[Cite as *McKim v. Finley*, 2014-Ohio-4012.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

CHRISTOPHER McKIM, et al.,	:	
Plaintiffs-Appellees,		Case No. 13CA5
vs.	:	
	:	DECISION AND JUDGMENT ENTRY
LYLE FINLEY, II,	:	
Defendant-Appellant.		

APPEARANCES:

COUNSEL FOR APPELLANT: Lyle Finley II, 1119 Cisler Drive, Marietta, Ohio 45750 Pro Se[1]

COUNSEL FOR APPELLEES: Robert Ellis, Ellis & Ellis, L.P.A., 328 Fourth Street, Marietta, Ohio 45750

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 9-5-14
PER CURIAM.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment in favor of Christopher McKim and Angela McKim, plaintiffs below and appellees herein, on their claim against Lyle Finley, II, defendant below and appellant herein. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE ERRED BY PROCEEDING WITH A JUDGE'S CONFERENCE TRIAL OVER OBJECTIONS BY

[1] Appellant represented himself pro se during the trial court proceedings.

DEFENDANT BECAUSE OF NOT RECEIVING A JURY TRIAL."

SECOND ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE ERRED BY DENYING A NEW JURY TRIAL."

THIRD ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE ERRED BY IGNORING AND FAILURE TO WEIGHT THE FRAUDULENT NATURE AND TESTIMONY OF THE PLAINTIFFS AND WITNESSES IN HIS RULING AND JUDGMENT."

FOURTH ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE ERRED IN TRANSFERRING ALL LAND AND MINERAL RIGHTS TO THE PLAINTIFFS WITHOUT REGARD TO THE LOSS OF THE ORIGINAL OWNER (DEFENDANT)."

FIFTH ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE HAS ERRED BY DENYING STAY OF RULING."

SIXTH ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE HAS ERRED BY INCLUDING PREJUDICE IN HIS FINAL RULING."

SEVENTH ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE HAS ERRED BY ASSOCIATING THE LAND CONTRACT WITH THE OPTION BEING SIGNED THE SAME DAY AS REASON TO ENFORCE ONE FROM THE OTHER (AN EXTRA LEGAL TRICK) IN THIS CASE."

EIGHTH ASSIGNMENT OF ERROR:

"PRESIDING JUDGE LANE HAS ERRED BY ORDERING THE DEFENDANT TO PAY ALL COURT COSTS BECAUSE THE DEFENDANT IS BEING PAID MONEY AS TO THE LAND CONTRACT."

{¶ 2} On February 10, 2014, appellees and appellant entered into a land contract for approximately ten acres of real estate. The terms of the contract required appellees to pay $5,000 down and then pay a balance of $15,000, plus interest, in thirty monthly installments. Eventually, contract terms were satisfied and the property transferred to the appellees. Although initially mentioned in the complaint, this land installment contract is no longer an issue.[2]

{¶ 3} Contemporaneously, the parties entered into another contract whereby appellees acquired the option to purchase an additional fifty-two acres for $85,000. The option contract made no reservation whatsoever, and specified that appellant would convey the subject premises "free and clear of all liens and encumbrances whatsoever except taxes and assessments . . . restrictions of record, easements of record and zoning ordinances."

{¶ 4} Appellees filed the instant action and alleged, inter alia, that they had notified appellant of their desire to exercise the option, but that appellant refused to honor the contract. The appellees asked for, among other things, an order that appellant specifically perform under the contract and convey to them the fifty two acres.

{¶ 5} Appellant denied liability and stated that the appellees apparently expected the option contract to include a conveyance of mineral rights, something that appellant claimed that he did not agree to sell. Appellant also counterclaimed and alleged fraud, "unclean hands" and damages as a result of his inability to lease mineral rights that he had allegedly reserved "in the deal made with" appellees. Appellant asked that the contract either be reformed or declared null

[2] We mention the contract because it appears to have some relevance to the argument that appellant makes in his seventh assignment of error.

and void. Appellees denied any liability.

