist.), 2005 -Ohio- 2627
(Cite as: 2005 WL 1245623 (Ohio App. 8 Dist.))

{¶ 17} "In the absence of a complete and adequate record, a reviewing court must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision." *Burrell v. Kassioleh* (1998), 128 Ohio App.3d 226, 232, 714 N.E.2d 442. Therefore, on the record presented to us, without a transcript or an App.R. 9(C) or (D) statement, we must presume regularity in the trial court's proceedings and affirm the judgment of the trial

{¶ 18} Appellant argues that a transcript of a subsequent trial court proceeding reflects the trial judge's acknowledgment of error in the hearing that is at issue before this court. Appellant cannot argue error occurring at, or as a result of, a hearing where he has neither provided a transcript nor an App.R. 9(C) statement. A trial judge's "musings" at a later hearing about his previous rulings are insufficient for this court's review.

{¶ 19} Finally, we note that the record does not support appellant's argument. The docket indicates that appellee's motion to renew the motion to show cause/motion for sanctions was "heard & submitted" on July 22, 2004. It further indicates that Koblentz's motion to accelerate the hearing regarding his application for fees was "heard & submitted" on July 22, 2004. Therefore, appellant's argument that the in-chambers proceeding was not an evidentiary hearing is without merit and, accordingly, appellant's assignments of error are over-ruled.

Affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court, Probate Division, to carry this judgment into execution.

A certified copy of this entry shall constitute

the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, Jr., P.J., and MICHAEL J. CORRIGAN, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(B) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 2005.

In re Guardianship of Muehrcke
Not Reported in N.E.2d, 2005 WL 1245623 (Ohio
App. 8 Dist.), 2005 -Ohio- 2627

END OF DOCUMENT

Westlaw

Page 1

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
 (Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

RE
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County,
 Dimitrios C. NATSIS, Plaintiff-Appellant,
 v.
 Kathleen NATSIS, Defendant-Appellee.

No. 80793.
 Decided Dec. 19, 2002.

After the parties divorced, wife filed a motion to show cause based on husband's alleged failure to pay child support and husband filed a motion to dismiss. The Court of Common Pleas, No. D-126020, adopted the magistrate's opinion which found that husband owed \$47,150.00 in past due child support. Husband appealed. The Court of Appeals, Cuyahoga County, Diane Karpinski, J., held that: (1) husband's failure to file a transcript from the magistrate hearing or an affidavit describing the evidence at trial precluded the Court of Appeals from reviewing husband's objections or his argument that laches precluded the action, and (2) trial court determination that husband owed wife \$47,150.00 in child support arrearage was not an abuse of discretion.

Affirmed.

Terrence O'Donnell, J., filed a dissenting opinion.

West Headnotes

[1] Child Support 76E ↪542

76E Child Support
 76EXII Appeal or Judicial Review
 76Ek542 k. Record. Most Cited Cases

Husband's failure to file a transcript from the magistrate hearing or an affidavit describing the evidence at trial precluded the Court of Appeals from reviewing husband's objections or his argument that laches precluded wife's action for past due child support; the issue of laches was primarily an issue of fact, and the issue of laches was to be resolved according to the particular facts of each case.

[2] Child Support 76E ↪542

76E Child Support
 76EXII Appeal or Judicial Review
 76Ek542 k. Record. Most Cited Cases

Husband's failure to file a transcript from the magistrate hearing or an affidavit describing the evidence at trial precluded the Court of Appeals from reviewing husband's allegation that the magistrate's decision was contrary to the sufficiency and the weight of the evidence, in wife's action for past due child support; magistrate's report demonstrated that he relied heavily on the oral testimony from a variety of witnesses whose credibility he was able to assess, and the magistrate was in a superior position to determine the weight and credibility of the evidence.

