[Cite as *McElrath v. Travel Safe.com Vacation Ins.*, 2003-Ohio-7206.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

SCOTT R. McELRATH,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2002-T-0085**
- vs -	:	
TRAVEL SAFE.COM VACATION INS.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Girard Municipal Court, Case No. 01 CVI 00249.

Judgment: Affirmed.

Glenn J. Schwartz, Northwood Center, 1601 Motor Inn Drive, #330-A, Girard, OH 44420 (For Plaintiff-Appellee).

Andrew H. Cox, Thompson Hine, L.L.P., 3900 Key Center, 127 Public Square, Cleveland, OH 44114-1216 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Travel Safe.Com Vacation Insurance, appeals from the June 3, 2002 judgment entry of the Girard Municipal Court, which overturned the magistrate's decision and found in favor of appellee, Scott R. McElrath.

{¶2} The record discloses the following facts. Appellee scheduled a vacation cruise to celebrate his eighteenth wedding anniversary. The vacation was scheduled to begin on October 8, 2001, and end on October 19, 2001. Once the vacation dates were

set, appellant opted to purchase a trip cancellation insurance policy ("policy") from appellant.

{¶3} The policy stated:

{¶4} "Trip Cancellation coverage provides benefits for losses you incur for 'trips' cancelled up to the time and date of departure. *** We will pay this benefit if your 'trip' is cancelled or interrupted due to any of these events ***.

{¶5} "***

{¶6} "7. You being subpoenaed, required to serve on a jury, hijacked or quarantined."

{¶7} Furthermore, the policy stated that "[l]osses are payable only for those events which could not have been reasonably foreseen by you, are outside your control and substantially impair your ability to travel."

{¶8} On or about August 14, 2001, appellee received a notification via mail from the United States District Court of the Northern District of Ohio entitled "Juror Summons and Questionnaire Enclosed" which stated:

{¶9} "THIS COURT SUMMONS YOU TO APPEAR FOR JURY DUTY AT THE TIME AND PLACE SHOWN. YOUR TERM OF SERVICE IS DETERMINED BY THE COURT. IF THE EXACT DAY TO REPORT IS NOT GIVEN YOU WILL BE NOTIFIED LATER. IF AN EXACT DATE IS SHOWN YOU MUST REPORT ON THAT DAY UNLESS A PHONE MESSAGE OR OTHER NOTICE TELLS YOU OTHERWISE."

{¶10} The notification did not give a specific date for appellee to report for jury duty. Instead, it explained that his possible jury duty would be determined at a later date.

{¶11} At the bottom of the notification, appellee was instructed to complete the enclosed juror qualification questionnaire. The notification explained:

{¶12} "IF YOU ARE FOUND TO BE QUALIFIED YOU WILL RECEIVE A NOTICE TO REPORT ON A CERTAIN DATE IN THE NEAR FUTURE. IF YOU ARE NOT FOUND TO BE QUALIFIED, YOU WILL NOT BE CALLED FOR JURY DUTY, AND YOU NEED NOT TELEPHONE THE COURT."

{¶13} In accordance with the notification's instructions, appellee completed the juror qualification questionnaire. Under a section reserved for remarks, appellee requested that he be excused from jury duty during his scheduled vacation time. Appellee then properly mailed the juror qualification questionnaire and request to the federal court.

{¶14} Upon receipt of appellee's juror qualification questionnaire and request, the jury administrator honored appellee's request and excluded him from the jury pool during his scheduled vacation dates. The jury administrator, however, did not inform appellee that he had been excused.

{¶15} When appellee did not receive a written response regarding his request, he contacted the federal clerk's office. After speaking with the clerk's office, appellee claimed he was unable to receive confirmation of whether he had been excused from jury service during his scheduled vacation.

{¶16} On September 19, 2001, three weeks prior to his scheduled cruise, appellee cancelled his vacation and sent a claim to appellant for coverage under the policy. Appellee maintained that he cancelled his vacation due to the possibility that he may be called upon for jury duty during his scheduled vacation time. Appellant denied appellee's claim.

