[Cite as *Yantek v. Coach Builders Ltd., Inc.*, 2007-Ohio-5126.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FRANK YANTEK,	:	APPEAL NO. C-060601 TRIAL NO. A-0402603
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N.*
COACH BUILDERS LIMITED, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Appeal Dismissed

Date of Judgment Entry on Appeal: September 28, 2007

Krohn & Moss, Ltd., Ronna S. Lucas, and *Peter Cozmyk,* for Plaintiff-Appellee,

William Flax, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} Defendant-appellant Coach Builders Limited, Inc., appeals from the trial court's June 23, 2006, entry in favor of plaintiff-appellee Frank Yantek on his claims for breach of warranty and attorney fees against Coach Builders. Yantek claimed that Coach Builders had failed to repair defects arising from its installation of a convertible roof on a 2000 Cadillac Eldorado ultimately purchased by Yantek. On appeal Coach Builders challenges legal and factual issues addressed before a magistrate. But because the trial court failed to adopt or modify the magistrate's decision, the June 23 entry is not a final order and we dismiss this appeal.

Proceedings Before the Magistrate

{¶2} In August 2005, the trial court referred Yantek's claims to a magistrate for resolution of "[a]ll matters necessary to bring this case to conclusion," including a jury trial of the issues.[1] On September 7, 2005, the parties filed a stipulation that provided the written consent necessary for the magistrate to preside over a jury trial.[2] The stipulation also included two unusual provisions not contemplated in Civ.R. 53. In an attempt to expedite the resolution of the case after the jury trial, the parties agreed that the trial court "shall sign the final judgment entry based on any verdict and any rulings on motions by [the magistrate]." The parties also "waive[d] any claimed error or objection to the fact of [the magistrate] presiding at trial, but retain[ed] the right to appeal to [this court] on the substance of any of [the magistrate's] rulings."

{¶3} At the conclusion of three days of testimony, the jury answered special interrogatories and returned a verdict in favor of Yantek, awarding damages of $12,817.

[1] T.d. 47; see Civ.R. 53(C) and 53(D)(1).
[2] See Civ.R. 53(C)(1)(c); see, also, Loc.R. 23(B)(3) of the Hamilton County Court of Common Pleas.

The magistrate denied Coach Builders' post-trial motions. And Yantek moved for attorney fees. On June 7, 2006, the magistrate presided over a hearing on the fee motion.

The June 23 Entry

{¶4} Two weeks later, on June 23, 2006, a document entitled "Judgment Entry" was journalized. The five-page document briefly summarized the case history and then detailed the arguments made at the hearing for and against the award of attorney fees. The penultimate paragraph began, "After a full consideration of [the] factors *the court* concludes * * * that the plaintiff is entitled to an award of $20,728.40 as his attorney fees and costs in this matter."[3] The document concluded by reciting that "[b]ased on the above, and consistent with the verdict rendered by the empanelled jury, judgment is awarded to the plaintiff Frank Yantek in the amount of $12,817.00, plus $20,728.40 for his attorney fees and costs * * *."

{¶5} While the trial court's undated signature appears immediately below this text, nowhere does the trial court indicate whether it had adopted the jury verdict and the magistrate's conclusions and rulings in their entirety, adopted them with revisions, or rejected them. The magistrate signed and dated the document directly below the court's signature. The document was placed of record on the same day that the magistrate signed it.

{¶6} While Civ.R. 53(D)(3)(a) requires a magistrate to prepare "a [written] magistrate's decision respecting any [referred] matter," except for the June 23 entry, the magistrate did not prepare and file a separate magistrate's decision.[4] Rather the magistrate prepared the entry for the trial court, in accordance with the provision in the

[3] Emphasis added.
[4] See Civ.R. 53(D)(3)(a)(i) and 53(D)(3)(a)(iii).

