[Cite as *Brown v. Gabram*, 2005-Ohio-6416.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MARK BROWN	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2004-G-2605**
- vs -	:	
CURT GABRAM	:	
Defendant-Appellee.	:	

Civil Appeal from the Chardon Municipal Court, Case No. 2004 CVI 651.

Judgment: Affirmed.

Mark Brown, Pro se*,* P.O. Box 18, Newbury, OH 44065 (Plaintiff-Appellant).

Donna M. Flammang and *Adam D. Cornett*, Taft, Stettinius & Hollister, L.L.P., 3500 BP Tower, 200 Public Square, Cleveland, OH 44114 (For Defendant-Appellee).

DONALD R. FORD, P.J.

{¶1} Appellant, Mark Brown, appeals from the November 5, 2004 judgment entry of the Chardon Municipal Court, which adopted the magistrate's decision and granted judgment in favor of appellee, Curt Gabram.

{¶2} On June 1, 2004, appellant filed a complaint in the Small Claims Division of the Chardon Municipal Court against appellee, asserting breach of contract. On the trial date of July 20, 2004, Magistrate Steven E. Patton discovered that he had a conflict

of interest, and the trial was continued. On September 14, 2004, the trial was held before Magistrate David L. Fuhry ("Magistrate Fuhry"), at which time both sides presented testimony and entered exhibits into the record. The trial was not recorded.[1]

{¶3} The trial record, which does not include a transcript of the proceedings, but consists solely of the transcript of the docket, the magistrate's decision, the exhibits admitted into evidence, and the objections filed by appellant, revealed that at some undated time, appellant and appellee entered into an oral contract pursuant to which appellant agreed to perform excavation work for appellee's new garage and breezeway. Appellant claimed that the agreed price was between $3,500 and $4,000, which appellee paid. Appellant further alleged that the parties agreed upon additional work in the amount of $1,100, which was performed but for which he never received payment. Appellee claimed that the original agreement was for $4,400, and that he paid the entire amount. He further claimed that the cost for the additional work was $360, which he also paid, although the work was not completed.

{¶4} On September 24, 2004, Magistrate Fuhry filed his findings and recommendations, finding in favor of appellee. On October 14, 2004, appellant filed his objections to the findings and recommendations, without a transcript of the proceeding or an affidavit of evidence. On November 5, 2004, the trial court adopted the magistrate's findings and recommendations in their entirety. It is from that judgment

1. There is some dispute as to whether the trial on September 14, 2004, was recorded. Appellant claims that the videotape recorder was broken, and therefore the trial was not recorded. Appellee claims that the trial was videotaped, and that according to the docket, appellant picked up a copy of this videotape. A review of the record demonstrates that on October 14, 2004, appellant did pick up a video. We note, however, that the transcript of the docket only reflects one "videotape of proceeding," which was filed on January 18, 2005. This one videotape is of the July 20, 2004 proceeding, not September 14, 2004. Thus, it appears that the September 14, 2004 trial was not recorded.

that appellant filed a timely notice of appeal and raises the following assignments of error:

{¶5} "[1.] The magistrate abused his discretion by denying [appellant] the opportunity to present certain evidence.

{¶6} "[2.] The magistrate abused his discretion by failing to fairly decide [the case] based on the preponderance of the evidence.

{¶7} "[3.] The magistrate abused his discretion by not videotaping the hearing or otherwise providing for a record of some kind.

{¶8} "[4.] The magistrate abused his discretion during previous hearings of other cases [appellant] has filed. *** ."

{¶9} For the sake of efficiency, this court will address appellant's first and second assignments of error in reverse order.

{¶10} In appellant's second assignment of error, he argues that appellee's evidence was not credible and did not support a finding against appellant by a preponderance of the evidence.[2]

{¶11} On appeal, a trial court's adoption of a magistrate's decision will not be overruled unless the trial court abused its discretion in adopting the decision. *Lovas v. Mullett* (July 29, 2001), 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, at 4-5. An abuse of discretion is more than an error of judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

2. This court interprets appellant's second assignment of error as one challenging the manifest weight of the evidence.

{¶12} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 14-15:

{¶13} "***'[M]anifest weight' requires a review of the weight of the evidence presented ***.

