

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Cassandra Wiltz,	:	
	:	Nos. 16AP-169
Plaintiff-Appellant,	:	16AP-278
	:	16AP-320
v.	:	(Ct. of Cl. No. 2014-00431)
Accountancy Board of Ohio,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on December 22, 2016

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**On brief:** *Cassandra Wiltz*, pro se.

**On brief:** *Michael DeWine*, Attorney General, and *Emily Simmons Tapocsi*, for appellee.

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APPEALS from the Court of Claims of Ohio

DORRIAN, P.J.

{¶ 1} Plaintiff-appellant, Cassandra Wiltz, appeals, from the Court of Claims of Ohio, the following: (1) the February 3, 2016 judgment entry which adopted the December 23, 2015 magistrate's decision dismissing her complaint pursuant to Civ.R. 41(B)(1), (2) the March 14, 2016 magistrate's order denying as moot her request for typewritten notes and audio recordings of the magistrate's prior proceedings, (3) the April 11, 2016 entry denying her App.R. 9(E) motion to correct the record, and (4) the July 6, 2016 entry denying her motion for relief from judgment pursuant to Civ.R. 60(B). For the reasons that follow, we affirm the entries and order.

**I. Facts and Procedural History**

{¶ 2} On June 23, 2015, in *Wiltz v. Accountancy Bd. of Ohio*, 10th Dist. No. 14AP-645, 2015-Ohio-2493, we affirmed in part and reversed in part the Court of Claims'

decision to dismiss appellant's discrimination claims against defendant-appellee, Accountancy Board of Ohio. We affirmed the Court of Claims' decision to dismiss the claim made, pursuant to R.C. 4112.02(A), but reversed the decision to dismiss the claims made pursuant to R.C. 4112.02(I) and (J). *Id.* at ¶ 17. We also reversed the court's decision to dismiss appellant's defamation claims. *Id.* at ¶ 21. We directed the court on remand to consider whether R.C. 2743.02(A)(3) applied to appellant's R.C. 4112.02(I) and (J), and defamation claims, thereby determining whether appellee was immune from liability for performing or not performing a public duty. *Id.* at ¶ 28.

{¶ 3} On remand, the Court of Claims' magistrate provided appellee 14 days to file an answer and notified the parties it would then set the case for trial. On September 23, 2015, the clerk of the Court of Claims filed an original scheduling notice informing the parties that (1) a case management conference would be held October 22, 2015 at 9:30 a.m. with the magistrate, (2) the pre-trial conference was scheduled to be held August 4, 2016, and (3) the trial was set for September 6-8, 2016. The notice indicated that the parties "shall" be fully prepared to discuss issues relating to discovery, issues of employee immunity, applicable defenses, and other matters. The notice stated that the court would initiate the conference by telephone.

{¶ 4} On November 6, 2015, the magistrate filed an order indicating that he had attempted to conduct the case management conference on October 22, 2015; "however, [appellant] was not available." The court then ordered appellant to provide the names of expert witnesses and a copy of their reports before January 11, 2016 and ordered appellee to furnish the same by February 22, 2016. The court set discovery and dispositive motions cut-off dates. The court notified the parties that a status conference was scheduled for November 17, 2015 at 9:00 a.m., and that the court would initiate the conference by telephone. Finally, the court notified the parties that "[f]ailure to comply with the court's orders may result in dismissal for failure to prosecute pursuant to Civ.R. 41(B)(1)."

{¶ 5} On December 3, 2015, the magistrate filed an order indicating that he had attempted to conduct the status conference with the parties on November 17, 2015; "however, [appellant] was not available." The order indicated that appellant had subsequently contacted the court and stated that she had not received the order

scheduling the telephone conference. The magistrate scheduled another status conference for December 17, 2015 at 9:00 a.m., and stated that the court would initiate the conference by telephone. The magistrate's order was sent to the same address as the September 23, 2015 clerk's notice and the November 6, 2015 magistrate's order: P.O. Box 64, Delaware, Ohio 43015. When appellant contacted the court, she confirmed that the information the magistrate had in the case file reflected her correct address and phone number.

