[Cite as *Holt v. Ken's Auto Sales, Inc.*, 2009-Ohio-6692.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

DARRELL L. HOLT	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 17
v.	:	T.C. NO. 07 CVF 01127
KEN'S AUTO SALES, INC., et al.	:	(Civil appeal from Fairborn Municipal Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 18th day of December, 2009.

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DARRELL L. HOLT, 234 Wallace Drive, Apt. C, Fairborn, Ohio 45324
Plaintiff-Appellant

KONRAD KUCZAK, Atty. Reg. No. 0011186, 130 West Second Street, Suite 1010, Dayton, Ohio 45402
Attorney for Defendant-Appellee

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Darryl L. Holt, filed March 6, 2009. On July 12, 2007, Holt filed, pro se, a small claims complaint against Ken's Auto Sales, Inc. ("Ken's"), in Fairborn Municipal Court. According to Holt, he and Ken's entered into a consumer transaction for the purchase of an automobile at approximately 1:00

a.m. on June 4, 2007. Pursuant to their agreement, Holt traded in a 1994 Ford F150 pickup truck ("Ford") for a 1988 Chevrolet pickup truck ("Chevrolet"). At approximately 10:00 a.m. on the same day, Holt alleges that he called Ken's to void the transaction, and the parties reached an agreement to exchange the vehicles on June 5, 2007. When no one was present at Ken's for the exchange on the 5th, Holt returned the Chevrolet and the keys to Ken's on the 7th, along with a note stating that he was returning the vehicle pursuant to their agreement. On June 10th, Holt allegedly went to "Defendant's home. Again, Defendant advised he would return [the] 1994 F-150 truck to Plaintiff, but was running late for work [and] had to meet with Plaintiff the next morning." Several days later, "Defendant told Plaintiff that his 1994 pick-up truck was scrapped at Hilltop Junkyard (also owned by Defendant)."

{¶ 2} Attached to the Complaint is a copy of a purchase order for the Chevrolet which provides that Holt purchased it for $4950.00, and that after taxes and a filing fee the total purchase price was $5336.50. Holt received a used car allowance for the Ford of $950.00, and his total payment due was $4386.00. There is a notation on the purchase order that states, "Customer will pay $386.00 by 6-18-04," [sic] and it is signed by Darryl Holt.

{¶ 3} The matter was transferred from the small claims division to the regular civil docket after Ken's filed a counterclaim, also attaching the purchase order and seeking judgment in the amount of $4,386.00.

{¶ 4} Holt obtained representation through the Greater Dayton Volunteer Lawyers Project. With leave of court he filed an amended complaint asserting that Ken's is a sole proprietorship owned by Kenneth Gevedon, and he joined Gevedon as a party. The amended complaint asserts claims of unjust enrichment and a cause of action under the Consumer Sales

Practices Act ("CSPA"). According to the CSPA claim, "it was unfair, deceptive and unconscionable of Defendants to knowingly take advantage of Plaintiff's inability to protect Plaintiff's interests because of Plaintiff's mental infirmities, ignorance, illiteracy, and inability to understand the language of an agreement, of which Defendants had actual knowledge." Gevedon filed an answer asserting in part that "he did not act in his personal capacity with respect to any transaction between Ken's Auto Sales Inc., but if he acted at all he acted solely as an agent of Ken's Auto Sales."

{¶ 5} On January 7, 2008, Ken's and Gevedon ("Defendants") filed a motion for summary judgment, which Holt opposed. On January 17th, the municipal court overruled Defendants' motion, finding that genuine issues of material fact existed.

{¶ 6} On August 13, 2008, counsel for Holt filed a motion to withdraw as counsel of record as well as a motion for a continuance. The trial of the matter was re-set from August 15, 2008, to October 17, 2008. The entry provides that no further continuances would be granted.

{¶ 7} On October 8, 2008, Holt filed a pro se motion for a continuance "in order to secure new legal counsel. Legal Aid had not supplied an attorney to handle this case." The trial court denied the continuance.

