**[Cite as *Najjar v. Najjar*, 2009-Ohio-3880.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 91789**

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**RASHIEDA NAJJAR**

PLAINTIFF-APPELLANT

vs.

**SULUMAN D. NAJJAR, ET AL.**

DEFENDANT-APPELLEE

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**JUDGMENT:**
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

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Civil Appeal from the Cuyahoga County
Common Pleas Court Domestic Relations Division
Case No. D-287384

**BEFORE:** Sweeney, J., Cooney, A.J., and Blackmon, J.

**RELEASED:** August 6, 2009

**JOURNALIZED:**

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JAMES J. SWEENEY, J.:

**{¶ 1}** Plaintiff-appellant, Rashieda Najjar ("Wife"), appeals the trial court's judgment entry of divorce. After reviewing the facts of the case and pertinent law, we affirm in part, reverse in part and remand this case to the trial court for further proceedings.

**{¶ 2}** Defendant-appellee, Suluman D. Najjar ("Husband"), and Wife were married in the Middle East in 1986. That same year, Husband moved to the United States and Wife followed him here in 1988. The couple have five children. On July 3, 2002, when all five children were still minors, Wife filed for divorce. On October 7, 2002, the court ordered Husband to pay Wife $800 monthly in temporary support. On various dates over the next four years, a magistrate heard testimony and reviewed evidence. On November 5, 2007, Wife filed a motion to modify the temporary support order.

**{¶ 3}** On February 11, 2008, the magistrate issued a decision regarding child support, spousal support, and the division of marital property. Specifically, and as pertaining to this appeal, the magistrate's findings included a spousal support award to Wife of $1,000 per month for four years and an attorney fee award to Wife of $5,000. On May 18, 2008, the magistrate issued a subsequent decision that a financial document from a foreign bank, which Wife allegedly discovered after the February 11, 2008 decision, was inadmissible because it was not properly authenticated.

**{¶ 4}** On June 2, 2008, Wife filed objections to the magistrate's decisions, making the following three allegations: 1) the after-acquired evidence should have been taken into consideration; 2) pursuant to R.C. 3105.18, the spousal support award should have been $5,000 per month for seven years; and 3) the attorney fee award should have been $19,000.

**{¶ 5}** On June 12, 2008, the court summarily overruled Wife's first and third objections. The court found Wife's second objection meritorious and increased the spousal support award to $1,530 per month for seven years. The court also decreased the child support obligation to $1,682.24 per month. The court granted Wife a divorce from Husband; ordered Wife as the residential parent of the children; divided the marital assets; and awarded Wife $5,000 in attorney fees.

**{¶ 6}** Wife now appeals, raising six assignments of error for our review. However, we first address Husband's assertion of a "fatal defect" in Wife's appellate brief. Husband argues that Wife failed to identify the parts of the record on which she relied in alleging the trial court's errors, in violation of App.R. 12 and App.R. 16.

**{¶ 7}** App.R. 12(A)(2) states that an appellate "court may disregard an 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 * * *." App.R. 16(A)(6) and (A)(7) require an appellant's brief to reference the record in the statement of facts and argument supporting each assignment of error. Furthermore, App.R. 16(D) states that, "[r]eferences in the brief to parts of the record shall be to the pages

of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used."

**{¶ 8}** Husband argues that although Wife "does make references to the Magistrate's Decisions which she alleges are in error," these decisions are "not part of the record * * * as required by statute." Husband insists that an appellant is required to reference the trial transcript in pointing to where the error occurred. While the trial transcript is certainly fair game for referencing the record, it is not the only part of the record to which a party may cite.[1]

**{¶ 9}** In the instant case, Wife cites to various parts of the record, including for example, "Judgment Entry, June 12, 2008, p.1." The court's judgment entry, upon which this appeal is based, is certainly part of the record. Furthermore, it is within our discretion whether or not to review an assignment of error based on allegations of failure to cite to the record. See App.R. 12(A)(2) (stating that the court *may* disregard an assignment of error) (emphasis added); *In re Constable*, Clermont App. Nos. CA2006-08-058 and CA2006-09-067, 2007-Ohio-3346 (holding that despite an appellant's failure to cite to the record or legal authority, "in the interest of justice, we have reviewed the record in light of appellant's assignments of error"). See, also, *City of Oakwood Village v. Brown*, Cuyahoga App. Nos. 89135 and 89786, 2008-Ohio-3151 (exercising discretion by declining to address an assignment of error pursuant to App.R. 12(A)(2) for a party's failure to present any supporting argument).