{¶17} Following the denial of his claim, appellee filed a complaint on March 18, 2002, in the small claims division of the Girard Municipal Court. His complaint requested judgment in the amount of $2,775, plus interest from September 19, 2001, pursuant to appellant's policy coverage for trip cancellation.

{¶18} On April 23, 2002, both parties appeared before a magistrate for a small claims hearing**.** Part of appellee's evidence was a letter dated April 15, 2002. In the letter, the jury administrator explained that it was not the procedure of the federal court to send jurors a formal letter excusing them from service for dates they indicate unavailability. Rather, the federal court honored their request by simply not asking them to report during the indicated period. After receiving evidence and testimony at the hearing, the magistrate published a decision and report on June 3, 2002. In his decision and report, the magistrate found that, under the specific terms of appellant's insurance policy, appellee was not entitled to relief.

{¶19} On the same day as the magistrate's decision, the municipal court did not adopt the magistrate's ruling and entered judgment in favor of appellee in the amount of $2,775, plus interest and other costs. The municipal court explained that the magistrate's decision was neither fair nor equitable under the circumstances.

{¶20} Pursuant to the trial court's June 3, 2002 judgment entry, appellant filed a timely notice of appeal setting forth the following assignment of error for our consideration:

{¶21} "The Court Erred In Reversing the Magistrate's Ruling In Favor of [appellant]."

{¶22} In its sole assignment of error, appellant argues that the trial court erred in not adopting the decision of the magistrate. Appellant contends that its trip cancellation

insurance policy provided coverage for canceled vacations due to a person being "required to serve on a jury." Appellant stresses that appellee did not serve on a jury, did not receive a notice to report for jury duty, and in fact, was removed from the jury pool during the period of his scheduled vacation. In this sense, appellant alleges that the August 2001 Juror Summons and Questionnaire did not require appellee to cancel his scheduled October 8, 2001 trip on September 19, 2001, in order to "make himself available" for jury duty.

{¶23} Generally, when a party fails to submit a transcript of the proceedings, an appellate court is unable to determine whether the evidential exhibits were admitted into evidence. "A reviewing court cannot consider an exhibit unless the record demonstrates that the exhibit was formally admitted into evidence in the lower court." *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028, at 4, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402. See, also, *Moore v. Nichol* (Oct. 30, 1991), 9th Dist. No. 15062, 1991 Ohio App. LEXIS 5219, at 10 (holding that the "[appellate] court cannot consider an exhibit absent a sufficient showing that it was formally admitted into evidence.")

{¶24} We must note that there was no transcript or App.R. 9(C) or (D) statements submitted in this case. Often in such situations, an appealing party may not be able to demonstrate any claimed error. In some cases, an assignment of error may be supported by the findings of fact and conclusions of law issued in support of a magistrate's decision later adopted by the trial court. See *DAK, PLL v. Borgerding*, 10th Dist. No. 02AP-1051, 2003-Ohio-3342, at ¶17.

{¶25} "[A] trial court is required to undertake an independent analysis to determine whether the magistrate's decision should be adopted." *Wantz v. Wantz* (Mar.

23, 2001), 11th Dist. No. 99-G-2258, 2001 Ohio App. LEXIS 1386, at 6-7, citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418. Pursuant to Civ.R. 53(E)(4)(b), "[t]he court may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter." Thus, the trial court's independent analysis may result in a different conclusion than that rendered by the magistrate.

{¶26} In the case at bar, the trial court adopted some, but not all, of the magistrate's findings. Therefore, the trial court created a new position and made its own independent findings and conclusions, thus, overruling the magistrate's decision. As such, it is not appropriate to focus exclusively on the findings contained in the magistrate's decision since the trial court issued its independent findings and conclusion in reaching its decision in its judgment entry.