{¶ 8} On October 23, 2008, following trial at which Holt, pro se, and Gevedon, with counsel, were present, the Magistrate issued a brief decision that provides:

{¶ 9} "The Magistrate finds that the plaintiff did not prove his claims that the defendants had violated the Consumer Sales Practices Act and that the defendants were unjustly enriched. * * *

{¶ 10} "Based upon the evidence presented by the defendant, defendant proved liability

based upon the contract between the parties. However, the defendant failed to prove any damages. The defendant was offered $3500.00 for the [Chevrolet] by another buyer. Defendant's contract with plaintiff was for $4950.00, for a difference of $1450.00. Defendant gave plaintiff a used car allowance of $950.00 for plaintiff's [Ford]. This would leave a difference of $500.00. The defendant kept plaintiff's Ford and the Chevrolet. The Magistrate finds that to award $500.00 to the defendants would create an unjust enrichment for the defendants.

{¶ 11} "Therefore, judgment for the defendants on all claims in the amount of zero damages."

{¶ 12} On November 4, 2008, Holt filed a pro se Objection to the Magistrate's Decision, which provides in total: "Without legal representation Darrell Holt was incapable of handling case due to illiteracy. Darrell is indigent and cannot afford an attorney." Holt did not support his objection with a transcript of the hearing before the Magistrate. The handwritten Objection provides that it is "written by: Rita Dryden (sister)," and it appears to be signed by both Holt and Dryden.

{¶ 13} On January 22, 2009, Holt filed a request for transcripts which provides in part, "My understanding transcripts will be provided at no cost as Mr. Holt is indigent." This document also indicates that it was prepared by Rita Dryden.

{¶ 14} On February 9, 2009, the municipal court issued a decision, following a hearing, that provides in part: "The Court finds that plaintiff's sole objection to the Magistrate's Decision is that he was not appointed counsel. The Court notes that plaintiff previously had counsel which represented him pro bono. However, on August 13, 2008, counsel for plaintiff

filed a motion to withdraw as counsel and also filed a motion to continue trial in order to allow plaintiff to secure counsel. Both motions were granted and a new trial was scheduled for October 17, 2008, allowing for approximately two months for the plaintiff to obtain new counsel. Plaintiff appeared at the trial without counsel and the matter proceeded to trial. * * *

{¶ 15} "The Court finds that sufficient time was allowed for plaintiff to obtain counsel and that he does not have a right to have appointed counsel on a civil matter." The court overruled Holt's objection and affirmed the decision of the Magistrate.

{¶ 16} After he filed his notice of appeal, Holt filed a request for "a copy of all transcripts at no cost due to indigence." We denied his request, noting, "Civil litigants do not have due process rights to the payment of litigation expenses by the State."

{¶ 17} Holt's brief is handwritten, it appears to be signed by Holt, and it indicates that it was "written by Rita Dryden (sister explained to Darrell Holt)." The brief enumerates six points that we assume are assigned errors, although they are not designated as such. They are as follows: (1) "Failure to Rule Decision in Small Claims Court," (2) "Change of Magistrate During Civil Trial," (3) "Plaintiff's Objection to the Magistrate's Decision," (4) "Konrad Kuczak, Attorney for Defendant Makes Incorrect Statements throughout Court Hearings," (5) "Court Fails to Rule on any and all Decisions and Judgments Pertaining in Question to Plaintiff's Mental Infirmities, Ignorance, Illiteracy, and Inability to Understand," and (6) "Court Fails to Recognize Mental Infirmities, Ignorance, Illiteracy, and Inability to Understand in Civil Action Trial and in Hearing of Objection to Magistrate Decision."

{¶ 18} "Initially, it should be noted that in accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's

report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118. Thus, the trial court's standard of review of a magistrate's decision is de novo.

{¶ 19} "An 'abuse of discretion' standard, however, is the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision. Claims of trial court error must be based on the actions taken by the trial court, itself, rather than the magistrate's findings or proposed decision. When an appellate court reviews a trial court's adoption of a magistrate's report for an abuse of discretion, such a determination will only be reversed where it appears that the trial court's actions were arbitrary or unreasonable. *Proctor v. Proctor* (1988), 48 Ohio App.3d 55, 60-61. Presumptions of validity and deference to a trial court as an independent fact-finder are embodied in the abuse of discretion standard. *Whiting,* supra.