{¶ 6} On December 18, 2015, the magistrate filed an order indicating that he attempted to conduct the status conference with the parties on November 17, as well as December 17, 2015; "however, [appellant] was not available on either occasion." The order noted that counsel for appellee informed the court they had been unable to contact appellant and she had not responded to discovery requests. It further noted that the court had previously confirmed appellant's correct address and phone number. The magistrate further noted that on November 6, 2015, it had notified the parties that failure to comply with the court's orders may result in dismissal for failure to prosecute pursuant to Civ.R. 41(B)(1). The magistrate found that appellant had not complied with the court's orders and had failed to prosecute. Accordingly, the magistrate recommended that appellant's complaint be dismissed pursuant to Civ.R. 41(B)(1).

{¶ 7} On December 23, 2015, the magistrate filed another decision and indicated that on December 22, 2015 appellant filed a letter with the magistrate wherein she stated that she attempted to answer her phone at the time of the scheduled December 17, 2015 status conference but that "there was an immediate disconnection (and apparently the Court had already hung up the phone)." (Dec. 23, 2015 Mag. Decision at 1.) The magistrate noted that each attempt to contact appellant by telephone resulted in the call being transferred to voicemail after a period of ringing. The magistrate concluded that, based on the foregoing, "most notably plaintiff's failure to respond to defendant's requests," that appellant had not complied with the court's orders and failed to prosecute. (Dec. 23, 2015 Mag. Decision at 2.) The magistrate again recommended the complaint be dismissed pursuant to Civ.R. 41(B)(1) for failure to prosecute. The order contained the following notice at the end:

*A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether*

*or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). \* \* \* 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 under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

(Emphasis sic.) (Dec. 23, 2015 Mag. Decision at 2.)

{¶ 8} On January 7, 2016, appellant filed objections pursuant to Civ.R. 53(D)(3)(b)(i). Appellee filed a memorandum contra and indicated that prior to the October 22, 2015 case management conference, appellee attempted to schedule appellant's deposition but appellant did not respond after counsel left a voicemail for her regarding the same.

{¶ 9} On February 3, 2016, the Court of Claims filed a judgment entry. The court acknowledged that appellant filed objections and noted they were untimely as they were due January 6, 2016, but filed January 7, 2016. The Court of Claims also indicated that it agreed with the magistrate's decision. The court observed that it had confirmed that all notices of scheduling the conferences were sent to the same address noted on appellant's filings, which was also the address of record in the court's case management software. The court stated that it was persuaded by the magistrate's decision that when the magistrate tried to call appellant during the stated time for the third conference on December 17, 2015, appellant's phone rang for a period of time and then the magistrate was transferred to appellant's voicemail. The Court of Claims ultimately determined "that there is no error of law or other defect evident on the face of the magistrate's decision" and, therefore, adopted the magistrate's decision and recommendation as its own. (Feb. 3, 2016 Jgmt. Entry at 2.) On March 3, 2016, in case No. 16AP-169, appellant filed an appeal of the magistrate's December 23, 2015 decision (and all clerk and magistrate's orders pre-dating the December 23, 2015 order on remand) and the Court of Claims' February 3, 2016 judgment entry adopting the magistrate's decision.

{¶ 10} On February 17, 2016, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). The Court of Claims denied the motion on March 3, 2016. However, appellant filed her appeal of the February 3, 2016 judgment entry on the same

day, thereby divesting the Court of Claims of jurisdiction to make the March 3, 2016 ruling. This court remanded the case to the Court of Claims for the limited purpose of vesting the court with jurisdiction to rule on the Civ.R. 60(B) motion. The Court of Claims again denied appellant's motion on July 6, 2016. On April 4 and July 25, 2016, in case No. 16AP-278, appellant filed an appeal of the Court of Claims' decision to deny her Civ.R. 60(B) motion.

{¶ 11} On March 3, 2016, appellant filed a motion for an order directing that the court reporter's "notes/tape recordings of conferences/hearings be reduced to typewritten form, made pursuant to App.R. 9(B)." Appellant asked that the court reporters notes/tape recordings of conferences/hearings which took place on October 22, November 17, and December 17, 2015 be reduced to typewritten form conforming with the requirements of App.R. 9(B)(6). On March 14, 2016, the magistrate entered an order indicating that "no such notes or recordings exist in this case" and accordingly denied the motion as moot. On April 4, 2016, in case No. 16AP-278, appellant filed a notice of appeal of the magistrate's March 14, 2016 order.

