

[Cite as *D'Amico v. Worley Auto Sales, Inc.*, 2009-Ohio-6742.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

RUDOLPH A. D'AMICO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-02-066
- vs -	:	<u>OPINION</u>
	:	12/21/2009
WORLEY AUTO SALES, INC.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2006-10-3853

Rudolph A. D'Amico, P.O. Box 292358, Kettering, OH 45429, plaintiff-appellant, pro se

Edward J. McTigue, 810 Sycamore Street, 6th Floor, Cincinnati, OH 45202, for defendant-appellee

POWELL, J.

{¶1} Plaintiff-appellant, Rudolph A. D'Amico, appeals pro se the decision of the Butler County Court of Common Pleas entering judgment in a fraud action in favor of defendant-appellee, Worley Auto Sales, Inc. For the reasons discussed below, we affirm the judgment of the trial court.

{¶2} This case arises out of the auction sale of an automobile. On April 8,

2005, appellant, acting as an authorized representative of Aegean Specialized Motor Cars, LLC, (Aegean), purchased a 1999 Cadillac Catera from appellee at a closed automobile auction¹ conducted by the Adesa Corporation (Adesa). The purchase price for the vehicle was \$2,450.

{¶3} The record indicates that Adesa used a "selling light system" to describe the condition of the vehicles being sold at the auction. This included "green light" and "white light" vehicle guarantees. A green light designation indicated that the vehicle was "guaranteed by the seller not to have any single mechanical defect (excluding radios) costing more than \$250 to repair." A white light designation guaranteed that the vehicle had a sound drive train, and specifically warranted that the transmission was in good condition. The selling light designations were described in Adesa's policies and procedures, which were received by appellant as a representative of Aegean.

{¶4} The policies and procedures also detailed an arbitration process for lodging complaints about vehicles after purchase. The Adesa facility had a test track which was used to detect mechanical problems in a purchased vehicle prior to the dealer removing it from the auction site. If a dealer discovered a defect on the test track, the vehicle was taken to an arbitration office where a mechanic conducted an examination of the vehicle and notified the purchaser and seller if any problems existed. According to the record, the arbitration process allowed for the parties to resolve mechanical issues by either adjusting the purchase price of the vehicle or by rescinding the transaction. All defect complaints were to be made to the arbitration

1. A closed auction is one in which only automobile dealerships can participate. The auction is fast-paced and is conducted under the presumption that the participating dealers are sophisticated and experienced buyers.

office within two hours of the vehicle crossing the auction block.

{¶15} The record indicates that the vehicle purchased by appellant was designated at the auction by appellee as both a green and white light vehicle. After purchase, appellant drove the vehicle off the auction premises. He did not utilize the track to test for any mechanical problems. The following day, appellant discovered that the vehicle's transmission was not working properly. He had it towed for service and was informed that the computer and transmission components were in need of repair. Appellant claims that he paid \$5,857.92 in repairs in order to make the vehicle fully operational.

{¶16} In October 2006 appellant filed suit against appellee alleging two counts of fraud. In his first count, appellant claimed that the selling light guarantees provided by appellee fraudulently misrepresented the condition of the vehicle. In his second count, appellant averred that although the vehicle's odometer was represented on the auction block to have 114,350 miles, the certificate of title issued to appellant after the purchase indicated that a discrepancy existed as to the actual mileage on the vehicle. Appellant sought actual damages of \$5,857.92, punitive damages, and reasonable attorney fees.

{¶17} The matter was tried before a trial court magistrate on December 3, 2007. In its August 2008 decision, the magistrate entered judgment in favor of appellee. The magistrate concluded that based on the evidence presented at trial, appellant had failed to demonstrate that appellee fraudulently misrepresented the condition of the vehicle at the time of the sale. Appellant filed objections to the magistrate's decision, which were overruled by the trial court in February 2009. In its decision, the court noted that appellant had failed to comply with both a local rule of

court and Civ.R. 53 in failing to obtain a hearing date on his objections, and in neglecting to timely file a transcript of the proceedings before the magistrate. The trial court adopted the magistrate's decision as its own final order.

{¶18} Appellant now appeals the trial court's decision and has raised seven assignments of error for our review. For the sake of expediency, we shall consolidate related assignments of error and address them out of order.