{¶27} Various exhibits, including the Certificate of Insurance, the April 8, 2002 Jury Administrator's Letter from the United States District Court, Northern District of Ohio, and the Juror Summons and Questionnaire, cannot be considered by this court since the record does not demonstrate that they were formally admitted into evidence in the lower court. See *Cardone*, supra, at 4. Thus, our review of the language of the policies in question is limited to the portion quoted by the trial court in its brief findings. As such, the proper standard of review is whether the trial court abused its discretion in reaching its final conclusion.

{¶28} *State v. Montgomery* (1990), 61 Ohio St.3d 410, 413 states: "[t]he term 'abuse of discretion' '(***) connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. (***)' *State v. Adams* (1980), 62 Ohio St.2d 151, 157 ***." (Parallel citations omitted.)

{¶29} In the instant matter, the trial court stated in its June 3, 2002 judgment entry that: "[i]t is crystal clear that [appellee] received a jury summons from a Federal Court and was required to make himself available or be subject to the sanctions of law. Accordingly, [appellee] did have a right to rescind the agreement and recover under the insurance policy provided by [appellant]." Furthermore, the trial court stresses that the policy expressly states that appellee is entitled to coverage if he has been "subpoenaed, required to serve on a jury, hijacked or quarantined." The trial court determined that appellee "was in fact required to serve on a jury by virtue of a summons ***."

{¶30} Because our review is confined to the parameters of the trial court's foregoing judgment entry, we believe that the trial court lawfully exercised its discretion by overruling the magistrate's decision and determining that appellee was required to serve on a jury.

{¶31} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Girard Municipal Court is affirmed.

Judgment affirmed.

DIANE V. GRENDELL, J., concurs.

JUDITH A. CHRISTLEY, J., dissents with dissenting opinion.

JUDITH A. CHRISTLEY, dissenting.

{¶32} I respectfully dissent . As an initial matter, I note that appellant failed to submit a transcript of the small claims hearing or affidavit of evidence per Civ.R. 53(E), or an appropriate substitute to either the trial court or this court. Generally, when a

party fails to submit a transcript of the proceedings, we are unable to determine whether the evidential exhibits were admitted into evidence. "A reviewing court cannot consider an exhibit unless the record demonstrates that the exhibit was formally admitted into evidence in the lower court." *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028, at 4, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402. See, also, *Moore v. Nichol* (Oct. 30, 1991), 9th Dist. No. 15062, 1991 Ohio App. LEXIS 5219, at 10 (holding that the "[appellate] court cannot consider an exhibit absent a sufficient showing that it was formally admitted into evidence."). Thus, the record must be further examined to determine whether it affirmatively demonstrates that the relevant exhibits were admitted before the magistrate and municipal court.

{¶33} After reviewing the record before us, it is clear to me that the exhibits necessary for review were admitted before the lower court. The magistrate's decision and report, and the municipal court's judgment entry, specifically refer to each relevant evidential exhibit now before our court. See, *DAK*, *PLL* v. *Borgerding*, 10th Dist. No. 02AP-1051, 2003-Ohio-3342, at ¶17. Both entries discuss the notification, insurance policy, and juror qualification questionnaire.[1] In its judgment entry, the municipal court quotes directly from each of these three exhibits. Likewise, the magistrate's decision and report details the contents of all three pieces of evidence.

{¶34} Accordingly, the record before us demonstrates that the relevant evidential exhibits were considered as evidence and formally admitted in the lower court. Thus, this court should have proceeded to evaluate appellant's assignment of error in light of these three key pieces of evidence.

1. I also note that the magistrate's decision expressly stated that the jury administrator's letter of April 15, 2002, had been admitted as exhibit D. However, the magistrate gave no real weight to the letter, as the only relevant evidence was the notification, insurance policy, and juror qualification questionnaire.

{¶35} That being said, appellant argues that the language of the policy is clear and unambiguous, and coverage was available only when appellee was "required to serve on a jury." As such, appellant maintains the municipal court erred by finding that appellee was entitled to coverage under the policy because he was only "required to make himself available" for a yet to be determined date of jury service.

