

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

CLAUDIA AMON,	:	<b>OPINION</b>
Plaintiff-Appellant,	:	<b>CASE NO. 2008-T-0033</b>
- vs -	:	
DICK KEAGY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Girard Municipal Court, Case No. 2008 CVI 00044.

Judgment: Reversed and remanded.

*Harry J. DePietro*, 920 Washington Avenue, Girard, OH 44420 (For Plaintiff-Appellant).

*Dick Keagy*, pro se, 233 East Point Drive, S.E., Warren, OH 44484 (Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Claudia Amon appeals from the judgment entry of the Girard Municipal Court, modifying the judgment of the magistrate in her small claims action against her former landlord, Dick Keagy, for failure to return her security and water deposits. We reverse and remand.

{¶2} Ms. Amon commenced this action by filing her complaint January 8, 2008, praying for seven hundred ninety dollars, interest at the statutory rate from November 30, 2007, and costs. The next day, she filed an amended complaint praying for fourteen hundred eighty dollars, evidently pursuant to R.C. 5321.16(C), which grants a tenant

whose landlord fails to return a security deposit within thirty days of the end of the lease term double damages.

{¶3} The matter came on for trial February 5, 2008, before the trial court's magistrate. According to Ms. Amon's counsel, he was retained by her upon a chance meeting in the court's parking lot minutes before the commencement of trial. He never filed a notice of appearance.

{¶4} February 20, 2008, the magistrate filed his decision. He determined that Ms. Amon had failed to notify Mr. Keagy in writing of her new address, as required by R.C. 5321.16(B). He further determined that Mr. Keagy had actual notice that she had moved to an apartment across the street. He found that Mr. Keagy had been required to replace the sink in Ms. Amon's former apartment at a cost of three hundred dollars. He determined that Mr. Keagy was entitled to deduct the money spent on the new sink from Ms. Amon's security and water deposits, but that he had wrongfully withheld the remaining four hundred ninety dollars beyond thirty days. He found that Mr. Keagy had finally paid Ms. Amon four hundred ninety dollars, but that she was entitled to treble damages, in the amount of nine hundred eighty dollars – four hundred ninety dollars times three, less the money already returned.

{¶5} The magistrate's decision was served upon the parties, but not upon Ms. Amon's attorney, evidently because the trial court's clerk was unaware of his representation, due to his failure to notice appearance. March 4, 2008, Mr. Keagy timely filed objections to the magistrate's decision, fundamentally challenging her right to damages, since she failed to give him written notice of her new address. Pursuant to

R.C. 5321.16(B) as written, damages under R.C. 5321.16(C) are premised on a tenant notifying his or her ex-landlord in writing of the former tenant's new address.

{¶6} March 5, 2008, the trial court filed its judgment entry, in which it determined that, since Ms. Amon never gave Mr. Keagy written notice of her new address, she was not entitled to damages under R.C. 5321.16(C) for his failure to return her deposits within thirty days of vacating her apartment. Consequently, it found the four hundred ninety dollars she had received from Mr. Keagy had made her whole.

{¶7} March 7, 2008, Ms. Amon, through counsel, moved the trial court for a transcript of the proceedings before the magistrate. The trial court denied this motion by a judgment entry filed March 11, 2008. March 14, 2008, Ms. Amon, through counsel, moved for a new trial, on the bases that Mr. Keagy had failed to serve her counsel with his objections to the magistrate's decision, and that her counsel was never served with that decision. Mr. Keagy opposed the motion for a new trial March 27, 2008.

{¶8} By a judgment entry filed March 28, 2008, the trial court denied Ms. Amon's motion for a new trial. First, it cited to its own local rule 14, for the proposition that a party must request, in writing, that any proceeding be recorded, and that Ms. Amon had failed to do so. It further noted that her counsel did not request that the trial court's reporter transcribe the February 5 trial before the magistrate, and did not request that the magistrate turn on the recording device in the courtroom. It further held that the failure by Ms. Amon's counsel to file a notice of appearance was the reason he had not received a copy of the magistrate's decision; and, that his failure to serve such notice upon Mr. Keagy absolved the latter from any duty to serve his objections upon counsel.