[3] Child Support 76E ↪487

76E Child Support
 76BIX Enforcement
 76Ek481 Evidence
 76Ek487 k. Weight and Sufficiency. Most Cited Cases

Trial court determination that husband owed wife \$47,150.00 in child support arrearage was not an abuse of discretion; although three witnesses testified they saw husband give wife a white envelope which husband alleged contained child support payments, none of the witnesses ever saw the amount of money inside the envelope, all of the witnesses only saw the envelope a few times, and wife explained that she relied on income from her

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

father, non-relatives, and the church as alternative forms of support.

George J. Sadd, Esq., Brook Park, OH, for plaintiff-appellant.

Terri L. Stupica, Esq., Cleveland, OH, for defendant-appellee.

KARPINSKI, J.

*1 ¶ 1} Defendant-appellant, Dimitrios C. Natsis, appeals the trial court's adoption, with modifications, of the magistrate's decision granting plaintiff-appellee, Kathleen Natsis's Motion to Show Cause in which she argued that appellant was in arrears of his child support obligations. For the reasons that follow, we affirm the judgment of the trial court.

¶ 2} This case falls under the jurisdiction of the domestic relations court. In October 1981, the parties were granted a dissolution of marriage. The order of dissolution incorporated a separation agreement executed by both parties. The agreement expressly provided appellant pay child support for the two minor children born of the marriage. At the time of the dissolution, the eldest child, a boy, was nine years old and the younger child, a girl, was eight years old. It is undisputed that the separation agreement required appellant to pay \$50.00 per week (\$400.00/month) for each child for a period of 104 weeks and thereafter \$60.00 per week (\$480.00/month) until each child reached majority.

¶ 3} In October 1999, appellee filed a motion to show cause because appellant had failed to pay the child support amounts specified in the agreement. The motion was referred to and heard by a magistrate who, after trial, rendered an amended decision with findings of fact and conclusions of law. The amended decision was filed on August 16, 2001. Before the conclusion of trial, however, appellant filed a motion to dismiss appellee's motion to show cause in which he argued, under the laches doctrine, appellee had waited too long-18 years-to

pursue any unpaid child support amounts. The magistrate denied the motion to dismiss.

¶ 4} In his decision, the magistrate explained his reasons for denying appellant's motion to dismiss and also made specific determinations about appellant's unpaid obligations of child support. The magistrate determined that

¶ 5} "nowhere in the pleadings or in the testimony does the Defendant * * * allege or demonstrate material prejudice resulting from the delay of [plaintiff's] filing.

¶ 6} " * * *

¶ 7} "Where Defendant * * * has failed to demonstrate material prejudice or injury the defense of laches will not lie. Defendant[s] Motion to Dismiss is without merit and should therefore be dismissed.

¶ 8} " * * *

¶ 9} "Defendant * * * should have paid child support at the sum of \$50 per week per child (2) for a period of 104 weeks commencing October 7, 1981 for a total of \$10,400 through October 6, 1983 (104 weeks x \$50 per week x 2 children = \$10,400). Thereafter, Defendant * * * should have paid child support in the amount of \$60 per week for a period of 144 weeks through August 15, 1990 * * * and for a period of 396 weeks through August 14, 191[sic] * * * or \$60 per week for 740 weeks for a total of \$44,400.00. The total amount Defendant * * * should have paid as and for Child Support from the date of the parties' dissolution through the emancipation of their youngest child was \$54,500.00. Defendant * * * asserted that during the course of his obligation to pay child support he fully paid his obligation and more by weekly giving the parties [sic] two (2) children money to give to their mother * * * for support. It was his testimony that he always gave them cash, never a check, and that he did so weekly."

*2 ¶ 10} The magistrate determined that ap-

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

pellant "was neither a credible nor convincing witness * * * and has no support for his testimony that he paid all of his child support." The magistrate gave appellant credit for child support payments he proved he had made in the amount of \$7,650.00. After subtracting \$7,650.00 from the \$54,800.00, the magistrate concluded that appellant was still in arrears of child support in the amount of \$47,150.00.