{¶14} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶15} In determining whether or not the trial court abused its discretion in adopting the magistrate's decision, we would need to review and weigh the testimony introduced at trial and consider the credibility of the witnesses. However, although appellant filed timely objections to the magistrate's decision, he failed to file with the objections a transcript of the trial or an affidavit, as required by Civ.R. 53(E)(3)(b).

{¶16} We visited this issue in *Calhoun-Brannon v. Brannon*, 11th Dist. No. 2003-T-0019, 2003-Ohio-7216, at ¶9:

{¶17} "Civ.R. 53(E)(3)(b) provides that 'any 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.' The duty to provide a transcript or affidavit to the trial court rests with the person objecting to the magistrate's decision. *In re O'Neal* (Nov. 24, 2000), 11th Dist. No. 99-A-0022, 2000 Ohio App. LEXIS 5460 ***, at 3. This court has repeatedly held that if the objecting party fails to

provide either of the [foregoing] in support of [his] objections, he 'is precluded from arguing factual determinations on appeal.' *Yancey v. Haehn* (Mar. 3, 2000), 11th Dist. No. 99-G-2210, 2000 Ohio App. LEXIS 788 ***, at 2." (Parallel citations omitted.)

{¶18} The result of this preclusion is the waiver of "any claim that the trial court erred in adopting the magistrate's findings," and the appellate court is limited to "a determination of whether the trial court erred in finding that there was no error of law or other defect on the face of the *** magistrate's decision. Civ.R. 53(E)(4)(a)." *Lovas*, supra, at 5.[3]

{¶19} Our review of Magistrate Fuhry's decision does not reveal any error of law or other defect. The magistrate found that appellant "paid $4760.00, not the $3500.00 he remembers *** [and that he] *** didn't fully perform." The magistrate concluded, as to the credibility of the evidence, that "[appellee's] testimony was clear, consistent and delivered with conviction. *** [Appellee] and his witness were convincing." As the trier of fact, Magistrate Fuhry was in the best position to hear and observe the witnesses, and to measure their credibility. In that capacity, he "had the right to either believe or disbelieve the testimony that was given." *Lovas*, supra, at 6. Noting that "[h]ad the parties reduced the agreement to writing it would have been a simple matter to determine what the price was[,]" the magistrate found in favor of appellee, making his determination "solely from the basis of testimony."

{¶20} Since we must accept the magistrate's factual findings, we conclude that the trial court did not err in adopting the magistrate's decision holding that appellee did

3. We recognize that this is a small claims action, "where the procedural rules are somewhat relaxed to accommodate those individuals who chose to represent themselves." *Lovas*, supra, at 8. Nonetheless, "'*[p]ro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel.'" Id., quoting *Meyers v. First Natl. Bank of Cincinnati* (1981), 3 Ohio App.3d 209, 210.

not breach the oral agreement between appellant and appellee. Therefore, appellant's second assignment of error is without merit.

{¶21} In appellant's first assignment of error, he claims that the magistrate improperly denied him the opportunity to present evidence relating to appellee's credibility. In appellant's brief, he argues that he should have been permitted to present "a summary, his cell phone records, and a police report [that appellant] filed after being threatened by Mr. Gabram ***."

{¶22} A review of appellant's objections to the magistrate's decision shows that the only evidentiary ruling he brought to the trial court's attention was the magistrate's failure to consider his cell phone bill to discredit appellee's wife's testimony that she and appellant had made repeated phone calls to appellant regarding getting him to complete the contracted work. Issues not presented to the trial court may not be raised for the first time on appeal. *Lovas*, supra, at 8. See, also, *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193, 2000 Ohio App. LEXIS 5615, at 6-7. Accordingly, we will consider only the issue of the admissibility of appellant's cell phone records.

{¶23} A trial court has broad discretion in the admission or exclusion of evidence. *Consol. Invest. Corp. v. Oak Real Estate, Ltd.*, 11th Dist. No. 2003-L-017, 2004-Ohio-1435, at ¶13. Therefore, evidentiary rulings will not be overturned absent an abuse of discretion. *State v. Long* (1978), 53 Ohio St.2d 91, 98.