{¶9} April 1, 2008, Ms. Amon timely noticed this appeal. April 21, 2008, she filed a proposed App.R. 9(C) statement with the trial court, in lieu of a transcript. A desultory period of motion practice ensued, when Ms. Amon's counsel discovered discrepancies between the magistrate's decision as filed with the record in this court, and the copy of that decision served upon his client.<sup>1</sup> December 2, 2008, after several remands to correct the situation, this court ordered a final remand to the trial court's clerk to correct certain discrepancies in the docket, and that the matter proceed.

{¶10} Ms. Amon assigns the following errors on appeal:

{¶11} "[1.] The trial court erred as a matter of law and abused its discretion when it failed to recognize a landlord's actual knowledge of a former tenant's new residence location overrides the statutory requirement that a tenant provide her new address to her former landlord in order for the provisions of R.C. 5321 et seq. to apply and give her statutory damages for her landlord's failure to timely return her security deposit as required by law.

{¶12} "[2.] The trial court denied Appellant due process and/or abused its discretion when it failed to record the trial held before Magistrate Mark S. Finamore on February 5, 2008.

{¶13} "[3.] The trial court Judge abused his discretion when he made findings and conclusions which were not only unsupported by evidence, but which were contrary to the uncontroverted evidence adduced at trial; as well as commenting on what he imagines did not take place at the proceeding at which he was not present, and of which, there is no record.

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1. In his original decision, the magistrate inadvertently used the word "plaintiff," when he meant "defendant," or vice-versa. At some point, the trial court corrected this with inked interlineations.

{¶14} “[4.] The trial court denied Appellant’s right to due process when it thwarted her right to object to those matters in the court’s final appealable order related to findings and/or conclusions originally contained in the Magistrate’s February 5, 2008 decision when it failed to give her counsel notice of that decision, and thus, any meaningful opportunity to object to it.”

{¶15} Initially, we must determine whether jurisdiction exists for us to consider the errors assigned. Civ.R. 53(D)(3)(b)(iv) provides that no error, except plain error, may be recognized by a court of appeals when a party has failed to file objections to a magistrate’s decision. Ms. Amon failed to file objections; and, her assigned errors do not rise to the level of civil plain error.

{¶16} “However, ‘(a) magistrate’s decision shall indicate conspicuously that a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion (\*\*\*) , unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).’ Ohio Civ.R. 53(D)(3)(a)(iii). Where the magistrate’s decision fails to include the language required by Civ.R. 53(D)(3)(a)(iii), a party is not prevented from assigning as error on appeal the lower court’s adoption of factual findings or legal conclusions. *Mix. v. Mix*, 11th Dist. No. 2003-P-0124, 2005-Ohio-4207, at ¶22.” *D.A.N. Joint Venture III, L.P. v. Armstrong*, 11th Dist No. 2006-L-089, 2007-Ohio-898, at ¶22.

{¶17} In this case, the magistrate’s decision did not contain the language required by Civ.R. 53(D)(3)(a)(iii), warning the parties of the effects of failing to file timely objections. Consequently, we deem we have jurisdiction to consider the errors assigned on their merits.

{¶18} “A trial court’s judgment regarding whether to adopt, reject, or modify a magistrate’s decision is reviewed for abuse of discretion, *In re Gochneaur*, 11th Dist. No. 2007-A-0089, 2008-Ohio-3987, at ¶16 \*\*\*[.] “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 \*\*\*. Regarding this standard, we recall the term ‘abuse of discretion’ is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. \*\*\*.” *Winkelman v. Winkelman*, 11th Dist. No. 2008-G-2834, 2008-Ohio-6557, at ¶8. (Parallel citations omitted.)

{¶19} By her first assignment of error, Ms. Amon alleges the trial court abused its discretion in determining that she was not entitled to statutory damages under R.C. 5321.16(C), due to her failure to abide by the requirements of R.C. 5321.16(B). We agree.

{¶20} R.C. 5321.16 governs the return of security deposits by landlords. R.C. 5321.16 (B) and (C) provide as follows:

{¶21} “(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant’s noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession.