{¶ 20} "An abuse of discretion means more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not merely substitute its judgment for that of the trial court. *Berk v. Mathews* (1990), 53 Ohio St.3d 161." *Randall v. Randall,* Darke App. No. 1739, 2009-Ohio-2070, ¶ 8-10.

{¶ 21} In addition to their brief on the merits, Defendants filed a motion to strike Holt's brief. In their motion, Defendants assert that Holt's sister, a non-attorney, engaged in the unauthorized practice of law in preparing the brief. Defendants further assert that the handwritten document fails to comply with Loc.R. 5.1, in that it is not typewritten. Defendants also argue that the brief fails to include a certificate of service, and that the brief was not served upon Defendants, contrary to App.R. 18. Finally, Defendants assert that the brief fails to

conform with the technical requirements of App.R. 16(A).

{¶ 22} We initially note, "[l]itigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standard as other litigants." *Yocum v. Means*, Darke App. No. 1576, 2002-Ohio-3803. A litigant proceeding pro se "cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter." Id. (Internal citations omitted).

{¶ 23} App.R. 16(A) sets forth the requirements of an appellate brief and provides:

{¶ 24} "(A) Brief of the appellant

{¶ 25} "The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

{¶ 26} "(1) A table of contents, with page references.

{¶ 27} "(2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.

{¶ 28} "(3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.

{¶ 29} "(4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.

{¶ 30} "(5) A statement of the case briefly describing the nature of the case, the course of the proceedings, and the disposition in the court below.

{¶ 31} "(6) A statement of facts relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule.

{¶ 32} "(7) An argument containing the contentions of the appellant with respect to each

assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶ 33} "(8) A conclusion briefly stating the precise relief sought."

{¶ 34} We agree with Defendants that Holt's brief fails to comply with App.R. 16 in virtually all respects. Under App.R.12(A)(2), we are free to disregard any assigned errors if the party raising them "fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R.16(A)." There is no transcript before us, and although we could summarily strike Holt's brief or sua sponte dismiss his appeal for failure to comply with App.R.16, we are mindful that the trial court took but one action in this case; it affirmed the magistrate's decision overruling Holt's sole objection regarding his lack of counsel. If we assume that the trial court's decision regarding Holt's lack of counsel is the act alleged to be erroneous, Holt having waived all other arguments by failing to preserve them for appeal, pursuant to Civ.R.53(D)(3)(b)(iv), Holt's brief fails on the merits.

{¶ 35} "In *State ex rel. Jenkins v. Stern* (1987), 33 Ohio St.3d 108, 110, * * * , the Ohio Supreme Court noted that '[t]here is no generalized right of counsel in civil litigation.' The Supreme Court noted that:

{¶ 36} "'* * * [C]ertain distinctions can be made between the rights of civil litigants and those of criminal defendants. A criminal defendant's right to counsel arises out of the sixth amendment, and includes the right to appointed counsel when necessary. * * * A civil litigant's right to retain counsel is rooted in fifth amendment notions of due process; the right does not

require the government to provide lawyers for litigants in civil matters. * * * A criminal defendant faced with a potential loss of his personal liberty has much more at stake than a civil litigant asserting or contesting a claim for damages, and for this reason the law affords greater protection to the criminal defendant's rights.'

{¶ 37} "Intermediate appellate courts, including our own, have followed these principles, and have found no constitutional right to representation in cases involving individual civil litigants." (Internal citations omitted). *Cincinnati Ins. Co. v. Schaub*, Montgomery App. No. 22419, 2008-Ohio-4729, ¶ 18-20.

{¶ 38} Holt's assigned error lacks merit; he was not entitled to appointed counsel, and there is no abuse of discretion. Defendants' motion to strike is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

Darrell L. Holt
Konrad Kuczak
Hon. Beth W. Root