Nothing about Wife's brief, from a procedural perspective, is "fatal." Wife filed a

[1] As discussed in our analysis of Wife's second assignment of error, infra, the trial

record on appeal and identified in her brief various parts of the record to support her position. Husband's argument that the magistrate's decisions in the instant case are "not part of the record" is incorrect. Furthermore, assuming arguendo that Wife's brief had fallen below the appellate standard, Husband's insistence that Wife's assignments of error "fail as a matter of law" is also incorrect. Accordingly, in exercising our discretion, we review Wife's six assignments of error.[2]

**{¶ 10}** We begin by addressing Wife's first and third assignments of error:

**{¶ 11}** "I. The trial court erred as a matter of law and abused its discretion in the determination of the parties' gross income for purposes of calculating child support.

**{¶ 12}** "III. The trial court erred as a matter of law and abused its discretion by determining that the Garfield Snack Shack had a fair market value of $125,000.00."

**{¶ 13}** When appealing a court's ruling on objections to a magistrate's decision, pursuant to Civ.R. 53(D)(3)(b)(iv), "a party shall not assign as error on

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transcripts in the instant case are not part of the record on appeal.

[2] To rule otherwise in the instant case would be contrary to our sense of justice. It would be as "unfair" as if we refused to consider Husband's appellate brief for failing to properly cite Ohio case law pursuant to the Ohio Manual of Citations, as revised July 12, 2002 as used in the Supreme Court of Ohio's Reporter's Office. For example, Husband improperly uses the following "citation": "***Ansar v. State Medical Board*** (2008-Ohio-3102)." The proper citation for this case is: *Ansar v. State Medical Board*, Franklin App. No. 08AP-17, 2008-Ohio-3102. Furthermore, "portions of opinions and quotations will be identified by the numbered paragraphs of the opinion." Revisions, supra at 3. Husband failed to identify pinpoint citations throughout his brief. For example, the proper pinpoint citation for a portion of the *Ansar* opinion, which Husband quoted directly is: *Ansar v. State Medical Board*, Franklin App. No. 08AP-17, 2008-Ohio-3102, at ¶12. Nonetheless, in the interests of justice, we accept Husband's appellate brief.

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)."

**{¶ 14}** Wife failed to raise the above two issues in her objections to the magistrate's decisions; therefore, she has waived them for purposes of appeal. See *Wilson v. Wilson*, Cuyahoga App. No. 86817, 2006-Ohio-4361, at ¶25-26 (holding that "Civ.R. 53 imposes an affirmative duty on the parties to make timely, specific objections in writing to the trial court, identifying any error of fact or law in the magistrate's decision. * * * An appellate court need not consider an error that could have been objected to, but was not brought to the attention of the trial court").

**{¶ 15}** Wife's first and third assignments of error are overruled.

**{¶ 16}** Wife's second assignment of error states as follows:

**{¶ 17}** "II. The trial court erred as a matter of law and abused its discretion by not adequately indicating the basis for its spousal support award."

**{¶ 18}** When ruling on a magistrate's decision, the trial 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." Civ.R. 53(D)(4)(d). In turn, an appellate court reviews a trial court's determination in divorce cases for an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (internal citations omitted).

**{¶ 19}** When a party objects to a factual finding in a magistrate's decision, the objection "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. * * * The objecting party shall file the transcript or affidavit with the court within 30 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." Civ.R. 53(D)(3)(b)(iii).

**{¶ 20}** In *State ex rel. Duncan v. Chippewa Township Trustees* (1995), 73 Ohio St.3d 728, 730, the Ohio Supreme Court held that "[w]hen a party objecting to a [magistrate'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 [magistrate's report], and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." See, also, *Schott v. Schott*, Tuscarawas App. No. 2003 AP 10-0082, 2004-Ohio-1914, at ¶16 (holding that "where an appellant fails to provide a transcript of the original hearing before the magistrate for the trial court's review, the magistrate's findings of fact are considered established").