{¶ 12} On March 25, 2016, appellant filed a "Motion to correct the record (to indicate that [appellant's] objection to magistrate's 12/23/15 decision was timely received by the court) and for an order indicating that [appellant's] objection will be heard by the court, made pursuant to App.R. 9(E)." Appellant argued that she was making the motion in the "interest of justice." On April 11, 2016, the Court of Claims denied the motion. The court considered appellant's arguments that her objections to the magistrate's decision arrived at the Court of Claims' post office on January 6, 2016, and that the Court of Claims was advised that it was available for pickup from the post office. The court further considered appellant's contention that the objections were available to be picked up at 4:25 a.m. January 6, 2016 at the Court of Claims' post office and the court simply refused to timely pickup/accept the mail as well as the USPS tracking receipt she attached to her motion in support. The court concluded that "the receipt indicates that [appellant's] package was available for pickup on January 6, 2016 at a facility in 'COLUMBUS, OH 43216' [and] [t]here is no indication on the USPS receipt that the 43216 address on that receipt is indeed where the court's mail arrives; that it received notification to pick up mail; and that it 'refused to timely pick up/accept the mail.'" (Apr. 11, 2016 Entry at 1.)

The court further concluded that it was appellant's, not the court's, duty to ensure that her documents were timely filed with the court. On April 21, 2016, in case No. 16AP-320, appellant filed a notice of appeal of the court's decision to deny her motion to correct the record.

{¶ 13} On April 13 and 27, 2016, we consolidated the three appeals for purposes of record filing, briefing, and oral argument.<sup>1</sup>

## **II. Assignments of Error**

{¶ 14} In her pro se appellate brief filed May 17, 2016, appellant appeals and assigns the following seven assignments of error:

[I.] The Court erred, denied the plaintiff due process, abused its discretion, and made decisions that are against the of evidence that is in the Record, when it dismissed the case on the basis of a claim that the plaintiff did not respond to the defendant's discovery requests (and, therefore, had violated Court orders), given that (a) the defendant did not ever make a discovery request of the plaintiff and there was nothing in the Record (at the time of the dismissal) to support the magistrate's claim that the defendant made a request, (c) the defendant did not ever seek relief for alleged failure to respond to a discovery request, (d) the Court did not ever make an order for the plaintiff to provide discovery to the defendant, (e) the Court did not advise the plaintiff (before the magistrate's dismissal decision was made) that That it was told that the plaintiff had failed to provide discovery, (f) the magistrate's decision to dismiss the case contained error/defects 'on its face', concerning this subject matter (and, therefore, should not have been adopted by the judge), and (g) the plaintiff's timely-filed Objection to the magistrate's decision that addressed this subject was (inappropriately) not heard by the Court.

[II.] The Court erred and abused its discretion, when the judge adopted the magistrate's 12/23/15 decision that claimed that the plaintiff had violated Court orders 'by not responding to the defendant's discovery request' and that dismissed the case for that reason, given that the 12/23/15 decision contained errors/defects 'on its face' and also did not contain claims that were sufficient to justify a dismissal.

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<sup>1</sup> Despite this court's consolidation, appellant filed three merit briefs: May 17, August 16, and September 2, 2016. For reasons outlined in a journal entry filed on September 27, 2016, we determined we will decide these consolidated appeals based on appellant's briefs filed on May 17 and August 16, 2016.

[III.] The Court erred, abused its discretion, and made decisions that are against the weight of evidence that is in the Record, when it made a 12/23/15 decision (adopted by a 2/3/16 judgment entry) that stated that the plaintiff violated Court order/rules 'by not participating in telephone conferences, including on 12/17/15 (when the plaintiff's phone rang and then transferred to voicemail)', given that there are no existing orders/rules that compelled the plaintiff to participate in a conference (and the decision does not identify such orders/rules), the real issue concerns why the plaintiff did not participate in the 12/17/15 conference, a phone call allegedly transferring to voicemail does not represent a refusal to participate (and the decision that claims/implies that it represents a refusal to participate has an error/defect 'on its face'), and the plaintiff's timely-filed Objection to the 12/23/15 decision should have been heard by the Court (and shows that the plaintiff actually was not allowed to participate in the 12/17/15 telephone conference).