{¶ 11} On September 5, 2001, appellant filed his "objections to the decision and findings" of the magistrate.^{FN1} In his objections, appellant argued that the magistrate erred in not sufficiently considering his laches defense that appellee had waited too long to pursue any unpaid child support amounts. It is undisputed that when appellant submitted his objections to the court he did so without providing a transcript of the trial proceedings upon which his objections were based.

FN1. Appellant had been granted an extension of time within which to file his objections. Thus his September 5th filing is timely.

{¶ 12} The brief, however, contained extended excerpts from the hearing-excerpts unauthenticated by any court reporter. The brief also referred to exhibits, which were in the record, and depositions that had been filed.^{FN2} Despite what appear to be references to a transcript, appellant did not provide a copy to the trial court or appellee.

FN2. Though appellant cites deposition testimony, we find no indication that the magistrate relied upon any of this testimony in reaching his decision in this case.

{¶ 13} On December 28, 2001, the trial court, with some modifications not relevant to the issues in this appeal, adopted the magistrate's decision and ordered appellant to pay appellee "\$47,150.00 as of August 14, 1991" in past due child support payments.^{FN3} Appellant filed this timely appeal on January 23, 2002.^{FN4} Then, on February 28, 2002,

appellant, for the first time, filed the transcript of the proceedings held before the magistrate.

FN3. The court found appellant in contempt and sentenced him to thirty days in jail. The court stated the sentence could be purged provided appellant pay the \$47,150.00 plus 2% through the child support enforcement agency. Further, the court also assessed attorney fees against appellant in the amount of \$1,840.00, which award is not part of this appeal.

FN4. In his brief appellee presents what he incorrectly calls an assignment of error. See App.R. 16. In this assignment, appellee requests this court to dismiss this appeal because appellant did not file a transcript in the trial court. Because the formal brief format does not permit an appellee to state a separate assignment of error (outside a cross appeal), we do not address appellee's assignment.

ASSIGNMENT ERROR NO. 1

{¶ 14} "THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S ASSERTION OF THE DOCTRINE OF LACHES, WHERE THE APPELLANT SHOWED THAT THE WIFE FILED THE NON-SUPPORT CLAIM EIGHTEEN (18) YEARS AFTER THE DIVORCE AND WHERE THE APPELLANT DEMONSTRATED MATERIAL PREJUDICE."

ASSIGNMENT OF ERROR NO. 2

{¶ 15} "THE DECISION OF THE MAGISTRATE WAS CONTRARY TO THE SUFFICIENCY AND TO THE WEIGHT OF THE EVIDENCE."

{¶ 16} As a threshold matter, we note that when a party objects to a magistrate's decision, the party must supply the trial court with a transcript of the hearing or an affidavit as to the evidence presented at the magistrate's hearing. Civ.R. 53(B)(3)(b). The Supreme Court of Ohio has ex-

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7038
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

plaintiff, "When a party objecting to a referee's report has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the report, appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the referee's report, * * *. In other words, an appeal under these circumstances can be reviewed by the appellate court to determine whether the trial court's application of the law to its factual findings constituted an abuse of discretion." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254; *Sontempo v. Miles* (Feb. 7, 2002), Cuyahoga App. No. 79341.

*3 (§ 17) Moreover, if the trial court did not have a transcript to review, an appellate review cannot include any reference to a transcript filed for the first time as part of the record on appeal. *Duncan*, supra citing *Hugh v. Hugh* (1993), 89 Ohio App.3d 424, 427, 624 N.E.2d 801, 802-803; *Brown v. Brown* (Sept. 20, 2001), Cuyahoga App. No. 78551; *Keresztosi v. Keresztosi* (Dec. 14, 2000), Cuyahoga App. No. 76648.

