[Cite as *Livingston v. Graham*, 2010-Ohio-1091.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RAY LIVINGSTON,	)	
	)	CASE NO. 09 JE 16
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
RICHARD GRAHAM,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Steubenville Municipal Court, Case No. 09CVI1.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:
Ray Livingston, *Pro se*
225 South 6th Street
Steubenville, Ohio 43952

For Defendant-Appellee:
Richard Graham, *Pro se*
2016 Oregon Avenue
Steubenville, Ohio 43952

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 22, 2010

VUKOVICH, P.J.

¶{1} Plaintiff-appellant Ray Livingston appeals the judgment of the Steubenville Municipal Court which overruled his objection from a magistrate's decision entered in favor of defendant-appellee Richard Graham. On appeal, he claims that the decision was contrary to the weight of the evidence. However, we cannot reach the weight of the evidence on appeal because appellant failed to present a transcript or affidavit of the evidence to the trial court and failed to object to the magistrate's decision with specificity. As such, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On January 16, 2009, appellant filed a small claims complaint against appellee in the Steubenville Municipal Court. He claimed that on February 1, 2008, appellee tried to knock a pole over that belonged to appellant and that appellee later deliberately ran into appellant's vehicle with a truck. Appellant sought $1,300 in damages.

¶{3} On March 20, 2009, a trial was conducted before a magistrate, who was unconvinced by appellant's evidence. Appellant filed a timely objection from the magistrate's decision, stating merely that a hearing had been held, that he objected to the magistrate's decision, and that he wanted the case heard by the judge. Appellant did not seek a transcript of proceedings nor did he file an affidavit in lieu of a transcript in support of his objection.

¶{4} On April 8, 2009, the trial court overruled appellant's objection. The court explained that appellant failed to object with specificity. Appellant filed timely notice of appeal to this court.

¶{5} In responding to this court's procedural requests, appellant complained that the magistrate apparently does not record its proceedings.[1] He attempted to

[1]Appellant alludes to this as being improper procedure. Civ.R. 53(D)(7) specifies: "*Recording of proceedings before a magistrate*. Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court." The small claims statutes do not provide otherwise. The Eleventh District has consistently admonished small claims magistrates for failing to provide a record. See, e.g., *Amos v. Keagy*, 11th Dist. No. 2008-T-0033, 2009-Ohio-3794, ¶27, fn.2 (finding local rule, which required a request for recording, conflicts with Civ.R. 53);

provide this court with a brief document reiterating the facts and his evidence, which was apparently filed under App.R. 9(C) as a statement of the evidence or App.R. 9(D) as an agreed statement as the record. Appellant claimed that the magistrate improperly refused to sign this document. However, there is no indication that the document had been provided to appellee as required by divisions of App.R. 9.

ASSIGNMENT OF ERROR

¶{6} Appellant's sole assignment of error contends that the trial court "did not apply enough weight to my evidence and therefore the case must be reverse[d]." Factually, appellant states that appellee deliberately ran his truck into appellant's car because he did not want appellant's car there. Since he saw appellee trying to knock his pole over with a truck, he assumes it was appellee who damaged his vehicle.

¶{7} Appellate review of the manifest weight of the evidence in a civil case is much more deferential to the trial court than in a criminal case. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶26. The civil manifest weight of the evidence standard provides that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. Id. at ¶24, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus.

¶{8} The reviewing court is obliged to presume that the findings of the trier of fact are correct. Id., citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. This presumption arises in part because the fact-finder occupies the best position to watch the witnesses and observe their demeanor, gestures, and voice inflections and to utilize these observations in weighing credibility. Id., citing Seasons Coal, 10 Ohio St.3d at 80.

Brown v. Gabram, 11th Dist. No. 2004-G02605, 2005-Ohio-6416, ¶30; *All Occasion Limousine v. HMP Events*, 11th Dist. No. 2003-L-140, 2004-Ohio-5116, ¶15-17, fn.3; *Moyers v. Moyers* (June 18, 1999), 11th Dist. No. 98-A-0080. The Eighth District has remanded where the magistrate failed to record its proceedings in accordance with Juv.R. 40(D)(2), which is akin to Civ.R. 53(D)(7). *In re Clayton* (Nov. 19, 2000), 8th Dist. No. 75757 (local juvenile rule, which required party to request recording, conflicts with mandatory recording requirement in state rule relating to magistrates). See, also, *Wooley v. Meluch,* 9th Dist. No. 24196, 2009-Ohio-449, ¶10-11; 1995 Staff Note to Civ.R. 53(D)(7) (magistrates should conduct proceedings on the record as rule only allows court to choose the means of recording). However, as established infra, this issue was not properly preserved.

¶{9} "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." Id., citing *Seasons Coal*, 10 Ohio St.3d at 81. As such, this court cannot substitute its judgment on whether appellee damaged appellant's vehicle if there was just some competent, credible evidence to support a judgment in favor of appellee.

¶{10} Nevertheless, we cannot even review the weight of the evidence here. App.R. 9(A) specifically states that a weight of the evidence argument requires the appellant to order a transcript of all evidence relevant to the finding or conclusion said to be contrary to the weight of the evidence. Where there is no transcript, App.R. 9(C) or (D) can be utilized. However, these rules were not properly utilized due to the lack of service upon appellee and the resulting lack of a signature by the fact-finder.