[IV.] The Court erred and denied the plaintiff procedural due process, when it dismissed the case on the basis of a claim that *ex parte* proceedings were held before a magistrate (and claims about what took place during those proceedings) and it also failed and refused to record any of the proceedings and/or to reduce the records of any of the proceedings to hand-written form, to put the records of the proceedings into the Record for the case, and to provide the records of the proceeding to the plaintiff (so that they could be available for use during the appeal and could be used to support the plaintiff's timely-filed Objection to the magistrate's 12/23/15 decision that dismissed the case).

[V.] The Court erred, abused its discretion, and made decisions that are against the weight of evidence that is in the Record, when it was noted in the Record that the plaintiff's Objection to the magistrate's 12/23/15 decision was not timely filed, when the Court made a 2/3/16 judgment entry that stated that the Objection was not timely filed and that did not acknowledge or address the unrefuted arguments and evidence of the Objection, and when the Court denied the plaintiff's motions that showed that the Objection was timely filed, that requested that the Record be corrected (to reflect the fact that it was timely filed), and that requested that the Objection be heard.

[VI.] The Court erred and abused its discretion, when it made a 3/3/16 judgment entry that denied the plaintiff's Civ.R.

60(B) Motion for Relief from the 2/3/16 Judgment (which adopted the magistrate's decision to dismiss the case), given the facts that (at the time that the entry was made on 3/3/16) the Court did not have jurisdiction to hear the Civ.R. 60(B) motion and the entry also inappropriately overlooked and refused to acknowledge any of the unrefuted arguments and evidence of the motion.

[VII.] The Court erred, abused its discretion, and made a decision that is against the weight of evidence that is in the Record, when it made a 4/11/16 judgment entry that denied the plaintiff's 3/23/16 App.R. 9(E) Motion to Correct the Record (to Indicate that Plaintiff's Objection to Magistrate's 12/23/15 Decision was Timely Received by the Court) and for an Order Indicating that the Plaintiff's Objection Will Be Heard by the Court, and it essentially indicated that there was no proof that the Court had timely received the Objection.

(Sic passim.)

{¶ 15} Appellant filed an additional pro se appellate brief on August 16, 2016 assigning two additional assignments of error, which this court shall refer to as assignments of error eight and nine:

[VIII.] The Court erred, abused its discretion, and made a decision that is against the weight of evidence that is in the Record, when it denied the plaintiff's Civ.R. 60(B) motion on the basis of claims that the motion and the affidavit supporting the motion did not set forth justifiable grounds for (or include evidence to support that the plaintiff was entitled to) relief under Civ.R. 60(B).

[IX.] The Court erred, abused its discretion, and made a decision that is against the weight of evidence that is in the Record, when it denied the plaintiff's Civ.R. 60(B) motion on the basis of a claim that the plaintiff's motion was essentially an inappropriate motion for reconsideration of a final judgment (which is considered to be a nullity).

### **III. Assignments of Error Five and Seven - Challenging the February 3, 2016 Judgment Entry Finding that Appellant's Objections to the Magistrate's Decision were Untimely and the April 11, 2016 Motion to Correct the Record**

{¶ 16} We first consider assignments of error five and seven because they assert the Court of Claims erred in finding that appellant's objections to the magistrate's



decision were not timely filed. Whether the objections were timely filed determines the standard by which the court could review the magistrate's decision, which in turn affects our own review of the assignments of error alleging the court erred in adopting the magistrate's findings and conclusion in his December 23, 2015 order.

{¶ 17} The record shows that appellant's objections to the December 23, 2015 magistrate's decision were filed January 7, 2016.

{¶ 18} Civ.R. 53(D)(3)(b)(i) states:

A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).