**{¶ 21}** In the instant case, transcripts from the original hearings and trial dates before the magistrate were not filed in the trial court at the time the court issued its June 12, 2008 judgment entry of divorce. Rather, Wife filed eight volumes of

transcripts in the trial court on July 14, 2008 - the same day Wife filed her notice of appeal. On July 18, 2008, these transcripts, along with the rest of the lower court record, were filed in this Court in conjunction with the instant appeal. Consequently, we are prohibited from reviewing these transcripts, as they are not part of the record on appeal. See *Condron v. City of Willoughby Hills*, Lake App. No. 2007-L-015, 2007-Ohio-5208, at ¶38 (holding that "an appellate court's review is strictly limited to the record that was before the trial court, no more and no less") (internal citations omitted). See, also, App.R. 9 and App.R. 12(A)(1)(b).

**{¶ 22}** Although the magistrate's decision notes that transcripts were *ordered*, a scrupulous review of the record, including the court's docket, shows that they were not *filed* until after the court issued its judgment entry on June 12, 2008. The only transcripts that were provided to this Court are file-stamped on July 14, 2008 - clearly, we cannot review documents that were filed in the trial court on the same day as the notice of appeal.

**{¶ 23}** R.C. 3105.18(C)(1) states that in making spousal support determinations, the court must consider 14 factors, such as each party's income and earning ability, and the duration of and standard of living during the marriage. R.C. 3105.18(C)(1)(a), (b), (e), and (g). This Court has held that although a trial court must consider the statutory factors, and has "broad discretion to examine all the evidence before it determines whether an award of spousal support is appropriate * * *, there is no requirement that the trial court make specific findings of fact regarding

its award of spousal support to a party." *Cooper v. Cooper*, Cuyahoga App. No. 86719, 2004-Ohio-4270, at ¶8-9.

**{¶ 24}** In the instant case, the trial court, in ruling on Wife's objections to the magistrate's decisions and granting the divorce in its June 12, 2008 judgment entry, stated the following regarding spousal support: "The Court further finds that Plaintiff's second objection is meritorious. Consequently, the spousal support for Plaintiff shall be increased to $1,500.00 per month and the duration of the spousal shall should [sic] be increased from 4 years to 7 years. * * * Suluman Najjar shall pay to Rashieda Najjar the sum of $1,530.00, which sum includes 2 percent processing charge, per month as spousal support. Said spousal support shall continue until the death of either party, or the remarriage of Plaintiff, or the expiration of seven (7) years from the date of the final decree in this matter (whichever shall first occur)."

**{¶ 25}** Although the court found merit to Wife's objection regarding spousal support and increased the award, the court did not refer to any findings of fact or conclusions of law from the magistrate's decision, and the judgment entry makes no other mention of spousal support or any other reasoning for the $530 increase.

**{¶ 26}** We find that the trial court failed to adhere to the mandates of Civ.R. 53(D)(4)(d), that, 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." There is no evidence that the court conducted an independent review; there is evidence that Wife requested leave to file a supplement to her objections, which was denied by the

court; and the record is unclear whether the court adopted or rejected, with or without modification, the magistrate's decision (see, infra, our analysis of Wife's fourth assignment of error). Additionally, we cannot determine whether the court took the R.C. 3105.18(C)(1) factors into consideration when increasing Wife's spousal support from $1,000 per month for four years - as stated in the magistrate's decision - to $1,530 per month for seven years.