written stipulation that the trial court "shall sign the final judgment entry based on any verdict and any rulings on motions" by the magistrate. The entry recounts the history of the proceedings before the magistrate even though Coach Builders waited until three months after the journalization of the entry to file a transcript of the jury trial.[5] Although no transcript of the fee hearing was ever filed in this case,[6] the entry also recounts the facts of that hearing over which the magistrate, not the trial court, presided. It is not plausible that the entry could have been prepared by the trial court. The only reasonable conclusion is that the magistrate prepared the entry, which was intended to serve as both the magistrate's decision on the fee award and the jury verdict, and as the trial court's entry of judgment.[7] The trial court did not prepare a separate entry of judgment.[8]

{¶7} Acting in conformity with its intention, embodied in the stipulation, to expedite the trial court's approval of the magistrate's rulings, Coach Builders did not file with the trial court objections to the magistrate's rulings in the June 23 entry.[9] Rather, it filed a timely notice of appeal from the entry. Coach Builders waited until three months

[5] See *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272, 654 N.E.2d 1254 (an appellate court is precluded from considering the transcript of a magistrate's hearing filed for the first time with the appellate record); see, also, *State v. Ishmail* (1978), 54 Ohio St.2d. 402, 377 N.E.2d 500.

[6] See Civ.R. 53(D)(3)(b)(iii) (an objection to any factual finding shall be supported by a transcript of all the evidence submitted to the magistrate).

[7] See Civ.R. 53(D)(3)(a)(iii) (each magistrate's ruling that includes any factual finding or legal conclusion "whether or not specifically designated as a finding of fact or conclusion of law" must include a warning that failure to file an objection to the trial court waives all but plain error).

[8] See Civ.R. 53(D)(4)(e) and 58; see, also, Civ.R. 54(A) ("[a] judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings"); cf. *Specialty Sys. of Ohio Constr., Inc. v. Mainland Indus. Coating, Inc.*, 2nd Dist. No. 19680, 2003-Ohio-3977, at ¶10 (permitting one document to serve as both the magistrate's decision and the trial court's judgment entry).

[9] See Civ.R. 53(D)(3)(b) (limiting appellate review of any error, factual or legal, in the magistrate's decision to a search for plain error); see, also, *O'Connor v. Trans World Services, Inc.*, 10th Dist. No. 05AP-560, 2006-Ohio-2747, at ¶9 (errors "that could have been brought to the attention of the trial court before [it] entered judgment are waived even if the magistrate presided over a jury trial").

after the June 23 entry to file a transcript of the jury trial.[10] And it never filed a transcript of the fee hearing. [11]

{¶8} On appeal, Coach Builders has raised four assignments of error asserting factual and legal errors in the proceedings before the magistrate. Coach Builders argues that the trial court erred in entering judgment on the jury's verdict, in overruling Coach Builders' motion for judgment notwithstanding the verdict, in dismissing its counterclaim, and in awarding attorney fees and costs.

Civ.R. 53 Procedure

{¶9} Where a matter is referred to a magistrate, the magistrate and the trial court must conduct the proceedings in conformity with the powers and procedures conferred by Civ.R. 53. "Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court."[12] And Civ.R. 53 contemplates that a written magistrate's decision shall be filed with the clerk and served on the parties, that the parties shall have an opportunity to object, and that the trial court shall rule on any objections and then either adopt, reject, or modify the magistrate's decision before entering a judgment.

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[10] See *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272, 654 N.E.2d 1254 (an appellate court is precluded from considering the transcript of a magistrate's hearing filed for the first time with the appellate record); see, also, *State v. Ishmail* (1978), 54 Ohio St.2d. 402, 377 N.E.2d 500.

[11] See Civ.R. 53(D)(3)(b)(iii) (an objection to any factual finding shall be supported by a transcript of all the evidence submitted to the magistrate).

[12] *Quick v. Kwiatkowski*, 2nd Dist. No. 18620, 2001-Ohio-1498, citing Section 5(B), Article IV, Ohio Constitution (the Ohio Supreme Court has authority to prescribe rules of procedure in Ohio courts).