{¶ 19} Civ.R. 6(A) states:

In computing any period of time prescribed or allowed by these rules \* \* \* the date of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

{¶ 20} Excluding December 23, 2015, the date on which the magistrate's decision was filed, and noting that January 7, 2016 was a Thursday, not a Saturday, Sunday, or legal holiday, we find the Court of Claims properly determined that appellant filed her objections to the magistrate's decision out of rule, because she filed her objections on the 15th day after the filing of the decision.

{¶ 21} Appellant argues she presented unrefuted evidence to show that she mailed her objections to the Court of Claims on January 5, 2016 by overnight express mail and that the mail was received and available for pickup at the Court of Claims' post office on January 6, 2016. The court rejected appellant's evidence and noted that it was appellant's duty, not the court's, to ensure that her documents were timely filed with the court.

{¶ 22} "A court is not required to address untimely objections." *Ramsey v. Ramsey*, 10th Dist. No. 13AP-840, 2014-Ohio-1921, ¶ 20, citing *Tomety v. Dynamic Auto Serv.*, 10th Dist. No. 09AP-982, 2010-Ohio-3699, ¶ 13. If a party fails to file

written objections within the requisite 14 days, but files objections after the expiration of the 14-day period and before the court entering final judgment, the court may consider the objections sua sponte and such consideration will be construed as the granting of leave to file late objections pursuant to Civ.R. 6(B). *Id.* Civ.R. 6(B) permits a court, for cause shown and pursuant to certain conditions, "at any time in its discretion" to order the extension or enlargement of a period of time an act is required or allowed to be done. Accordingly, we consider these assignments of error pursuant to an abuse of discretion standard.

{¶ 23} Civ.R. 6(B) states:

**Time: extension.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Civ.R. 50(B), Civ.R. 59(B), Civ.R. 59(D), and Civ.R. 60(B), except to the extent and under the conditions stated in them.

We note that appellant did not seek leave for an extension or an enlargement of time to file her objections.

{¶ 24} Civ.R. 6(D) states:

**Time: additional time after service by mail or commercial carrier service.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon that party and the notice or paper is served upon that party by mail or commercial carrier service under Civ.R. 5(B)(2)(c) or (d), three days shall be added to the prescribed period.

{¶ 25} Civ.R. 6(D) applies when a party is required to act "within a prescribed period after the *service* of a notice or other document *upon that party*," not, within a prescribed period after an entry is filed. (Emphasis added.) Furthermore, this court has held that the three-day mail rule does not enlarge the time for appellant to file her

objections. See *DAK PLL v. Borgerding*, 10th Dist. No. 02AP-1051, 2003-Ohio-3342, ¶ 11. With this in mind, and under the circumstances, we cannot find that the Court of Claims abused its discretion in determining that it was appellant's duty, not the court's, to ensure that her documents were timely filed with the court. Furthermore, because the record does not provide any information or explanation to us regarding whether a postal facility in Columbus, Ohio 43216 correlates to the office of the clerk of court for the Court of Claims, we also cannot say that the court abused its discretion in rejecting appellant's arguments. Accordingly, we overrule appellant's fifth and seventh assignments of error.

**IV. Assignments of Error One, Two, Three, and Four, in part, Challenging the February 3, 2016 Judgment Entry Adopting the December 23, 2015 Magistrate's Decision**

{¶ 26} Next, we consider assignments of error one, two, three, and part of four which challenge the Court of Claims' adoption of the magistrate's factual findings related to procedures, discovery, and appellant's participation and the magistrate's ultimate conclusion to dismiss. In so doing, we determine whether the Court of Claims abused its discretion in adopting the magistrate's decision. We also note that in reviewing a dismissal pursuant to Civ.R. 41(B)(1), the Supreme Court of Ohio has said: "The decision to dismiss a complaint for failure to prosecute is within the sound discretion of the trial court, and an appellate court's review of such a dismissal is confined solely to the question of whether the trial court abused its discretion." *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997), citing *Pembaur v. Leis*, 1 Ohio St.3d 89, 91 (1982). The court cautioned, however, that because disposition of cases on their merits is favored, "although reviewing courts espouse an ordinary 'abuse of discretion' standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim's merits. Proper factors for consideration in a Civ.R. 41(B)(1) dismissal with prejudice include the drawn-out history of the litigation, including a plaintiff's failure to respond to interrogatories until threatened with dismissal, and other evidence that a plaintiff is deliberately proceeding in dilatory fashion or has done so in a previously filed, and voluntarily dismissed, action." (Citations omitted.) *Id.* Accordingly, we apply a heightened abuse of discretion standard to these assignments of error.