{¶ 6} At the bench trial, it was uncontroverted that appellant entered into the option contract. The pertinent question is whether appellant reserved, or intended to reserve, the mineral rights from the land that he promised to convey if the appellees exercised the option. However, no mention of any reservation was included in the contract, and the only evidence on this issue was appellant's own statements and the context of the questions that he asked other witnesses.

{¶ 7} Appellees both testified that when the contract was executed, no discussion occurred about the reservation of mineral rights. Appellant even called his own attorney, Anita Newhart, who prepared the option contract. Newhart testified that she had no recollection that appellant wanted to retain the mineral rights, nor did she make such any notation in her notes of her conversation(s) with appellant. George Litman, Attorney Newhart's assistant, also testified and stated that he remembered no mention of any reservation of mineral rights. Nevertheless, in his closing argument appellant maintained that the transaction was fraudulent. Appellant further asserted that (1) he mistakenly allowed appellees to "weasel into [his] life and property," (2) he felt he was "taken advantage of," (3) if appellees won their case, he would "lose big time," (4) he had no health insurance, and (5) he could "plead dementia [and] Alzheimer's as much as anybody in this room."

{¶ 8} At the conclusion of the trial the court found in favor of the appellees and ordered appellees to pay appellant the agreed sum and appellant to convey the land. The court also

dismissed appellant's counterclaim with prejudice. This appeal followed.[3]

I

{¶ 9} Before we turn to the merits of the assignments of error, we first address a few procedural issues. Appellant is representing himself on appeal pro se, just as he did in the trial court.[4] This Court will afford pro se litigants some degree of leniency on appeal. See *Ogle v. Kroger Co.*, 4th Dist. Hocking No. 13CA22, 2014-Ohio-1099, at ¶14; *Scioto Cty. Bd. of Commrs. Revolving Loan Fund Bd. v. McDermott Industries, L.L.C.*, 4th Dist. Scioto No. 12CA3504, 2014-Ohio-240, at ¶14. Here, many irregularities and peculiarities appear in appellant's brief. For example, appellant (1) cites no legal authority to support any of his assignments of error, and (2) does not include separate arguments for each individual assignment of error. See App.R. 16(A)(7).[5] At least on the latter point, we would be well within our authority to disregard all of the assigned errors and summarily affirm the trial court's judgment. See App.R. 12(A)(2); also see *Ohio Valley Resource Conservation & Dev v. Pertuset*, 4th Dist. Scioto No. 12CA3503,

[3] Although the judgment specified that a status hearing was to be held in February 2013, the purpose of that hearing was to ensure that the transfer of the property to the appellees had been completed. Thus, although the trial court anticipated future proceedings, all claims and counterclaims had been resolved. Accordingly, this future status conference creates no final appealable order problem. See R.C. 2505.02; Civ.R. 54(B).

[4] Appellant explained that he tried to get help from a "legal clinic" but "there's no legal clinic in December." Then, during his closing argument he claimed to have "had a lawyer initially" to represent him, only to have counsel back out of the arrangement after discovering opposing counsel was "the Fogle-Ellis take no prisoners lawyer dynasty in Marietta."

[5] The "argument" portion of his brief begins on page fourteen and is not separated for each assignment of error.