The Trial Court's Essential Duties

{¶10} But a magistrate's exercise of such broad powers is intended only "to assist courts of record."[13] A magistrate's "oversight of an issue or issues, even an entire trial, is not a *substitute* for the [trial court's] judicial functions but only an *aid* to them."[14] "[E]ven where a jury is the factfinder [in a proceeding before a magistrate], the trial court remains as the ultimate determiner" of the case.[15] It is the primary duty of the trial court, and not the magistrate, to act as a judicial officer.[16]

{¶11} An essential component of a trial court's judicial function is to review and to ratify a magistrate's decision before it becomes effective. The scope of the trial court's review depends on whether a party has filed objections to the magistrate's decision. When, as here, a party fails to file objections, the trial 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."[17] The trial court may also choose a course of action other than adopting the decision even if there is no defect. The trial court "may adopt or reject a magistrate's decision in whole or in part, with or without modification [and] may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate."[18]

{¶12} To perform these essential duties, the better course is for the court to expressly indicate on the record that it is adopting or modifying a magistrate's decision.

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[13] Civ.R. 53(C)(1).
[14] *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphasis added); see, also, 1970 Staff Note to Civ.R. 53 ("a [magistrate] shall aid the court in the expedition of the court's business and not be a substitute for the functions of the court").
[15] *Hartt v. Munobe*, 67 Ohio St.3d at 7, 1993-Ohio-177, 615 N.E.2d 617.
[16] See *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, 105, 443 N.E.2d 161.
[17] Civ.R. 53(D)(4)(c); see, also, July 2006 Staff Note to Civ.R. 53 ("the 'evident on the face' standard does not require that the court conduct an independent analysis of the magistrate's decision").
[18] See Civ.R. 53(D)(4)(b).

But it is not required to recite talismanic or "magic words." For example, where a trial court failed to use the words "adopt" or "modify" in its order, but held a hearing, afforded the parties the opportunity to introduce new evidence, and provided independent reasoning and analysis to modify the magistrate's decision, this court held that the trial court had met the adoption-or-modification requirement of former Civ.R. 53(E)(4)(b) before entering judgment.[19] But what a trial court may not do is fail to conduct the inquiry necessary to demonstrate that it has adopted, modified, or rejected a magistrate's decision prior to entering judgment: "A magistrate's decision is not effective unless adopted by the court."[20]

{¶13} Where the trial court has failed to exercise its judicial functions of reviewing and adopting a magistrate's decision, the jurisdiction of this court to proceed is called into question. Because an appellate court has jurisdiction to review only the final orders or judgments of lower courts within its appellate district,[21] it must determine its own jurisdiction to proceed before reaching the merits of any appeal.[22] If the order being challenged is not final, then the court must dismiss the appeal.[23] Although neither party has raised the issue in this appeal, we must determine whether the trial court's failure to adopt the June 23 entry of the magistrate deprives this court of jurisdiction to proceed.

{¶14} The majority of Ohio courts of appeal to consider the issue have relied upon the requirement that "[a] magistrate's decision is not effective unless adopted by the court"[24] to conclude that a magistrate's decision that has not been adopted or modified by

[19] *In re Estate of Knowlton*, 1st Dist. No. C-050728, 2006-Ohio-4905, at ¶47.
[20] Civ.R. 53(D)(4)(a).
[21] See Section 3(B)(2), Article IV, Ohio Constitution; see, also, R.C. 2505.03(A).
[22] See *State ex rel. White vs. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366, 684 N.E.2d 72.
[23] See *General Acc. Ins. Co. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266.
[24] Civ.R. 53(D)(4)(a).

the trial court is not a final order.[25] Rather the magistrate's decision remains an interlocutory order: an interim or temporary order that is "tentative, informal, or incomplete,"[26] that is subject to change or reconsideration upon the trial court's own motion or that of a party, and that does not determine the action and prevent a judgment.[27] A magistrate's decision remains interlocutory until the trial court reviews the decision, adopts or modifies the decision, and enters a judgment that determines all the claims for relief in the action or determines that there is no just reason for delay.[28] Absent each of these three steps, the rulings of the magistrate and the verdict of the jury over which the magistrate presided are not final and appealable orders.[29]