{¶ 27} We have affirmed above the Court of Claims' determination that appellant's objections were not timely filed. Civ.R. 53(D)(4)(c) states that "[i]f no timely objections

are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision."<sup>2</sup> In its February 3, 2016 judgment entry, the court found "there is no error of law or other defect evident on the face of the magistrate's decision" and accordingly adopted the magistrate's decision and recommendation to dismiss as its own. (Feb. 3, 2016 Jgmt. Entry at 2.)

{¶ 28} Underlying these assignments of error is appellant's challenge of the magistrate's factual findings regarding procedure, discovery, and appellant's participation in his December 23, 2015 decision. To summarize, appellant challenges the findings (1) she received notice of the magistrate's scheduled conference calls, (2) that appellee requested discovery from her and she did not reply, and (3) that appellant was not available to participate in the scheduled conference calls. However, because appellant did not timely file her objections, the Court of Claims was not required to conduct an independent review as to the objected matters to ascertain that the magistrate had properly determined the factual issues and appropriately applied the law pursuant to Civ.R. 53(D)(4)(d). The court was only required to review the face of the magistrate's decision for any "evident" error of law or other defect. In so doing, the Court of Claims did not abuse its discretion.

{¶ 29} Furthermore, Civ.R. 53(D)(3)(iv) states: "Except for a claim of plain error,<sup>3</sup> 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 under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." "A party who does not file written objections to a magistrate's decision may not raise on appeal issues on the merits that might have been the basis of the objections." *Brown v. Zurich US*, 150 Ohio App.3d 105,

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<sup>2</sup> Civ.R. 53(D)(4)(d) states: "*Action on objections*. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate."

<sup>3</sup> Appellant has made no assertion that the errors she claims now are plain. Furthermore, "[i]n appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself." *Brown v. Zurich US*, 150 Ohio App.3d 105, 2002-Ohio-6099, ¶ 27 (10th Dist.), citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

2002-Ohio-6099, ¶ 26 (10th Dist.), citing *Clendenen v. Fannin Realty, Inc.*, 10th Dist. No. 01AP-1295, 2002-Ohio-4548, ¶ 17; *McBroom v. Bob-Boyd Lincoln Mercury, Inc.*, 10th Dist. No. 98AP-229 (Oct. 22, 1998).

{¶ 30} Appellant did not timely object to the Court of Claims' adoption of the magistrate's factual findings or legal conclusions, therefore she has waived her right to assign error regarding the same on appeal.

{¶ 31} In addition to reviewing the face of the decision for evident error, the court also noted that it had reviewed the record to confirm that all notices scheduling the magistrate's conferences were sent to the same address noted on appellant's filings, which is also the address of record in the court's case management software.<sup>4</sup>

{¶ 32} We also note that even if the Court of Claims had considered that appellant timely filed her objections, she did not timely file either a transcript or an affidavit of the evidence submitted to the magistrate relevant to the findings to which she purportedly objected. Civ.R. 53(D)(3)(b)(iii) states:

*Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), 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. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(Emphasis sic; emphasis added.) Appellant did submit an affidavit with her objections, however the affidavit included only her assertions that she did not receive the notices, did not receive any discovery requests, and did not receive any phone calls from the

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<sup>4</sup> We reviewed the record as well and confirmed that appellant listed her address as "P.O. Box 64, Delaware, Ohio 43015" on the complaint. This same address is noted next to an indication of "cc:" on each of the magistrate's and clerk's August 28, September 23, November 6, December 3, 18, and 23, 2015 notices and decisions.

magistrate or that they were disconnected. The affidavit did not include "the evidence submitted to the magistrate."