[1] (§ 18) In the case at bar, when appellant filed his objections to the magistrate's decision, he did not submit a transcript or affidavit describing the evidence adduced at trial. Appellant argues that he did not need to submit a transcript with his objections in the trial court because the issue of laches is a question of law. We disagree.

(§ 19) We agree with the decision in *Sutton v. Sutton* (Dec. 27, 1995), Greene App. No. 95-CA-25, whose procedural facts are virtually identical with those in the case at bar. In *Sutton*, supra, the court was faced with the same situation we are faced with here, namely, appellant's filing objections to a magistrate's decision without providing the trial court with a transcript of the evidence actually presented to the magistrate. On appeal, the appellant in *Sutton*, like appellant in the case at bar, argued that the issue of laches was one of law and thus there was no need for her to file a transcript with her objections. The court in *Sutton*

disagreed stating, "It is settled law in Ohio that the issue of laches 'is predominately one of fact, to be resolved in each case according to its special circumstances.' 66 Ohio Jurisprudence 3d (1986) 422, Limitations and Laches, Section 222. The seminal case on the issue is *Smith v. Smith* (1959), 168 Ohio St. 447, 156 N.E.2d 113, where the Supreme Court defined laches as follows: 'Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.' " Paragraph 3 of syllabus. *Sutton*, supra at *3.

(§ 20) Contrary to appellant's argument in the case at bar, a defense based upon laches is most certainly fact dependent. In asserting this defense, a defendant must present factual evidence that there was a delay which caused material prejudice. *Sutton*, supra, citing to *Ferreo v. Sparks* (1991), 77 Ohio App.3d 185, 601 N.E.2d 568. We must, therefore, reject appellant's position on the nature of a laches defense.

(§ 21) Moreover, because appellant did not provide the trial court with a transcript in support of his objections, all of which were based upon the defense of laches, our review is limited to deciding whether the court abused its discretion in adopting the magistrate's decision. *Brown*, supra.

(§ 22) We note that in his brief on appeal, appellant almost completely relies upon the transcript he filed for the first time over one month after he filed his notice of appeal. Because appellant's arguments are inextricably tied to a transcript we cannot consider, we must conclude that his arguments on the issue of laches fail. We also observe that the failure to timely file a transcript also prevents an appellee from reviewing the testimony and addressing the merits of the case.

*4 [2] (§ 23) Further, we also reject appellant's argument that the magistrate's decision is contrary

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

to the sufficiency and weight of the evidence set forth in the transcript. Obviously, the only way to evaluate the sufficiency or weight of evidence is by reference to the transcript of evidence admitted at trial. For the same reason that we cannot refer to the transcript regarding appellant's laches defense, we are likewise precluded from considering that transcript relative to the evidentiary issues raised in the second assignment of error.

{¶ 24} Moreover, it is obvious from the face of the magistrate's report that he relied extensively on oral testimony from a variety of witnesses whose credibility only he was able to assess. Without a transcript of the proceedings, the trial court had to defer to the factual determinations "made by the one who has viewed the witnesses, and heard the testimony, and who has thereby enjoyed a superior position to determine the weight and credibility of the evidence." *In re Welch Children* (May 1, 2002), Hamilton App. No. C-020666, at *6.

{¶ 25} We must reject, moreover, any argument based on any exhibits other than the Judgment of Dissolution and the Separation Agreement, which are the only exhibits the Magistrate references. Other than these two documents, the magistrate's decision does not identify which, if any, exhibits the magistrate relied upon or considered. Without a transcript, moreover, neither the trial court nor a reviewing court would know whether any exhibits not identified by the magistrate were admitted, authenticated, or ever actually introduced into evidence. A review of such exhibits, as the dissent proposes, therefore exceeds the proper boundaries of appellate review.