{¶15} Only in special circumstances have the Ohio Supreme Court and this court sanctioned a trial court's failure to adopt or to modify a magistrate's decision. In *Miele v. Ribovich*, the Ohio Supreme Court held that the requirements of Civ.R. 53 are only applicable to the extent that they do not interfere with the summary nature of forcible-entry-and-detainer actions that are "intended to serve as an expedited mechanism by which an aggrieved landlord may recover possession of real property."[30]

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[25] *See Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 572, 2005-Ohio-1835, 828 N.E.2d 153, at ¶20; see, also, *Robinson v. BMV*, 8th Dist. No. 88172, 2007-Ohio-1162, at ¶5, and *Ingledue v. Premier Siding & Roofing, Inc.*, 5th Dist. No. 2005CAE120088, 2006-Ohio-2698, at ¶11; but, see, *Harkai v. Scherba Industries, Inc.*. (2000), 136 Ohio App.3d 211, 221, 736 N.E.2d 101; see, also, *Champion Contracting & Constr. Co. Inc. v. Valley Post No. 5563*, 9th Dist. No. 03CA0092-M, 2004-Ohio-3406, at ¶17-18 (because a trial court's action on a magistrate's decision is not an essential element of a final order or judgment as defined by R.C. 2505.02, and Civ.R. 54 and 58, an appellate court has jurisdiction to render a decision on a journal entry in which the trial court has failed to specifically state that it is adopting or modifying a magistrate's decision).

[26] *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U.S. 541, 546, 69 S.Ct. 1221.

[27] See R.C. 2505.02(B)(1); see, also, *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, fn. 1.

[28] See Civ.R. 53(D)(4)(e) ("[a] court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order"); see, also, *Mahlerwein v. Mahlerwein*, at ¶20; *Ingledue v. Premier Siding & Roofing, Inc.*, 5th Dist. No. 2005CAE120088, 2006-Ohio-2698, at ¶13.

[29] See *McClain v. McClain*, 2nd Dist. No. 02CA04, 2002-Ohio-4971, at ¶19; *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 572, 2005-Ohio-1835, 828 N.E.2d 153, at ¶20 (4th Dist.); *Ingledue v. Premier Siding & Roofing, Inc.*, 5th Dist. No. 2005CAE120088, 2006-Ohio-2698, at ¶13; *Cuyahoga Support Enforcement Agency v. Dickerson*, 8th Dist. No. 86831, 2006-Ohio-2082, at ¶10.

[30] 90 Ohio St.3d 439, 441, 2000-Ohio-193, 739 N.E.2d 333.

{¶16} In *Steadman v. Nelson*, this court affirmed the trial court's issuance of a writ of restitution in a forcible-entry-and-detainer action despite the trial court's failure to sign and thus to adopt the magistrate's decision setting a bond.[31] After acknowledging that " 'the nature of interests involved [in these actions] * * * merit[ed] special consideration,' "[32] this court noted that because the trial court had ultimately signed the entry issuing the writ itself, this "was sufficient to constitute an adoption of the magistrate's decision on the bond given its interlocutory nature and the summary nature of the forcible-entry-and-detainer proceeding."[33]

{¶17} Here, unlike in a forcible-entry-and-detainer action, the trial court was confronted with a more prosaic action: Yantek's breach-of-warranty claims seeking money damages. Those claims were resolved by a three-day jury trial. The interests in this action do not merit the special consideration contemplated by *Miele*. Thus the trial court was not excused from compliance with Civ.R. 53.