*The tenant shall provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorney fees under division (C) of this section.*

{¶22} “(C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorney fees.” (Emphasis added.)

{¶23} In this case, the magistrate found that Ms. Amon failed to give Mr. Keagy written notice of her new address, but that he had actual notice that she had moved across the street, and awarded her treble damages. The trial court rejected the magistrate’s decision that Ms. Amon was entitled to any damages, relying on the last two sentences of R.C. 5321.16(B). This was error. Ohio’s appellate courts have determined that, when a landlord has actual notice of a former tenant’s new address, then the tenant may recover statutory damages pursuant to R.C. 5321.16(C), if the landlord fails to fulfill his duties under R.C. 5321.16(B). See, e.g, *Adams v. Davenport*, 2d Dist. No. 2005-CA-108, 2006-Ohio-4646, at ¶13-16; *Baron v. Buckner* (Apr. 29, 1991), 12th Dist. No. CA90-10-071, 1991 Ohio App. LEXIS 1895, at 10; *Prescott v. Makowski* (1983), 9 Ohio App.3d 155, 156-157.

{¶24} “In fact, ‘the award of damages provided in R.C. 5321.16(C) is mandatory if a landlord wrongfully withholds a portion of a tenant’s security deposit.’ *Klemas v. Flynn* (1993), 66 Ohio St.3d 249, 251, \*\*\*, citing [*Smith v.*] *Padgett* [1987], 32 Ohio St.3d

[344], at paragraph three of the syllabus. The Ohio Supreme Court has held that the ‘term “amount wrongfully withheld” means the amount found owing from the landlord to the tenant over and above any deduction that the landlord may lawfully make.’ *Vardeman v. Llewellyn* (1985), 17 Ohio St.3d 24, 29, \*\*\*.” *Bacon v. Atlas Home Corp.*, 9th Dist. No. 22471, 2005-Ohio-6979, at ¶8. (Parallel citations omitted.)

{¶25} Consequently, it was error for the trial court to reject the magistrate’s conclusion that Ms. Amon was entitled to damages. She was. However, the magistrate erred in concluding she was entitled to treble damages. Rather, her damages are double, the amount of her deposits wrongfully withheld, less Mr. Keagy’s damages. R.C. 5321.16(C); *Bacon* at ¶8. As the record indicates Mr. Keagy has already returned four hundred ninety dollars to Ms. Amon, she is still entitled to a further four hundred ninety dollars, plus reasonable attorney fees. R.C. 5321.16(C); *Bacon* at ¶8.

{¶26} The first assignment of error has merit, to the extent indicated.

{¶27} Given our disposition of the first assignment of error, we decline to reach

the others, deeming them moot.<sup>2</sup>

{¶28} The judgment of the Girard Municipal Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶29} It is the further order of this court that appellee is assessed costs herein taxed.

{¶30} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

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2. Regarding the second assignment of error, we note for the benefit of the trial court that Girard Municipal Court Local Rule 14, placing the burden of requesting recording of the proceedings on the parties, conflicts with Civ.R. 53(D)(7). That rule states: "Except as otherwise provided by law, all proceedings before a magistrate *shall be* recorded in accordance with procedures established by the court." (Emphasis added.) The use of the word "shall" in a statute or rule indicates the matter is mandatory. Cf. *State ex rel. Bodkins v. Laws* (1994), 69 Ohio St.3d 383, 385. Further, this court has held that small claims proceedings before a magistrate are subject to this recording requirement. See, e.g., *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, at ¶26-31, citing to *All Occasion Limousine v. HMP Events*, 11th Dist. No. 2003-L-140, 2004-Ohio-5116 (construing former Civ.R. 53(D)(2)). It is evident from the trial court's judgment entry denying Ms. Amon's motion for a new trial, that the trial court views its rule requiring a party to make written request for recording as the "procedures established by the court," referenced in Civ.R. 53(D)(7). This is incorrect. That phrase simply gives trial courts discretion to choose a method of recording. Local rules of court may supplement and implement the rules of procedure promulgated by the Supreme Court of Ohio. They may not alter them.