NO. 5-10-0081

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LANNIE GRIBBLE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Williamson County.
	)	
v.	)	No. 09-SC-908
	)	
WAYNE STANLEY,	)	Honorable
	)	James R. Moore,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: Plaintiff is entitled to a new hearing when an affirmative defense was raised at the end of the hearing, thereby denying plaintiff an opportunity to rebut the defense.

Lannie Gribble, plaintiff, sought damages in small claims court from his neighbor Wayne Stanley, defendant, for the destruction of certain trees located on Gribble's property. The circuit court of Williamson County found in favor of Stanley and awarded no damages. Gribble appeals. We reverse and remand.

According to the complaint filed by Gribble, he and Stanley own adjacent properties in Marion, Illinois, which are separated by a fence. In the fall of 2008, according to Gribble, Stanley inquired about cutting down trees on Gribble's land near the fence line. Gribble did not give Stanley permission to do so. Gribble stated that the trees, ornamental in nature, were in excess of 15 feet tall and provided a privacy screen for his property. In June of 2009, Stanley allegedly caused nine trees on Gribble's property to be cut down. Gribble filed a small claims suit for trespass to recover damages sustained as a result of Stanley's actions.

Gribble claimed that the replacement value of the trees was $3,500. Stanley denied all the allegations stated in Gribble's complaint except that he owned the adjoining property.

The parties subsequently had a bench trial and both parties were represented by counsel. There is no transcript or bystander's report of the proceedings in the record, however. In his brief, Gribble asserts that testimony was presented, consistent with the allegations in his complaint, that Stanley did not have permission to cut the trees on Gribble's property and that Stanley was the one responsible for the damage to his trees. Of course, given the state of the record, we do not know if that is the case. The record does contain, however, numerous photos admitted into evidence depicting the fence line and cut trees. The record also contains a copy of an estimate to replace the trees, secured by Gribble, as well as a report from Long Forestry Consultation, prepared for Stanley, to identify and value the trees cut. This report admits that Stanley began clearing the fence row in preparation for replacing the fence but that the trees cut down were, for the most part, volunteer trees with little or no commercial value. At the conclusion of the hearing, the court took the matter under advisement, subsequently rendering a decision in favor of Stanley. In the holding, the court stated that the evidence was undisputed that a common boundary fence was established between the properties. The court then stated, "[T]he rights and duties as between the adjoining property owners as to the fence is governed by the provisions of the Fence Act set forth at 765 ILCS 130.00 [*sic*], *et seq.* [West 2008]." The court concluded that Stanley's actions did not constitute a trespass under the law, as he was attempting to do "fence maintenance."

Gribble argues on appeal that Stanley's failure to raise the affirmative defense of the Fence Act (765 ILCS 130/0.01 *et seq.* (West 2008)) in his answer constituted a forfeiture of his right to later raise that defense at the trial. He further argues the court abused its discretion by finding for Stanley based on an affirmative defense that, according to him, was

raised *sua sponte* after the close of the trial. Finally, he contends that the decision finding no trespass is in error. Stanley counters that the Fence Act is not an affirmative defense and that Gribble simply failed to prove his case. Stanley also filed a motion to strike Gribble's brief and summarily affirm, taken with the case, on the basis of the inadequacy of the record on appeal.

Addressing the motion first, we note that the burden rests on an appellant to provide a sufficient record to support a claim of error, and in the absence of that record, the reviewing court will presume that the trial court's order was in conformity with established legal principles and had a sufficient factual basis. *Landau & Associates, P.C. v. Kennedy*, 262 Ill. App. 3d 89, 92, 634 N.E.2d 373, 375 (1994). The principle is applicable to appeals from judgments rendered in small claims cases. *Landau & Associates, P.C.*, 262 Ill. App. 3d at 92, 634 N.E.2d at 375. The failure to present a report of the proceedings, however, does not automatically require a dismissal of the appeal or a summary affirmance of the trial court's decision, provided that the issues can be resolved on the record as it stands. *Landau & Associates, P.C.*, 262 Ill. App. 3d at 92, 634 N.E.2d at 375. While the record here is indeed scant, thereby hampering a complete and thorough review, we agree that the record contains enough for us to conclude that reversible error occurred in this instance. *Cf. Landau & Associates, P.C.*, 262 Ill. App. 3d 89, 634 N.E.2d 373. Stanley's motion, taken with the case, is therefore denied. The utilization of the affirmative defense of the Fence Act, whether raised at the last minute by Stanley or by the court *sua sponte*, was improper in this instance. We therefore conclude that Gribble is entitled to a new hearing.

It is true that the rules governing pleadings and proceedings in small claims court are relaxed under the Illinois Supreme Court rules pertaining to small claim actions. Nonetheless, certain practice rules, as well as provisions of the Code of Civil Procedure, are applicable to small claims proceedings if consistent with the aims of the small claims rules.

See *Darwin Co. v. Sweeney*, 110 Ill. App. 3d 331, 333, 442 N.E.2d 318, 321 (1982). Section 2-613(d) of the Illinois Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2008)), which requires affirmative defenses to be plainly set forth in a defendant's answer, has been found to be applicable in small claims cases. See *Harmon Insurance Agency, Inc. v. Thorson*, 226 Ill. App. 3d 1050, 1052, 590 N.E.2d 920, 922 (1992); *Darwin Co.*, 110 Ill. App. 3d at 333, 442 N.E.2d at 321. An affirmative defense is one that "gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated." *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222, 459 N.E.2d 633, 635 (1984). The failure to comply with this rule constitutes a forfeiture of the defense, and the defendant is precluded from later relying upon it at a trial. See *International Ass'n of Firefighters Local No. 23 v. City of East St. Louis*, 213 Ill. App. 3d 91, 95-96, 571 N.E.2d 1198, 1202 (1991). The purpose of the rule is to promote the adjudication of a case on its merits and to prevent the harsh consequences of an unfair surprise at a trial. *Harmon Insurance Agency, Inc.*, 226 Ill. App. 3d at 1052, 590 N.E.2d at 921. Here, Stanley was represented by counsel, and instead of asserting or even mentioning the Fence Act, he simply denied all the allegations save one–that he owned the adjoining property. He even denied cutting down or damaging the trees. According to Gribble, the Fence Act was raised by the court *sua sponte* at the end of the hearing after all the testimony and exhibits had been received into evidence. The record before us does not confirm or deny Gribble's assertion. The record sheet simply states that there was no rebuttal (a fact which tends to support Gribble's assertion that the matter was raised *sua sponte* by the court after the evidence had been submitted), that the parties rested, and that the matter was taken under advisement with a decision being issued three days later. Again, whether raised by Stanley or by the court itself at the end of the case, the introduction of the defense was unfair to Gribble, who was denied any chance to rebut the defense, including the applicability of the Fence Act to the parties' situation and whether any provisions of the Fence Act, if

applicable, were followed. Gribble was effectively stripped of his rights to have a fair and independent adjudication of his claim on the merits.

For the aforementioned reasons, we reverse the judgment of the circuit court of Williamson County and remand this cause for a new hearing.

Motion denied; judgment reversed; cause remanded.