

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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LYMAN LINCOLN	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23847
vs.	:	T.C. CASE NO. 09 CVI 3567
	:	(Civil Appeal from
RUSH EXPEDITING, INC.	:	Municipal Court,
Defendant-Appellee	:	Small Claims Division)

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O P I N I O N

Rendered on the 29th day of October, 2010.

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Lyman W. Lincoln, 5160 Lemoyne Drive, Huber Heights, OH 45424
Plaintiff-Appellant, Pro Se

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Attorney for Defendant-Appellee

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GRADY, J.:

{¶ 1} Plaintiff, Lyman Lincoln, appeals from a judgment that the Kettering Municipal Court rendered in favor of Defendant, Rush Expediting, Inc. ("Rush"), Lincoln's employer, on Lincoln's claim for loss of his personal property.

{¶ 2} Lincoln's action was filed in the small claims division and was heard by a magistrate. Lincoln argued that Rush is liable

for the value of a number of articles of his personal property that were stolen from a truck Rush had assigned him to drive, while the truck was parked on Rush's property. The magistrate filed a written decision that rejected Lincoln's claim for relief on a finding that "[t]he Plaintiff admitted, upon cross-examination[,] that upon his employment he was advised that Defendant would not be responsible for loss or damage to any personal property left in Defendant's truck and that employees should not keep personal property in company owned vehicles."

{¶3} Lincoln filed a timely objection to the magistrate's decision on December 29, 2009, objecting to the magistrate's factual finding concerning his admission. The trial court overruled Lincoln's objection on the following day, December 30, 2009. The court adopted the magistrate's factual finding, also noting that Lincoln "has failed to provide a transcript as required by Civ.R. ____ (E) (3) (c)."

{¶4} Lincoln filed a notice of appeal to this court on January 25, 2010. On March 4, 2010, Lincoln filed a transcript of the hearing before the magistrate in support of his appeal. Because the transcript was not before the trial court when it rendered its judgment of December 30, 2009, we may not consider it in our determination of the error Lincoln assigns. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728.

{¶5} Lincoln does not assign any specific error of law the trial court committed for our review. Instead, he raises a number of factual issues concerning his claim against Rush, issues which presumably were raised in the proceedings before the magistrate.

{¶6} When the trial court overruled Lincoln's objection to the magistrate's factual finding on the day after the objection was filed, the court relied on Civ.R. 53(E)(3)(c) for the proposition that Lincoln had failed to support his objection with a transcript of the proceedings before the magistrate. Civ.R. 53 was amended effective July 1, 2006. Paragraph (E)(3)(c) was deleted from the Rule. Paragraph (D)(3)(b)(iii) became effective on that same date. It states:

{¶7} "*(iii) 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 supplied).

{¶ 8} The Staff Note to Civ.R. 53 states:

{¶ 9} "Sentence two of Civ.R. 53(D)(3)(b)(iii) adds a new requirement, adapted from Loc.R. 99.05, Franklin Cty. Ct. Of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Civ.R. 53(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared."

{¶ 10} The trial court erred when it overruled Lincoln's objection to the magistrate's factual finding without allowing Lincoln the thirty days in which to obtain and file a transcript of the hearing before the magistrate that Civ.R. 53 (D) (3) (b) (iii) now permits. *DeFrank-Jenne v. Pruitt*, Lake App. No. 2008-L-156, 2009-Ohio-1438. That error likewise denied Lincoln the opportunity afforded by Civ.R. 53(D)(3)(b)(iii) to seek leave of court to supplement his objection after a transcript was timely filed.

{¶ 11} Lincoln does not assign the Civ.R. 53(D)(3)(b)(iii)

error the court committed for our review. Therefore, we may notice the court's error only under the plain error doctrine. "[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, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122-123.

{¶ 12} The error was in the court's final judgment of December 30, 2009, to which Lincoln could not have objected. The error prevented Lincoln from filing a transcript, for which the court overruled the objection Lincoln filed. It also prevented Lincoln from seeking leave to supplement his objection on the basis of a transcript he was denied an opportunity to file. A transcript could reveal further bases on which to object to the magistrate's factual findings. Lincoln instead raises those issues as assignments of error on appeal, but they are beyond our review because they were not raised in the trial court.

{¶ 13} The error the trial court committed puts Lincoln in a classic "Catch 22" dilemma. It affects the basic fairness of the proceeding in which his claim for relief was adjudicated adversely to him. Therefore, we find that the error is plain error, and

we will reverse the final judgment for Rush and remand the case for further proceedings consistent with this opinion.

DONOVAN, P.J. and FAIN, J. concur.

Copies mailed to:

Lyman Lincoln
James J. Fullenkamp, Esq.
Hon. Thomas M. Hanna