2013-Ohio-5406, at ¶2; *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, at ¶37. However, in the interests of justice we will consider the merits of appellant's arguments rather than simply dispose of them on a procedural point. That said, there are limits to the leniency afforded to pro se litigants. We will not, for example, construct arguments from assignments of error or arguments so poorly worded that they cannot be understood, see e.g. *Ohio Valley Resource Conservation & Dev. v. Pertuset*, 4th Dist. Scioto No. 12CA3503, 2013-Ohio-5406, at ¶2, fn. 1; *Cooke v. Bowen*, 4th Dist. Scioto No. 12CA3497, 2013-Ohio-4771, at ¶7, nor may pro se litigants be excused from following the Ohio Rules of Civil Procedure. See e.g. *Wells Fargo Bank, N.A. v. Smith*, 4th Dist. Gallia App. No. 13CA6, 2014-Ohio-1802, at ¶3, fn. 1. Moreover, as the trial court aptly noted to appellant before the commencement of the proceedings, courts cannot simply disregard legal requirements because appellant chose to represent himself. With these principles in mind, we now turn our attention to the assigned errors.

II

{¶ 10} Appellant's first assignment of error asserts that the trial court deprived him of a jury trial. However, as the trial court correctly pointed out in the January 7, 2013 transcript, appellant did not demand a jury trial in either his answer and counterclaim or in his amended answer and counterclaim.

{¶ 11} Civ.R. 38(B) provides that any party may demand a jury trial at any time after the commencement of proceedings, but no later than fourteen days after service of the last pleading directed to such issue. Moreover, jury trial requests must be in writing. *Mickens v. Smith*, 6th Dist. Erie No. E-05-078, 2006-Ohio-4300, at ¶12.

{¶ 12} Here, appellant cites nothing in the record to show that he filed a written jury trial request. While the January 7, 2013 transcript suggests a somewhat disputed record regarding whether appellant made an oral request at an earlier pre-trial proceeding, the record is absolutely clear that appellant did not make a written jury request. Without a written request for a jury trial in conformance with Civ.R. 38(B), we find no merit to appellant's first assignment of error and it is hereby overruled.

III

{¶ 13} Appellant asserts in his second assignment of error that the trial court erred by denying him a "new jury trial." To begin, we note the obvious point that appellant cannot have a "new jury trial" when he had no "jury trial" in the first place. The case sub judice was conducted as a bench trial, not a jury trial. Another problem with the assignment of error is that we find no motion for new trial in the record, nor do we find any notation on the docket that appellant filed any such motion. However, an "Exhibit B" in appellant's brief is a trial court decision to overrule appellant's "Motion for a New Trial." We thus assume that appellant actually filed the motion.

{¶ 14} The granting of a Civ.R. 59(A) motion for new trial is generally left to a trial court's sound discretion and the decision will not be reserved absent an abuse of that discretion. *State Farm Mut. Auto. Ins. Co. v. Williams*, 5th Dist. Licking No. 13–CA–04, 2013-Ohio-3884, at ¶22; *Tipton v. Goodnight*, 4th Dist. Gallia No. 05CA7, 2006-Ohio-113, at ¶7. The phrase "abuse of discretion" connotes more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, unconscionable, or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983); *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d

144 (1980). Here, appellant does not argue that the trial court abused its discretion, and we find no such indication from the limited information that we have before us.

{¶ 15} In denying appellant a new trial, the trial court noted that appellant's motion was "one sentence" long and "provide[d] no detail" as to how fraud was perpetrated or how he was prejudiced. It also appears that appellant wanted to submit "telephone records," but the court noted that appellant had these records prior to trial thereby negating any argument that the material is newly discovered evidence. See Civ.R. 59(A)(8). In short, we discern no abuse of discretion and we hereby overrule appellant's second assignment of error.

IV

{¶ 16} We will jointly consider appellant's third and fourth assignments of error because they appear to be closely related. Appellant contends that the trial court erred by (1) failing to properly "weight" the evidence, and (2) in "transferring all land and mineral rights to [appellees] without regard to the loss of the original owner." In short, appellant contends that the trial court "seems to have little empathy for the minority in his courtroom[.]" We are not persuaded.

{¶ 17} To begin, it is well established that the Parol Evidence Rule does not allow the introduction of evidence to contradict the terms of a written contract. See *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, at ¶13; *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000). Once again, the option contract in this case made no exception for mineral rights. Appellant's contention that this exception was actually the parties' intent would violate that rule.