{¶ 33} Furthermore, Civ.R. 53(D)(3)(a)(ii) provided appellant 30 days after filing her objections to file the transcript or affidavit. Appellant filed her objections on January 7, 2016, therefore, she would have had until February 8, 2016 to file the transcript or affidavit. There is no indication in the record that appellant requested a transcript. Furthermore, she did not file her motion for an order directing that the court reporter's notes/tape recordings of conferences/hearings be reduced to a typewritten form, pursuant to App.R. 9(B), until March 3, 2016—well after the February 8, 2016 deadline.

{¶ 34} Accordingly, we overrule appellant's first, second, and third assignments of error in their entirety, and fourth assignment of error in part, all of which challenge the Court of Claims' adoption of the magistrate's factual findings related to procedures, discovery, appellant's participation, and ultimate conclusion to dismiss.

#### **V. Assignments of Error Six, Eight, and Nine Challenging the March 3 and July 6, 2016 Entries Denying Appellants' Motion for Relief from Judgment**

{¶ 35} Next, we examine appellant's assignments of error six, eight, and nine, which challenge the Court of Claims' March 3 and July 6, 2016 judgment entries denying appellant's motion for relief from judgment pursuant to Civ.R. 60(B). We consider only the July 6, 2016 entry as the Court of Claims did not have jurisdiction when it entered the March 3, 2016 order. We review a trial court's decision to grant or deny a motion for relief from judgment under Civ.R. 60(B) for abuse of discretion. *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP-1006, 2011-Ohio-3163, ¶ 12. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 36} A party seeking relief from judgment under Civ.R. 60(B) "must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47

Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must establish all three of the requirements to obtain relief from judgment. *Bank of Am., N.A. v. Malone*, 10th Dist. No. 11AP-860, 2012-Ohio-3585, ¶ 7, citing *Duffey* at ¶ 13. The parties do not dispute that appellant filed her motion to vacate within a reasonable time; accordingly, we will consider only the first two prongs of the *GTE* test.

{¶ 37} In denying appellant's Civ.R. 60(B) motion, the Court of Claims found that appellant's motion set forth no justifiable grounds for relief under Civ.R. 60(B)(1) through (5). The court noted that appellant filed an affidavit on June 24, 2016, but the document contained no new evidence which supported that appellant was entitled to relief under Civ.R. 60(B). The court determined:

Essentially, plaintiff is still urging the court to reconsider its February 3, 2016 decision dismissing her complaint. However, a motion for reconsideration of a final judgment in the trial court is not authorized under the Ohio Rules of Civil Procedure and is considered a nullity. *Pitts v. Dept. of Transp.*, 67 Ohio St.2d 378, 379 (1981). Additionally, a motion for relief from judgment pursuant to Civ.R. 60(B) is not available as a substitute for appeal. *Doe v. Trumbull Cty. Children Serv. Bd.*, 28 Ohio St.3d 128, 129 (1986); *Justice Lutheran Social Serv. v. Cent. Ohio*, 79 Ohio App.3d 439, 442 (1992). For the foregoing reasons, plaintiff's motion is DENIED.

(Emphasis sic.) (July 6, 2016 Jgmt. Entry at 2.)

{¶ 38} In *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128 (1986), syllabus, the Supreme Court held that "[a] party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal." As noted above, Civ.R. 53(D)(3)(b)(iv) states: "[a] party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, \* \* \* unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." In *Brown*, we held that an appellant waived his opportunity to raise Civ.R. 60(B) merit issues before the trial court when it failed to file objections to the magistrate's decision pursuant to Civ.R. 53(E)(3)(b) [now 53(D)(3)(b)]. We declined to address the merits of the appellant's assignments of error due to its failure to comply with Civ.R. 53(E)(3)(b).