¶{11} In addition, there are procedural problems below which preclude this court from viewing a statement of the evidence or even a full transcript if one had been presented. Where a magistrate is utilized, the procedure must be in accordance with Civ.R. 53. See Sup.R. 1(A) (except where otherwise provided, the Superintendence Rules apply to all municipal and county courts); Sup.R. 9(B) (in civil matters, the magistrate shall act pursuant to Civ.R. 53). This is true even in small claims matters. Civ.R. 1(C)(4) (the Civil Rules are inapplicable to small claims matters under Chapter 1925 only to the extent that they are clearly inapplicable); R.C. 1925.16 (except as inconsistent procedures are provided in this chapter or in rules of court adopted in furtherance of this chapter, all proceedings in the small claims division of a municipal court are subject to the Rules of Civil Procedure). Thus, Civ.R. 53 applies to proceedings before a magistrate in the small claims division. *Wilkinson v. Escaja* (Mar. 30, 2001), 7th Dist. No. 99CA310; *Kuala v. Nolen* (Oct. 6, 2000), 2d Dist. No. 18389. See, also, *Thomas v. Early*, 10th Dist. No. 05AP-236, 2005-Ohio-4551, ¶11-12 (Civ.R. 53 is not inconsistent with small claims statutes); *Grenga v. Ohio Edison Co.*, 7th Dist. No. 03MA41, 2004-Ohio-822, ¶4,11 (applying Civ.R. 53 to small claims proceedings).

¶{12} Pursuant to Civ.R. 53(D)(3)(b)(iii), an objection to a factual finding, whether or not specifically designated as such, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding "or an affidavit of that evidence if a transcript is not available." Appellant's objection was not accompanied by a transcript or an affidavit of evidence.

¶{13} Thus, the trial court could not review the magistrate's weighing of the factual evidence. See *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶17, 32. This problem carries over into the appeal to this court as well for various reasons. See id. Cf. *Sonoga v. Trumbull Cty. Child. Support Enf. Agency*, 11th Dist. No. 2004-T-0110, 2005-Ohio-3616, ¶23 (where appellant filed an affidavit of evidence with the trial court and indicated that the magistrate's hearing was not recorded); *All Occasion Limousine v. HMP Events*, 11th Dist. No. 2003-L-140, 2004-Ohio-5116, ¶7 (where appellant filed detailed objections including the magistrate's failure to record the proceedings and then submitted an affidavit of evidence to the trial court).

¶{14} Specifically, where the objecting party fails to provide the trial court with the transcript of the proceedings before the magistrate, the appellate court is precluded from considering the transcript of the magistrate's hearing or the alternative affidavit of evidence submitted with the appellate record. See *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730; *Petty v. Equitable Prod. & Eastern States Oil & Gas, Inc.*, 7th Dist. No. 05MA80, 2006-Ohio-887, ¶19, 22 (if no transcript has been presented to the trial court for ruling on the objections from the magistrate's decision, then no transcript can be presented in appellate court). See, also, *State v. Ishmail* (1978), 54 Ohio St.2d 402, ¶1 of syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.").

¶{15} In this event, both the trial court and the appellate court are bound by the magistrate's factual findings. *Petty* 7th Dist. No., 05MA80 at ¶23.[2] Thus, we cannot review factual issues such as the weight of the evidence where this issue was never

[2]We also note that appellant never sought findings of fact from the magistrate. See Civ.R. 53(D)(3)(a)(ii).

presented to the trial court by way of a transcript or the affidavit of evidence alternative. In addition, an appellant cannot cure the lack of a transcript or affidavit of evidence with App.R. 9(C) or (D). *Grenga*, 7th Dist. No. 03MA41 at ¶4, 11.

¶{16} As the trial court pointed out, there is another problem with appellant's compliance with Civ.R. 53. Pursuant to Civ.R. 53(D)(3)(b)(iv), except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law, unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b). Besides requiring the objection to be supported by a transcript or evidence, this latter division also mandates: "*An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection*." (Emphasis added). Civ.R. 53(D)(3)(b)(ii).

¶{17} Appellant's "objection" does not complain about the failure to record the magistrate's proceedings. Thus, we cannot review whether the proceedings were recorded and whether they were required to be recorded where this issue was not raised to the trial court in the first instance. See *Selby v. Selby*, 7th Dist. No. 06BE55, 2007-Ohio-6700, ¶3-4, 12 (the failure to use an affidavit of evidence in objecting to the trial court is deemed waiver of any error regarding the lack of a transcript); *Bell v. Bell* (June 24, 1998), 9th Dist. No. 2680-M (appellant's failure to use the alternative method of an affidavit of evidence constitutes waiver, and the lack of a recording before a magistrate is not a plain error of the trial court). See, also, *Wooley v. Meluch*, 9th Dist. No. 24196, 2009-Ohio-449, ¶10-13.

¶{18} In fact, the document said to be an objection does not state any grounds at all for objecting. Instead, it merely sought a hearing before the trial court. This is not an actual objection. Rather, it is merely part of a remedy, the propriety of which was not alleged by appellant in any event as he did not allude to additional evidence. See Civ.R. 53(D)(4)(d) (court can elect to hear additional evidence if it could not have been presented with reasonable diligence).

¶{19} Thus, the only obligation of the trial court was essentially a plain error review of the face of the magistrate's decision. See Civ.R. 53(D)(3)(b)(iv) ("Except for a claim of plain error * * *"), (D)(4)(c) ("error of law or other defect evident on the face

of the magistrate's decision"). As plain error was not apparent from the face of the magistrate's decision, the trial court did not err in adopting the magistrate's decision and in overruling appellant's objection.

¶{20} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.