[3] {¶ 26} Nor has appellant demonstrated any error in the Magistrate's application of law to his findings of fact. Under the doctrine of laches, defendant must demonstrate, as the magistrate correctly observed, material prejudice. Nothing in the magistrate's findings of fact supports a finding of prejudice. Although the court order required the father to make the child support payments directly to the mother, he always made his payments to his

wife through his children. They were always in cash in an envelope and he never requested a receipt. Three witnesses, the two children and a friend, were able to testify that each was present at different times for payments made in envelopes, the contents of which they did not see. The friend testified he witnessed the exchange of envelopes but could not testify as to the amount or the duration of these exchanges. The daughter reported receiving these envelopes only once or twice. The son stated no envelopes were given to him after 1985. Finally, the magistrate found the Father to be neither a convincing nor credible witness and that the Mother was able to explain an alternative source of support she relied upon: her father, non-relatives, and church. We find no abuse of discretion in the magistrate's application of law to these findings.

*5 {¶ 27} Accordingly, we find no abuse of discretion in the trial court's determination that appellant failed to meet his child support obligations pursuant to the express terms of the parties' separation agreement and that he owes appellee \$47,150.00 in child support arrearage. Appellant's two assignments of error are overruled and the judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA A. BLACKMON, P.J., concurs and
TERRENCE O'DONNELL, J., dissents with separate
dissenting opinion.
DIANE KARPINSKI, Judge.

Judge TERRENCE O'DONNELL, Dissenting.

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

{¶ 28} Respectfully, I dissent.

{¶ 29} The troublesome aspects of this case are twofold: first, as a court of equity, the domestic relations division of the common pleas court ought to be able to fully consider laches as a defense where Kathleen Natsis waited 18 years after her dissolution to present her claim for nonpayment of child support, and where, as here, the children are now 28 and 29 years old, respectively; and second, as a reviewing court, we are bound to consider the record as properly presented to us on appeal—in this instance as the majority correctly states, because no transcript had been provided to the trial court, we can only review whether the court abused its discretion in adopting the magistrate's decision. In this instance, I believe it did.

{¶ 30} In *Smith v. Smith* (1957), 107 Ohio App. 440, 443-444, 146 N.E.2d 454, this court defined the doctrine of laches:

{¶ 31} "Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes. It is lodged principally in equity jurisprudence." At the outset, it is important to recognize that the 18-year delay in filing for child support in this case does not set a record in Ohio legal annals. In *Conroy v. Bailey*, (1984), 15 Ohio St.3d 34, 472 N.E.2d 328, the court there considered a situation where the parties had married in 1929 and divorced in 1934, and the wife pursued child support until 1946; then, following her husband's death in 1982, she presented a \$28,000.00 claim against his estate—35 years later! The court allowed her claim because the estate failed to establish that the delay caused any material prejudice.

{¶ 32} Here, although no transcript of proceedings before the magistrate had been presented to the trial court, our record does contain several exhibits, notably, the original dissolution decree dated October 7, 1981, a land contract dated September 17, 1981 evidencing Dimitrios's purchase of a resid-

ence located at 2357 Wooster Road in Rocky River, Ohio, a letter dated November 25, 1992 signed by Attorney Arthur Lambros evidencing conveyance of that property with equity of \$35,000 to \$40,000 to Kathleen, and a copy of the quit claim deed for that conveyance.

*6 {¶ 33} While the majority finds no material prejudice resulting to Dimitrios Natsis from the 18 year delay in the assertion of Kathleen's claim for \$54,240.00 of child support, an examination of the aforementioned exhibits reveals the following:

{¶ 34} The decree of dissolution incorporates a separation agreement which specifies the marital home to be the one located on 24528 Hilliard Boulevard in Westlake, Ohio, and further specifies that each party will retain his or her respective property. In 1992, with no pending child support claim, Dimitrios deeded his property, the Wooster home, to Kathleen with equity of at least \$35,000.00. A careful reading of the dissolution decree and the judgment entry reveals he had no obligation to do so. Several aspects of material prejudice exist: no issue of a release for any outstanding claim of child support ever arose, because Kathleen never presented a claim for child support, yet she accepted the realty from Dimitrios; and, during the years following their dissolution, Dimitrios made cash payments to Kathleen and despite her sworn testimony that he did not do so, the court found she did in fact receive cash payments from him in the amount of \$7,650.00—disturbingly it found her to be a convincing witness.