{¶ 39} Having carefully reviewed appellant's Civ.R. 60(B) motion, as well as the affidavit she filed on June 24, 2016, we agree with the Court of Claims that appellant

essentially reargues the objections she filed with the Court of Claims on January 7, 2016.<sup>5</sup> Appellant argues on page one of her motion that she is filing this motion "because the judgment entry contains errors (about facts), the judgment entry also mistakenly overlooks the arguments and undisputed evidence of [appellant's] Objection to 12/23/15 Decision of Magistrate, and the judgment entry was based upon the [appellee's] Response to [appellant's] Objection that [appellant] was not served with a copy of (and has not received or seen)." (Feb. 17, 2016 Mot. for Relief from Jgmt. at 1.) Appellant reiterates the argument that her objections were timely filed and that she did not receive notices or orders regarding the conferences. Appellant included with her memorandum in support of her Civ.R. 60(B) motion a copy of her objections filed January 7, 2016 and the exhibits thereto.

{¶ 40} We further agree that appellant did not set forth justifiable grounds for relief pursuant to Civ.R. 60(B)(1) through (5). Appellant asserts on page one of her motion that she is making the request for relief from judgment "in the interest of justice." Civ.R. 60(B) requires a party set forth one of the following reasons to support her request for relief from judgment:

(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

Although "in the interest of justice" is not one of the criteria required by the rule, we consider whether appellant's asserted grounds of "in the interest of justice" constitute "any other reason justifying relief from the judgment" pursuant to Civ.R. 60(B)(5). Intended as a "catch-all" provision, Civ.R. 60(B)(5) " 'reflect[s] the inherent power of a court to relieve a person from the unjust operation of a judgment.' " *Gill v. Grafton*

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<sup>5</sup> In her June 24, 2016 affidavit, appellant also argues the merits of and summarized her complaint. However, because we determine that appellant did not set forth justifiable grounds, pursuant to Civ.R. 60(B)(1) through (5), it is not necessary for us to consider whether she has a meritorious claim.



*Corr. Inst.*, 10th Dist. No. 10AP-1094, 2011-Ohio-4251, ¶ 37, quoting *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64 (1983), paragraph one of the syllabus. Courts only invoke Civ.R. 60(B)(5) in those extraordinary and unusual cases where the moving party demonstrates substantial grounds warranting relief from judgment. *Id.*, citing *Caruso-Ciresi* at paragraph two of the syllabus; *Soc. Psychological Servs., Inc. v. Magellan Behavioral Health, Inc.*, 10th Dist. No. 10AP-326, 2010-Ohio-6531, ¶ 17. We cannot say that appellant's reiteration of her untimely filed objections constitutes one of those extraordinary and unusual cases which demonstrates substantial grounds warranting relief from judgment. With all this in mind, we cannot say that the Court of Claims abused its discretion in denying appellant's Civ.R. 60(B) motion. Accordingly, we overrule appellant's sixth, eighth, and ninth assignments of error.

**VI. Assignment of Error Four, in part, Challenging the March 14, 2016 Magistrate's Order Denying as Moot Appellant's Request for Typewritten Notes and Audio Recordings of the Magistrate's Prior Proceedings**

{¶ 41} Assignment of error four, in part, challenges the magistrate's March 14, 2016 order denying as moot appellant's request for typewritten notes/audio recordings of the magistrate's proceedings prior to his December 23, 2015 decision.

{¶ 42} Appellant argues that Civ.R. 53(D)(7) and L.C.C.R. 11(A) and (B) required the magistrate to transcribe or audio record the conferences held prior to his December 23, 2015 decision.

{¶ 43} Civ.R. 53(D)(7) states: "Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court." L.C.C.R. 11(A) states: "The clerk shall appoint a court reporter or enter into a contract on behalf of the court for court reporting services including recording of proceedings pursuant to subdivision (B)." L.C.C.R. 11(B) states: "Proceedings before the court may be recorded by stenographic means, by phonographic means, by photographic means, by the use of audio electronic devices, or by the use of video recording systems. The clerk may order the use of any method of recording authorized by this rule."

{¶ 44} Without deciding whether the magistrate complied with Civ.R. 53(D)(7), we determine this issue is moot given our resolution of the first through ninth assignments of error. Accordingly, we overrule the balance of assignment of error four.

**VII. Conclusion**

{¶ 45} Accordingly, having overruled appellant's nine assignments of error, it is the judgment and order of this court that the judgments of the Court of Claims of Ohio are affirmed.

*Judgments affirmed.*

TYACK and KLATT, JJ., concur.

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