{¶ 18} There are, of course, many exceptions to the Parol Evidence Rule. One is when the existence of fraud can be shown. See *Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio

App.3d 326, 2009-Ohio-5263, 920 N.E.2d 1023, at ¶25 (4th Dist.); *Mar Jul, L.L.C. v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, at ¶57. Here, although appellant frequently accused virtually everyone of behaving fraudulently in this matter, he did not explain what the "fraud" was, or how it came to transpire. The elements of fraud are: (1) a representation or, when a duty exists to disclose, concealment of a fact; (2) that is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. See e.g., *Volbers–Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010–Ohio–2057, 929 N.E.2d 434, at ¶ 27; also see *Swanson v. Boy Scouts of Am.*, 4th Dist. Vinton No. 07CA663, 2008–Ohio–1692, at ¶17, fn. 2. In the case sub judice, appellant did not establish any of these elements.

{¶ 19} Even assuming, arguendo, that appellant could provide testimony to establish each and every element, to the extent that he claims the trial court erroneously disregarded it, we, as a court of review, will not reverse a trial court's finding if supported by sufficient competent and credible evidence. *Hardert v. Neumann*, 4th Dist. Adams No. 13CA977, 2014-Ohio-1770, at ¶18; See *Salmons v. Jones*, 4th Dist. Lawrence No. 13CA11, 2013–Ohio– 5417, at ¶11. Further, it is well-settled that evidence weight and witness credibility are issues that a trier of fact must determine. See *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007–Ohio– 5048, at ¶ 106; *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998).

{¶ 20} In the case sub judice, the trial court, sitting as the trier of fact, could choose to

believe all, part or none of the testimony of any witness. *State v. Nichols*. 85 Pjop A[[/3d 65. 76. 619 M/E/2d 80 (4th Dist.1993). The underlying rationale for deferring to the trier of fact on evidentiary weight and credibility issues is that the trier of fact is best positioned to view the witnesses, to observe their demeanor, gestures and voice inflections and to use those observations to weigh witness credibility. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Here, the only evidence adduced that appellees perpetrated any kind of fraud is appellant's own, self-serving testimony. Obviously, the trial court discounted that testimony.

{¶ 21} Appellant testified that he has been offered lucrative royalty or lease agreements for the mineral rights. However, Appellee Angela McKim testified that she and her husband had no interest at all in the oil and gas reservoirs. In fact, McKim testified that she wanted to prohibit any "fracking" of the land and, instead, operate an organic farm. The resolution of this conflicting testimony is reserved for the trier of fact who apparently discounted appellant's testimony and believed the appellees.

{¶ 22} More important, appellant's own witnesses also appear to negate his contention of fraud. Appellant's own counsel, who prepared the option contract, and her assistant both testified that they had no recollection of any discussion concerning the mineral rights. Once, again, the trial court apparently concluded that appellant's testimony was not credible.

{¶ 23} Insofar as appellant's contention that the trial court "seem[ed] to have little empathy for the minority in his courtroom[,]" this argument has no merit. A contract is a contract. The enforceability of a contract depends no more on a person's "minority" status than it does on the color of one's eyes. Also, judicial rulings must be based on the law rather than

subjective feelings like "empathy."

{¶ 24} We acknowledge that at various points during questioning, appellant asked witnesses if they were aware of negative financial aspects the option contract would inflict on him. Again, this is irrelevant. A contract is either enforceable or it is not. Here, the trial court found no credible evidence to show that the contract is unenforceable and nothing in the law prohibits land contract vendors from entering contracts that benefit the objectives of land contract vendees more than themselves.

{¶ 25} Insofar as appellant's claim that the trial court erred in its order that he transfer the real estate, this is the logical remedy in an action requesting specific performance.

{¶ 26} For all of these reasons, we find no merit to appellant's third and fourth assignments of error and they are hereby overruled.