Entry Not Adopted by the Trail Court

{¶18} Here, the parties agreed to circumvent the minimal and essential procedural requirements of a trial court's review of the face of a magistrate's decision and its adoption, rejection or modification of the magistrate's orders. And the magistrate and the trial court acquiesced in the parties' agreement. Coach Builders' belief, advanced at the oral argument of this appeal, that the pretrial stipulation obviated any need to file objections with the trial court is misplaced. While parties may stipulate to the factual findings of a magistrate, there is no provision in the civil rules that permits parties

[31] See 155 Ohio App.3d 282, 2003-Ohio-6057, 800 N.E.2d 775, at ¶12, appeal not accepted for review, 102 Ohio St.3d 1409, 2004-Ohio-1763, 806 N.E.2d 562.
[32] Id., quoting *Miele v. Ribovich*, 90 Ohio St.3d at 441.
[33] Id.

to waive the trial court's obligation to review the magistrate's decision for errors of law and to adopt or modify the decision, as the parties attempted to do here.[34] The form stipulation thus fails to comply with the civil rules.[35] Permitting its use would allow parties to substitute magistrates' decisions for those of the trial court and would, in effect, permit direct appeal from a magistrate's decision. "The parties cannot confer by consent or acquiescence subject-matter jurisdiction on a court where it is otherwise lacking."[36]

{¶19} Ohio courts we repeatedly cautioned against rubberstamping—"the practice of adopting [a magistrate's decision] as a matter of course, especially where [the magistrate] has presided over an entire trial,"[37] and have "reject[ed] any concept which would suggest that a trial court may in any way abdicate its function as judge over its own acts."[38] Even if it was omitted at the behest of the parties, the failure of the trial court in this case to perform its ultimate function to review the magistrate's action in accordance with the civil rules, and to enter a final judgment in accordance with Civ.R. 54 and 58, rendered the June 23 entry an interlocutory order not ready for appellate review. The civil rules are clear: "A magistrate's decision is not effective unless adopted by the court."[39]

{¶20} Although the June 23 entry appears to dispose of all the issues before the court, it was not adopted by the trial court. Absent this essential judicial act, the decision awarding attorney fees and entering judgment on the jury verdict is not a final appealable

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[34] See, e.g., *Lesick v. Medgroup Management, Inc.* (Sept. 25, 1998), 1st Dist. Nos. C-970590 and C-970612, and *Cangemi v. Cangemi*, 8th Dist. No. 84678, 2005-Ohio-772, at ¶22.
[35] That portion of the form stipulation that provides for the unanimous consent of the parties to a jury trial before the magistrate complies fully with Civ.R. 53(C)(1)(c).
[36] *State v. Purnell*, 1st Dist. No. C-060037, 2006-Ohio-6160, at ¶12, citing *Colley v. Colley* (1989), 43 Ohio St.3d 87, 92, 538 N.E.2d 410; *Commodity Futures Trading Comm. v. Schor* (1986), 478 U.S. 833, 106 S.Ct. 3245; *State v. Flynt* (1975), 44 Ohio App.2d 315, 317, 338 N.E.2d 554 ("Since jurisdiction of subject matter is fixed by law, the consent of the defendant cannot create such jurisdiction * * *.").
[37] *Hartt v. Munobe*, 67 Ohio St.3d 3, 6-7, 1993-Ohio-177, 615 N.E.2d 617; see, also, *Inman v. Inman* (1995), 101 Ohio App.3d 115, 119, 655 N.E.2d 199; *Haag v. Haag* (1983), 9 Ohio App.3d 169, 171-172, 458 N.E.2d 1297.
[38] See *Normandy Place Assoc. v. Beyer*, 2 Ohio St.3d at 105, 443 N.E.2d 161.
[39] Civ.R. 53(D)(4)(a).

order. By not adopting or modifying the magistrate's decision, the trial court did not enter a final judgment on Yantek's claims.[40]

{¶21} We, therefore, hold that we lack jurisdiction over this appeal because the trial court failed to conduct the review mandated by the rule[41] and to adopt, modify, or reject the magistrate's decision before permitting it to be journalized as an entry of the court.[42]

{¶22} Therefore, the appeal is dismissed.

Appeal dismissed.

HENDON, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

[40] See *Lytle v. K & D Group, Inc.*, 8th Dist. No. 84889, 2005-Ohio-875, at ¶6.
[41] See Civ.R. 53(D)(4)(c).
[42] See Civ.R. 53(D)(4)(b) and 53(D)(4)(e).