{¶36} It is well-established under Ohio law that an insurance policy is a contract between the insurer and the insured. *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St.3d 474, 479, 2001-Ohio-100. Accordingly, "insurance contracts must be construed in accordance with the same rules as other written contracts." *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665.

{¶37} A critical rule declares that a clear and unambiguous insurance contract must be enforced as written and its words must be given their plain and ordinary meaning. *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 608, 1999-Ohio-322. This rule precludes a court from rewriting a contract when the intent of the parties is clear. *Hybud Equip. Corp.* at 666.

{¶38} In the instant case, the portion of appellant's policy at issue is clear and unambiguous. The policy expressly states that appellee is entitled to coverage only when he has been "subpoenaed, required to serve on a jury, hijacked or quarantined." Because this language is clear and unambiguous, there can be no misinterpretation of the parties' intent. When examining the policy, we are prohibited from rewriting the contract and we must give the words of the policy their plain and ordinary meaning. Accordingly, the issues of fairness and equity are not relevant to our appellate review.

{¶39} The plain and ordinary meaning of "required to serve on a jury" indicates that a specific date or time frame for jury duty has been established, and that the person

selected for such service is obligated by law to be present on the date specified. Therefore, to be covered under the policy it must be evident that appellee was obligated to report for jury duty on a specific date during his vacation.

{¶40} The notification and attached juror qualification questionnaire clearly explained that the date of jury service had yet to be determined. Specifically, the section of the notification informing appellee when jury duty was to be served expressly stated, "[d]ate to be determined." Thus, there was not even a possible time frame established, such as "within the next 120 days," or similar defining language that would limit the possibilities of a future date for jury duty.

{¶41} Moreover, the notification makes clear that the juror qualification form, filled out by appellee, would be used to determine whether he was a qualified candidate for jury service. The notification further explained that only after appellee had qualified for jury service would he be sent a notification revealing the date and time he was required to appear for jury duty.

{¶42} Here, we have language that merely indicates that at some unknown point in the future appellant might be called for jury duty. Such language confirms that appellee was not yet required to report for jury duty. The notification's language specifically indicated that appellee's qualification as a juror, and a scheduled date for jury duty, were yet to be determined.

{¶43} Despite the clear language of the notification, the municipal court explained in its judgment entry that appellee was entitled to coverage because the notification required him to "make himself available" for jury duty. Such a finding extends the coverage of the unambiguous policy language beyond its plain and ordinary meaning. Even the language used by the municipal court in its judgment entry indicates

that appellee was not yet required to serve on a jury. Specifically, the court found that appellee was still awaiting the specific notice that would require him to report for jury duty on a certain date.

{¶44} On appeal, appellee's appellate brief concedes that the notification and attached juror qualification form did not require him to appear for jury duty during his scheduled vacation. Instead, appellee states that he "was clearly not required to serve on a jury but it is not clear at all whether or not he was subpoenaed in the case during the scheduled cruise."

{¶45} "Subpoenaed" is a legal term of art. A person is subpoenaed when they have been "command[ed] to appear at a certain time and place to give testimony upon a certain mater." Blacks Law Dictionary (6 Ed.1991) 995. Appellee had never been commanded to appear at a certain time and place for the purpose of giving testimony upon a certain matter. Because the record does not reflect, or even suggest, that appellee was subpoenaed by the federal court, the policy language with respect to being "subpoenaed" is not applicable. Further, there is no way to confirm if this argument was raised before the magistrate.

{¶46} Based upon the foregoing analysis, it is clear that appellee was not "required to serve on a jury," nor was he "subpoenaed" by the federal court. Regardless of how "unfair or "inequitable" this result may seem, "[i]t is not the responsibility or function of a court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 362, 1997-Ohio-202. Therefore, the policy provisions for coverage were not met, and appellant properly denied appellee's claim. Appellant's assignment of error has merit and the judgment in favor of appellee should be reversed.

{¶47} To that end, I dissent.