V

{¶ 27} Appellant's fifth assignment of error concerns the trial court's denial of his motion to stay the proceedings pending appeal. Appellant's motion for stay is part of the record, but the trial court's decision is not. Nevertheless, that decision is attached to appellant's brief as "Exhibit C."

{¶ 28} "When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond." Civ.R. 62(B); also see R.C. 2505.09. Here, there is no indication in the record that appellant suffered any prejudice as a result of the trial court's denial of a stay. Not only do we affirm the judgment that ordered specific performance of the option contract, we also point out that appellant could have pursued a stay in this Court pursuant to App.R. 7(A). Apparently,

however, he chose not to do so.

{¶ 29} For all of these reasons, we hereby overrule appellant's fifth assignment of error.

VI

{¶ 30} Appellant's sixth assignment of error asserts that the trial court judge erred by including "prejudice in his final ruling." Absent a more specific explanation of this assignment of error, we assume that appellant refers to the trial court's dismissal of his counterclaim "with prejudice."

{¶ 31} To dismiss a claim "with prejudice" simply means that a judgment is conclusive of the rights of parties and the claim cannot be asserted again. *Black's Law Dictionary*, 1438 (5th Ed. 1979). More simply, in the context of this case the trial court ruled against appellant's claims and he cannot reassert them. There is no error in such ruling in that we have already concluded that competent and credible evidence supports the trial court's judgment.

{¶ 32} We hasten to add that the phrase "dismissed with prejudice" does not mean that the trial court displayed any "bias" or "partiality" against appellant, as he suggests in his brief. Rather, this phrase is simply legal terminology regarding the final resolution of the case. Thus, appellant's sixth assignment of error is without merit and is hereby overruled.

VII

{¶ 33} We readily admit that the gist of appellant's seventh assignment of error eludes us. Fortunately, Ohio law does not require us to construct an argument. The argument appellant makes in his brief is that the trial court erred by its association of "the land [installment] contract with the option being signed the same day." Appellant contends that this

is a "legal trick." We, however, have no idea what he means.

{¶ 34} Allegations regarding the land installment contract are part of the original complaint. It is not improper to make a reference to that instrument when deciding the case. We also fail to see how this event is a "legal trick," nor do we perceive how the trial court's wording prejudiced appellant in any way.

{¶ 35} The option contract, by its terms, is enforceable and no impediments exist to such enforcement. The terms of that contract have been satisfied and, as the trial court correctly ruled, both parties must now honor their obligations. For all of these reasons, we hereby overrule appellant's seventh assignment of error.

VIII

{¶ 36} Appellant's eighth assignment of error involves the trial court's order that he pay court costs. Appellant appears to argue that the only reason the court ordered him to pay costs is because he is to receive monies from appellees pursuant to the option contract. This is not true.

{¶ 37} Civ.R. 54(D) states that, except when express provision is made by statute or the Ohio Rules of Civil Procedure, costs shall be allowed to the prevailing party. Here, the trial court ordered appellant to pay the costs not because he recovered monies from appellees, but because appellees are the prevailing parties in this action.

{¶ 38} Appellant cites no rule or statute that allows him to recover costs in this instance. We hereby overrule appellant's eighth assignment of error for these reasons.

{¶ 39} Having reviewed all errors that appellant assigned and argued, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.[6]

[6] On April 14, 2014, over a year after he filed his appeal, appellant filed with this Court a "Motion to Preserve Evidence." The evidence mentioned in this motion includes, but is not limited to, "videos of traffic stop[s]," DNA fingerprints, footprints and tissue samples and, inter alia, "autopsies." We overrule this motion for a number of reasons (1) this is not the proper forum to file such a motion, and (2) we are not aware of any such evidence being presented in the instant case.

[Cite as *McKim v. Finley*, 2014-Ohio-4012.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees collect of appellant all costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J., Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele
Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.