{¶24} A review of the record shows that the admitted exhibits do not include any cell phone records, nor does the magistrate's decision refer to any such records. Without a trial transcript or an acceptable alternative, this court is unable to determine how appellant sought to admit the records, what form such records took, or on what

basis the magistrate excluded them. Absent such necessary trial records, appellant cannot demonstrate the claimed error, and we presume that the proceedings of the lower court are valid. *Knapp v. Edward Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶25} Therefore, we conclude that the magistrate properly excluded the phone records, and the trial court did not abuse its discretion in upholding the magistrate's decision in doing so. Thus, appellant's second assignment of error is overruled.

{¶26} In appellant's third assignment of error, he claims that the magistrate was required to videotape the trial, or otherwise record it in some manner.

{¶27} In *All Occasion Limousine v. HMP Events,* 11th Dist. No. 2003-L-140, 2004-Ohio-5116, this court recently examined the issue of whether Civ.R. 53(D)(2), which requires that all matters before a magistrate be recorded, applies to small claims proceedings. We held that it did.

{¶28} In *All Occasion*, we reviewed the provisions of R.C. 1925 et seq., which governs proceedings in small claims court, and the provisions of Civ.R. 1, which provides the scope of the Civil Rules of Procedure, applicability, construction, and exceptions to the rules, and found that they were not inconsistent. Id. at ¶12-16.

{¶29} "R.C. 1925.16 provides that, '[e]xcept as inconsistent procedures are provided in this chapter or in rules of court adopted in furtherance of the purposes of this chapter, all proceedings in the small claims division of a municipal court are subject to the Rules of Civil Procedure (***).' Civ.R. 1(C) states, '*** to the extent that they would by their nature be clearly inapplicable, [the rules] shall not apply to procedure (***) (4) in small claims matters ***[.]'" Id. at ¶12.

{¶30} Furthermore, we noted that this court has "consistently admonished magistrates for failing to provide a formal record." Id. at ¶15, relying on *Swarmer v. Swarmer* (Dec. 18, 1998), 11th Dist. No. 97-T-0212, 1998 Ohio App. LEXIS 6153, at 5, and *Moyers v. Moyers* (June 18, 1999), 11th Dist. No. 98-A-0080, 1999 Ohio App. LEXIS 2821, at 7. We noted that in *Swarmer,* we "'*** made it abundantly clear to the judges of this trial court that a renewed practice of not providing a formal record of the proceedings before the magistrates of that court would not be countenanced, except under the most narrow of justifiable circumstances *** .'" In addition, we noted that in *Moyers*, "'*** Civ.R. 53(D)(2) was adopted in part to assure that there is no shoddy or irregular practice regarding the recording of magistrate's hearings throughout the state.'" *All Occasion*, supra, at fn. 2 and 3.

{¶31} Therefore, in *All Occasion*, we held that Civ.R. 53(D)(2) applies to small claims proceedings "[b]ecause the requirement of Civ.R. 53(D)(2) is not inconsistent with the procedures established in R.C. 1925 et seq., nor clearly inapplicable to small claims court under Civ.R. 1(C)[.]" Id. at ¶16-17.

{¶32} In the case at hand, although the hearing was not recorded, appellant had an alternative. Civ.R. 53(E)(3)(c) provides that: "[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*." (Emphasis added). Although a transcript of the proceedings was not available, the appellant filed his objections without the alternative; i.e., an affidavit of the evidence. More significantly, it was appellant's *duty* to provide the trial court with the affidavit, if the

transcript was not available. *Calhoun*, supra, at ¶9. (Emphasis added). He failed to do so. Thus, appellant's third assignment of error is not well-taken.

{¶33} Appellant argues in his fourth assignment of error that the magistrate abused his discretion in past cases that appellant has filed, which ongoing abuse has established a pattern of denial of his due process rights over a course of years.

{¶34} App.R. 3(D) requires that the notice of appeal "shall designate the judgment, order or part thereof appealed from[.]" In the present case, the notice of appeal indicates that "the order appealed from" is the November 5, 2004 judgment entry of the Chardon Municipal Court, Case No. 2004 CVI 651. Therefore, any issues involving appellant's past cases are irrelevant for the purposes of this appeal.

{¶35} Moreover, appellant has not argued that his due process rights were violated in the current case. Therefore, appellant's fourth assignment of error is meritless.

{¶36} For the foregoing reasons, appellant's assignments of error are not well-taken, and the judgment of the Chardon Municipal Court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.

concur.