

[Cite as *Wallace v. Ferguson*, 2013-Ohio-2437.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LOIS W. WALLACE	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
CRAIG & LISA FERGUSON	:	Case No. 12-CA-105
	:	
Defendants-Appellees	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Municipal Court,
Case No. 12CV100540

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT: June 4, 2013

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

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Farmer, J.

{¶1} On February 13, 2012, appellant, Lois Wallace, filed a complaint against appellees, Craig and Lesa Ferguson, for damages to her property caused by felled trees by persons hired by appellees.

{¶2} A hearing before a magistrate commenced on March 28, 2012. By decision filed June 1, 2012, the magistrate ruled in favor of appellees, finding appellant failed to establish her damages. Appellant filed objections. By journal entry filed September 19, 2012, the trial court denied the objections and approved and adopted the magistrate's decision.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THE PLAINTIFF-APPELLANT'S ESTIMATES OF DAMAGES WERE INADMISSIBLE, THEREFORE FAILING TO PROVE HER DAMAGES."

II

{¶5} "THE TRIAL COURT'S FINDING THAT THE PLAINTIFF-APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE, THE DAMAGES TO HER PROPERTY AND THE CAUSE OF THESE DAMAGES, IS AGAINST THE WEIGHT OF THE EVIDENCE."

III

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE MAGISTRATE TO PRESIDE OVER THIS CASE. THE SAME MAGISTRATE HAD

RULED ON AN EARLIER CASE THAT WAS CURRENTLY UNDER APPEAL IN THE 5TH DISTRICT COURT OF APPEALS."

I

{¶7} Appellant claims the trial court erred in finding her exhibits on estimates of damages were inadmissible. We agree.

{¶8} Generally, rulings on admissibility are reviewed under an abuse of discretion standard. *State v. Sage*, 31 Ohio St.3d 173 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶9} The magistrate and the trial court appear to have completely disregarded Evid.R. 101(C)(8) which states the rules of evidence do not apply to proceedings in small claims court. Rule 4.0 of the Small Claims Division of Fairfield County Municipal Court states the following:

You must have all of your evidence at the hearing of your case. Under no circumstances will any new evidence be accepted after conclusion of the hearing. Although you may prepare and present your case in any manner you see fit, you must have evidence to support your claim. Evidence includes your testimony, the testimony of witnesses, written agreements, receipts, public records, tangible items, photographs, etc. **A written statement from a witness is not admissible as evidence.** You may issue subpoenas, if necessary, to command the

attendance of witnesses, and also for any documents you may need to substantiate your claim. Listed below are several examples of the types of cases commonly heard in the Small Claims Division, and the evidence that is suggested:

DAMAGE TO REAL PROPERTY

- Two copies of two estimates of repair, or repair bill.
- Photographs/video recording of the damage.
- Witnesses who viewed the incident.

{¶10} The magistrate's decision filed June 1, 2012 demonstrates a disregard for the exception to the Rules of Evidence:

2.***The issue in the within cause is reasonable cost. None of the companies providing estimates had representatives testify at the hearing. Plaintiff is well aware of the procedures for filing subpoenas, since she has requested subpoenas both in this case and in previous actions against the Defendants. Based on the evidence presented, including pictures, it would appear that Plaintiff is attempting to collect from Defendants much more than the actual damages caused by Defendants' agents. In the instant case, testimony from the companies providing estimates of damages was crucial.

3. Plaintiff received \$691.12 from her insurance company leaving a demand of \$948.19 which includes attorney's fees.

4. Plaintiff has the burden of proving damages and in the instant case, has failed to do so. The Court cannot speculate.

{¶11} Appellees were well aware of the amount in question because a complete packet of the proposed estimates to repair the damage was filed along with the complaint on February 13, 2012.

{¶12} Upon review, we find the trial court erred in excluding appellant's exhibits on the issue of damages.

{¶13} Assignment of Error I is granted and the matter is remanded for reconsideration.

II

{¶14} Based upon our decision in Assignment of Error I, this assignment is moot.

III

{¶15} Appellant claims the magistrate should have recused himself. In reviewing the docket, we do not find a motion for recusal or an affidavit of prejudice filed by appellant.

{¶16} Assignment of Error III is denied.

{¶17} The judgment of the Municipal Court of Fairfield County, Ohio is hereby reversed, and the matter is remanded to said court for reconsideration.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

JUDGES

SGF/sg 521