{¶ 35} Her delay in presenting this claim prejudiced Dimitrios by having him continue to make cash payments instead of either paying by check or money order or obtaining receipts from her for those payments; notably, the court decree did not require payment of child support through the court; Kathleen's delay also deprived him of the opportunity to effect a mutual release in exchange for his delivery of the Wooster Road property to her in 1992.

{¶ 36} As a court of equity, the court has a

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058
(Cite as: 2002 WL 31838501 (Ohio App. 8 Dist.))

duty, it appears to me, to look at the entire record and to examine the totality of the circumstances. Here, I believe the record reveals that Dimitrios has been materially prejudiced by the 18-year delay in presenting this claim in that Kathleen presented it after she received the full benefit of the gift of realty and at a time when Dimitrios could no longer obtain evidence of the payments which this record shows had been made to her. It also shows that the court has reached an inequitable result. The fact that the majority chooses to ignore the physical documentary evidence contained in the record which the trial court reviewed and chooses to chastise my review of it as exceeding the proper boundaries of appellate review only dramatizes its ill-considered, result-oriented decision. I would reverse the judgment of the court.

Ohio App. 8 Dist., 2002.

Natsis v. Natsis

Not Reported in N.E.2d, 2002 WL 31838501 (Ohio App. 8 Dist.), 2002 -Ohio- 7058

END OF DOCUMENT

Westlaw

Page 1

Not Reported in N.E.2d, 1986 WL 11959 (Ohio App. 8 Dist.)
(Cite as: 1986 WL 11959 (Ohio App. 8 Dist.))

C
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
STATE of Ohio, Plaintiff-appellee,
v.
Mark WOLFE, Defendant-appellant.

No. 51124.
Oct. 23, 1986.

Criminal appeal from Shaker Heights Municipal
Court
Case No. 83-CR-0328
Andrea Kantor-Rubin, Patricia M. Lawley, Assistant
Prosecutors, City of Beachwood, Beachwood,
for plaintiff-appellee.

Mark Wolfe, pro se.

JOURNAL ENTRY AND OPINION
FRYATEL, Judge.

*1 On July 7, 1983, a complaint was filed against defendant-appellant Mark Wolfe in Shaker Heights Municipal Court alleging a violation of R.C. 2917.21 (telephone harassment). On July 18, 1983, defendant pled not guilty and bond was set at five hundred dollars.

On July 19, 1983, defendant's bond was revoked pending psychiatric reports as to defendant's capacity to stand trial and to determine whether defendant was a danger to himself or the community. On July 27, 1983, the municipal judge ordered the jailor to return the defendant to the court for a hearing. Subsequent to the hearing, the judge ordered the defendant back to the workhouse, pending acceptance at a medical facility as approved by the

court. Defense counsel, the prosecutor and defendant's father also were in court. No objections were made to this arrangement. On July 28, 1983, defendant was transferred to Marymount Hospital under the care of Dr. Sigmund Cha. The defendant was ordered to remain under Dr. Cha's care until Dr. Cha assured the court that defendant was not a danger to himself or the community, at which time the court would then release defendant on his personal recognizance on the condition that he refrain from contacting the complainant and his family and that he continue with Dr. Cha as an outpatient. Pursuant to R.C. 2945.72(B) defendant waived his right to a speedy trial.

