

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

MADELINE R. HAVERDICK, n.k.a.	:	OPINION
MADELINE R. PREZIOSO,	:	
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0040
FRANK HAVERDICK, JR.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2004 DR 417.

Judgment: Reversed and remanded.

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44482 (For Plaintiff-Appellant).

Gary R. Rich, 342 Mahoning Avenue, N.W., P.O. Box 4010, Warren, OH 44482-4010 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Madeline R. Haverdick, n.k.a., Madeline R. Prezioso, appeals from the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, adopting the magistrate’s decision denying her motion for contempt. For the reasons discussed below, we reverse and remand.

{¶2} In September of 2004, appellant filed a complaint for legal separation from appellee, Frank Haverdick. The case was initially settled by way of stipulation,

however, the matter was reopened after the trial court granted a motion for new trial filed by appellee. The parties eventually agreed that appellee would take possession of the marital residence.¹ The parties additionally agreed on a division of marital property and household items. The final divorce decree was entered on January 21, 2009 and included the following orders:

{¶3} “*** The marital residence *** is subject to a lien known as William R. Biviano, Biviano Law Firm vs. Madeline Haverdick [and] is to be in the possession of Defendant Frank Haverdick. Defendant, Frank Haverdick shall pay to Plaintiff as and for her share of marital equity the sum of \$60,000.00 payable immediately. Plaintiff, Madeline Haverdick, shall have 30 days from the date of the closing to vacate the premises. The lien attributable to Attorney Biviano shall be paid for out of Madeline Haverdick's share.

{¶4} “*** Both parties having agreed that the personal property and household goods have already been divided, said division shall become permanent without any further claim of one against the other.”

{¶5} Appellee paid appellant the sum of \$60,000 on April 3, 2009. On May 7, 2009, 33 days after tendering payment, appellee changed the locks on the residence, thereby taking possession of the property and all contents within the home.

{¶6} On May 11, 2009, appellant demanded appellee appear before the court and show cause why he should not be held in contempt for failing to comply with the final divorce decree. Additional discovery took place after which the matter came on for trial before the magistrate. The magistrate took two days of testimony and, on January

1. The record reflects that appellant had rented an apartment in January of 2009, but remained in the marital home through the beginning of May of 2009.

29, 2010, denied appellant's motion for contempt. On February 10, 2010, appellant filed timely objections to the magistrate's decision alleging both factual and legal errors. The objections also included a request for additional time "to transcribe the recorded testimony of the hearing so that she may make additional arguments and objections in the case." Two days later, on February 12, 2010, the trial court overruled appellant's objections and adopted the magistrate's decision in its entirety.

{¶7} Appellant now appeals and alleges two assignments of error. We shall address these arguments out of order. For her second assignment of error, appellant asserts:

{¶8} "The trial court erred, to the detriment of appellant, by refusing to grant appellant additional time to prepare a transcript."

{¶9} Appellant asserts the trial court abused its discretion in adopting the magistrate's decision without affording her sufficient time to file a transcript of the proceedings in order to further develop her objections to the magistrate's findings and conclusions. We agree.

{¶10} Appellant filed timely objections to the magistrate's decision, objecting not only to the magistrate's ultimate legal conclusions, but also certain factual findings concerning the credibility of appellant's testimony. Two days later, the trial court adopted the magistrate's decision, ruling:

{¶11} "The Court conducted an independent review of the record, the Motion and the Magistrate's decision in dispute. Based on that review,

{¶12} "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

{¶13} "1) The Objections are overruled on the Merits, and further;

{¶14} "2) All orders previously issued by the Magistrate to remain effective.

{¶15} “Plaintiff-Wife’s Motion in Contempt shall be denied. Plaintiff-Wife’s documentation and testimony is without credibility. She is not entitled to any personal property located at the marital home except the washer & dryer located in the basement.”

{¶16} We find two basic problems with the trial court’s judgment. First of all, the trial court did not possess a transcript of the testimony heard by the magistrate. Without the aid of a transcript, the trial court could not have conducted an independent review of appellant’s documentation and testimony. Civ.R. 53(D)(4)(d) mandates that a trial court 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.” *Id.* The trial court clearly failed to meet its obligation under the Civil Rules and thus the trial court’s adoption of the magistrate’s decision is defective as a matter of law. *In re B.D.*, 11th Dist. Nos. 2009-L-003 and 2009-L-007, 2009-Ohio-2299, at ¶79; see, also, *Cottage v. Cottage* (June 13, 1997), 11th Dist. No. 96-T-5412, 1997 Ohio App. LEXIS 2592. *28, citing *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6.

{¶17} In addition to this error, the trial court erred in ruling on appellant’s objections without allotting her the requisite opportunity to obtain transcripts. Not only were the transcripts necessary to support the objections already before the court, appellant also sought the transcripts to “make additional arguments and objections in the case.” Civ.R. 53(D)(3)(b)(iii) provides:

{¶18} “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.”

{¶19} Here, appellant’s objections included a request that the court allow her time to obtain transcripts. Not only was a transcript necessary to support appellant’s objections to the magistrate’s factual findings, appellant represented she was seeking a transcript to supplement her objections with additional objections and argumentation. When the court overruled appellant’s objections two days after they were filed, it did so without allowing appellant the thirty days in which to obtain and file a transcript of the hearing in violation of Civ.R. 53(D)(3)(b)(iii). This is reversible error. *DeFrank-Jenne v. Pruitt*, 11th Dist. No. 2008-L-156, 2009-Ohio-1438, at ¶14-15; See, also, *Lincoln v. Rush Expediting, Inc.*, 2d Dist. No. 23847, 2010-Ohio-5286, at ¶9; *Black v. Brewer*, 178 Ohio App.3d 113, 117, 2008-Ohio-4365; *Gruger v. Diversified Air Systems, Inc.*, 7th Dist. No. 05MA-103, 2006-Ohio-3568, at ¶22.² In committing this error, the court also denied appellant the opportunity to supplement her objections once a transcript was timely filed as contemplated by Civ.R. 53. *Lincoln*, supra, at ¶10.

{¶20} Appellant’s second assignment of error is sustained.

{¶21} For her first assignment of error, appellant alleges:

2. In *Pruitt*, as well as *In re K.E.C.*, 11th Dist. No. 2009-T-0035, 2010-Ohio-2819, this court determined, over strenuous dissent, that a party’s failure to request a transcript or failure to seek leave to do so was not required to trigger the thirty day period set forth in the rule. In this case, appellant informed the court that a transcript would be forthcoming. Thus, this particular issue is irrelevant to the disposition of appellant’s second assignment of error.

{¶22} “The trial court erred, to the detriment of appellant, by allowing appellee to constructively evict appellant, and allowing appellee to seize her property without sanctions or punishment.”

{¶23} Appellant’s first assignment of error challenges the trial court’s adoption of the magistrate’s substantive findings and conclusions. Because we hold the trial court erred by not allowing appellant a reasonable time to prepare a transcript with which she could support and/or supplement her objections, we hold it is unnecessary to address the merits of appellant’s first assignment of error at this time.

{¶24} For the reasons discussed above, the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is reversed and the cause is remanded to the trial court for further proceedings in accordance with the law and consistent with this opinion.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.