**{¶ 27}** In *Longo v. Longo*, Geauga App. No. 2004-G-2556, 2005-Ohio-2069, the Eleventh District Court of Appeals of Ohio held that R.C. 3105.18(C)(1) requires the trial court to do two things: take the statutory factors into consideration in determining a spousal support award, and "indicate the basis for the award in sufficient detail to facilitate adequate review." (Citing *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 784.) The *Longo* court found that the trial court abused its discretion under the following circumstances: "In its December 23, 2003 judgment entry, after properly considering the relevant R.C. 3105.18 factors, the court found appellant was entitled to $7,000 per month in 'permanent' spousal support. Notwithstanding its compliance with its statutory mandate, the court did not provide a sufficiently detailed basis for review of this figure; to wit, the court, after considering the various factors listed in R.C. 3105.18, did not explain why $7,000 per month would be adequate and reasonable under the circumstances. To ensure adequate review, an appellate court must be privy to how the trial court arrived at its specific monetary figure. Without the benefit of this analysis, the $7,000 per month figure is arbitrary."

**{¶ 28}** Accordingly, we find the $1,530 spousal support award in the instant case to be arbitrary and thus an abuse of discretion, given our limited standard of review. We decline to guess at what evidence the court relied on to make its determination and are prohibited from questioning the findings of fact and conclusions of law from the magistrate's February 11, 2008 decision, as Wife failed to file transcripts with the lower court pursuant to Civ.R. 53(D)(3)(b)(iii).

**{¶ 29}** Wife's second assignment of error is sustained, insomuch as the trial court abused its discretion.

**{¶ 30}** Wife's fourth assignment of error states as follows:

**{¶ 31}** "IV. The trial court judge failed to adopt any specific findings in support of its final judgment entry of divorce dated June 12, 2008."

**{¶ 32}** In the instant case, Wife fails to cite to legal authority to support her assertions under this assignment of error. Pursuant to App.R. 16(A)(7), an appellant's brief shall include "argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities [and] statutes * * * on which appellant relies." We are unsure exactly what Wife claims as error under this argument; however, we address a trial court's actions regarding a magistrate's decision.

**{¶ 33}** Civ.R. 53(D)(4) governs a court's actions subsequent to a magistrate's decision, and it reads in pertinent part as follows:

**{¶ 34}** "(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.

**{¶ 35}** "(a) Action of court required. A magistrate's decision is not effective unless adopted by the court.

**{¶ 36}** "(b) Action on magistrate's decision. Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate."

**{¶ 37}** In the instant case, the court did not expressly adopt or reject, with or without modification, the magistrate's February 11, 2008 decision. However, the court overruled Wife's first and third objections to the magistrate's decision relating to the issues of attorney fees and authentication of the financial document from a foreign bank. By implication, we assume the court adopted the magistrate's decision regarding these issues, including its findings of fact and conclusions of law. Additionally, the court found Wife's second objection "meritorious." While it is unclear whether the court rejected the "magistrate's decision in whole or in part, with or without modification," this argument is made moot by our ruling on Wife's second assignment of error. See App.R. 12(A)(1)(c).

**{¶ 38}** Wife's fourth assignment of error is overruled in part and made moot in part.

**{¶ 39}** In Wife's fifth and sixth assignments of error, she states as follows:

**{¶ 40}** "V. The trial court erred as a matter of law and abused its discretion in the amount and manner it awarded attorney fees and expenses.

**{¶ 41}** "VI. The trial court erred as a matter of law and abused its discretion when it refused to accept into evidence a bank statement titled in defendant-appellee's name from the Arab Bank of Jordan, reflecting funds in the amount of $384,439.48, and by failing to divide this marital asset."

**{¶ 42}** We first note that although the trial court did not expressly "adopt" the magistrate's decision as required by Civ.R. 53(D)(4)(a) regarding the above issues, we assume the court impliedly adopted the decision as explained under Wife's fourth assignment of error.

**{¶ 43}** Next, we are limited in our review of these issues because transcripts of matters before the magistrate were not filed in the trial court for the judge's review. "When a party objecting to a [magistrate'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 [magistrate's] report, and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *Duncan*, supra, 73 Ohio St.3d, at 730. See, also, *Cosic v. Singh*, Cuyahoga App. No. 80366, 2002-Ohio-4085.

**{¶ 44}** In the instant case, the magistrate found that Wife requested that Husband pay $19,000 toward her attorney fees. "The Magistrate finds that the amount of fees requested by [Wife] are reasonable and necessary considering the

difficulties this case presented. The Magistrate finds that [Husband] shall contribute $5,000 toward [Wife's] fees, which shall be paid from the marital bank accounts referenced above. [Wife] does not currently have the financial ability to pay these attorney fees and many of the fees were caused by [Husband's] failure to facilitate discovery with regard to the financial issues in this case as described above." The court overruled Wife's objection to this decision.