On August 11, 1983, [with Dr. Cha's permission] defendant was placed on trial leave from the hospital. A competency hearing was set for October 17, 1983, but later continued to November 7, 1983, in order to obtain testimony from Dr. Cha. On November 7, 1983, a competency hearing was conducted and defendant was found competent to stand trial (defendant waived his right to have Dr. Cha present). Defendant changed his plea to no contest. Evidence was heard and defendant was found guilty. Defendant was fined one thousand dollars and costs and sentenced to six months. Five hundred dollars and all the days were suspended on the condition that defendant continue psychiatric treatment and that there be no similar violation during probation. Defendant was given permission to move to Chicago, Illinois, but required to keep in contact with Shaker Heights Municipal Court Probation Department. Defendant's bond was released. Subsequent to this hearing, defendant repeatedly violated his probation. On May 6, 1985, defendant was again before the court. After hearing testimony from three witnesses, the court found that the defendant violated the court's order of November 7, 1983, and entered a finding of guilty. Defendant was sentenced to thirty days in the workhouse, ordered to pay the costs of the action and to refrain from further communication with the prosecutor.

Not Reported in N.E.2d, 1986 WL 11959 (Ohio App. 8 Dist.)
(Cite as: 1986 WL 11959 (Ohio App. 8 Dist.))

The bond was continued.

On May 8, 1985, defendant's bond was released. On May 9, 1985, defendant's attorney's oral request for mitigation of sentence was heard and granted. The balance of twenty-seven days was suspended. The defendant was released immediately and his probation was extended for one year.

*2 On June 11, 1985, another probation violation hearing was set for July 1, 1985. On July 1, 1985, the case was called and defendant, having failed to appear, was found in contempt of court.

On October 1, 1985, defendant *pro se* filed a motion for a directed verdict and a motion for reconsideration. Defendant failed to appear at the hearing set for November 4, 1985. The motions were overruled.

On October 18, 1985, defendant filed an untimely notice of appeal. On December 3, 1985, (plaintiff) appellee's motion for dismissal was granted. On February 11, 1986, the appeal was reinstated pursuant to (defendant) appellant's motion. Appellant was ordered to file a proper brief by March 17, 1986.

On April 14, 1986, appellant moved to bar appellee's participation at oral argument.²⁰¹ On May 2, 1986, this court overruled the motion since appellant failed to serve any of his documents on appellee. The court held that appellant's request that his previously filed documents be accepted as complying with minimum Appellate Rules and that the documents would be considered by the panel hearing the merits of the appeal.

In his single assignment of error appellant *pro se* alleges he was falsely imprisoned for twenty-eight days and because of this incarceration, he was forced into entering a guilty plea.

The record in the case at bar consists of the original papers and certified copies of the docket and journal entries. The record does not contain a transcript of the proceedings pursuant to App.R. 9(A).

The appellant also failed to file one of the alternatives to the transcript, i.e. a statement of the evidence approved by the judge (App.R. 9(C)), or a statement of the evidence agreed by both parties (App.R. 9(D)).

The appellate court is limited on review to the record before it. App.R. 12(A). Absent a transcript of the proceedings in the lower court, the court will presume regularity. *In re Sublett* (1959), 169 Ohio St. 19, 20; *Ostrander v. Parker-Fallis* (1972), 29 Ohio St.2d 72, 74.

In the instant case, nothing in the record supports appellant's claim that he entered a guilty plea under duress. A mere allegation in an appellate brief is not sufficient to overcome the presumptions of regularity of the proceedings and judgment entered in the trial court. The judgment of the lower court must be affirmed. Appellee's motion to file its brief *instanter* is granted while its motion to dismiss the appeal is ruled moot.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Shaker Heights Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, P.J., and MCMANAMON, J., concur.

*3 N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the

Not Reported in N.E.2d, 1986 WL 11959 (Ohio App. 8 Dist.)
(Cite as: 1986 WL 11959 (Ohio App. 8 Dist.))

Judgment and order of the court and time period for
review will begin to run.

FNL. Appellant failed to appear at the
scheduled oral argument.

Ohio App., 1986.
State v. Wolfe
Not Reported in N.E.2d, 1986 WL 11959 (Ohio
App. 8 Dist.)

END OF DOCUMENT