**{¶ 45}** Revised Code 3105.73(A) provides that "[i]n an action for divorce, * * * a court may award all or part of reasonable attorney's fees * * * if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate."

**{¶ 46}** Wife argues that the court did not specifically state that the award of attorney fees was equitable, nor did it specifically "indicate that it considered any of the factors listed in the statute." Wife additionally argues that Husband had an "overwhelmingly greater income" than she did; therefore, "it is incomprehensible that the Trial Court would order a mere $5,000 to [Wife] as and for attorney fees." Wife cites no case law to support her position.

**{¶ 47}** Despite our limited standard of review of this issue, we again find that the court abused its discretion regarding the magistrate's decisions. See *Williams-Booker v. Booker*, Montgomery App. Nos. 20752, 21767, 2007-Ohio-4717 (holding that it was not an abuse of discretion to award a party to a divorce action to pay 62

percent of the other party's attorney fees, after taking into consideration the parties' income and conduct during the matter); *Peters v. Peters*, Lorain App. No. 06CA008869, 2006-Ohio-5815 (holding that an award of 25 percent of the attorney fees requested, rather than the entire amount, was not an abuse of discretion, because the court balanced the statutory factors and awarded an amount less than the full request).

**{¶ 48}** The partial award of $5,000 is arbitrary and unreasonable. The magistrate's findings of fact, which we must consider "established," support an award of $19,000, which is the entire amount Wife requested. The magistrate found that Wife's request was reasonable and necessary, as she did not have the means to pay her attorney fees, many of which were caused by Husband. The magistrate then inexplicably awarded Wife approximately 26 percent of her request. As there is no evidence that the court undertook an independent review of the partial award, we find the court abused its discretion in overruling Wife's objection to this decision.

**{¶ 49}** Wife's fifth assignment of error is sustained.

**{¶ 50}** In Wife's sixth and final assignment of error, she argues that the court abused its discretion in finding inadmissible a financial document that Wife allegedly discovered after the magistrate issued his February 2, 2008 decision.

**{¶ 51}** On April 28, 2008, the magistrate held a hearing on a motion to reopen the evidence that Wife filed on April 7, 2008. The magistrate's decision stated that Wife testified that Husband's relative, who she knows only by the name of "Omar," mailed her a statement from the Arab Bank in Amman Jordan. The statement was

written in Arabic and translated into English by a translating service. The statement purported to show that Husband had a bank account in Jordan with a $360,000 balance, which was "$250,000 more than the balance considered by the Magistrate at the time of trial."

**{¶ 52}** The magistrate's decision also stated that Husband "testified that he has no relative named Omar, that the account in question was closed as he had testified at the original trial, and that [the document] was a forgery."

**{¶ 53}** The magistrate then found that, although the document did not appear to be a forgery on its face, Wife's testimony was not enough to properly authenticate or establish a foundation for the document.

**{¶ 54}** Ohio Evid.R. 901(A) governs document authentication, and it states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Furthermore, Evid.R. 901(B)(1) lists an example of proper authentication of evidence as testimony of a witness with knowledge "that a matter is what it is claimed to be."

**{¶ 55}** In the instant case, the court did not abuse its discretion in determining that the document in question was inadmissible. Under Evid.R. 901, the only knowledge that Wife had of the document was that it was sent to her by "Omar." The magistrate concluded that "the document would have been admitted had 'Omar' appeared to testify how it came into his possession, but not on the word of [Wife] alone." We cannot say that this was arbitrary, unreasonable, or unconscionable.

**{¶ 56}** Wife's sixth assignment of error is overruled.

**{¶ 57}** Judgment affirmed in part, reversed in part and remanded to the trial court for further proceedings.

It is ordered that appellant recover from appellee 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 Court of Common Pleas, Domestic Relations 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.

JAMES J. SWEENEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., CONCURS
IN JUDGMENT ONLY