{¶19} Assignment of Error No. 3:

{¶110} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED AGAINST PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE'S DECISION BASED ON A LOCAL RULE REQUIRING A TRIAL TRANSCRIPT WHEN IT DISREGARDED THE FACT THAT PLAINTIFF HAD REQUESTED SAID TRANSCRIPT BY MOTION AS INDICATED ON THE DOCKET ENTRY OF DECEMBER 11, 2008."

{¶111} Although not separately argued in his brief,² in his third assignment of error, appellant essentially contends that the trial court erred in determining that appellant failed to provide the court with a transcript of the December 3, 2007 trial.

{¶112} Loc.R. 4.16(A) of the Butler County Common Pleas Court provides in relevant part as follows:

{¶113} " * * * All objections shall contain a notice of the date, time and place of the hearing. Anyone objecting to a magistrate's finding of facts shall provide the court with a typewritten transcript of the proceedings at his or her cost."

{¶114} In addition, Civ.R. 53(D)(3)(b)(iii) provides that an objection to a factual

2. A pro se appellant is held to the same obligations and standards set forth in the appellate rules that apply to all litigants. *Kilroy v. B.H. Lakeshore Co.* (1996), 111 Ohio App.3d 357, 363. Generally, errors not separately argued or supported by the briefs may be disregarded. See App.R. 12(A)(2). Although the issue raised in this assignment was not argued separately, in the interest of justice, and because the basis for appellant's challenge is readily apparent, we will consider the merits of this assignment of error. See *Aegis v. Sedlacko*, Mahoning App. No. 07 MA 128, 2008-Ohio-3190, ¶15.

finding, whether or not specifically designated as a finding of fact, must be supported by a transcript or affidavit of the evidence submitted to the magistrate. The objecting party is required to file the transcript or affidavit with the court within 30 days after filing objections unless the time for preparing the transcript is extended by the court. See Civ.R. 53(D)(3)(b)(iii).

{¶15} Appellant argues generally that he formally requested the trial transcript be prepared, and asserts that this request is evidenced in the court's docket entry of December 11, 2008. However, our review of the trial court docket reveals no such entry. The record indicates that on September 11, 2008, appellant filed a pleading entitled "request for more time to file objections to magistrate's decision and request for transcript of trial." It appears that the trial court treated this motion as a request for an extension of time to file both his objections and the transcript, and not as a separate request to prepare the transcript. In its October 2008 entry, the court granted appellant's request for an extension of time until December 10, 2008 to file his objections and to provide the court with the trial transcript. Although appellant's objections were timely filed with the court on December 3, a close review of the record indicates that the transcript was never filed. Because the burden of filing a transcript falls squarely on the objecting party, we find no error in the trial court's determination that appellant failed to comply with both the local court rule and Civ.R. 53 in failing to provide a transcript of the trial. See *Ruiz-Bueno v. Ruiz-Bueno*, Lake App. No. 2207-L-180, 2008-Ohio-3747, ¶27. Appellant's third assignment of error is overruled accordingly.

{¶16} Assignment of Error No. 4:

{¶17} "THE TRIAL COURT ABUSED IT[S] DISCRETION WHEN IT FAILED

TO PROVIDE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUESTED BY PLAINTIFF. FURTHER, DISREGARDING PLAINTIFF'S PROPOSITIONS FOR SAID FINDINGS. WHICH PROPOSITIONS WERE NEITHER OBJECTED TO OR OFFERED IN RESPONSE BY DEFENDANT [SIC]."

{¶18} In his fourth assignment of error, appellant claims that the trial court erred in failing to provide findings of fact and conclusions of law pursuant to his request, which was included with his objections to the magistrate's decision. Appellant further contends that the court erred in disregarding his proposed findings and conclusions. Appellant cites no legal authority in support of his generalized claim of error.

{¶19} Civ.R. 52 provides in part, "[w]hen questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests * * *, the conclusions of fact found separately from the conclusions of law." After such a request is made, "the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law * * *." Civ.R. 52.

{¶20} The purpose of the trial court's issuance of findings of fact and conclusions of law is "to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court's judgment." *Vanderhoff v. Vanderhoff*, Seneca App. No. 13-09-21, 2009-Ohio-5907, ¶10, quoting *Werden v. Crawford* (1982), 70 Ohio St.2d 122, 124. A trial court may substantially comply with the requirements of Civ.R. 52 if its judgment entry adequately explains the basis for its decision. *Id.* Furthermore, "an opinion or memorandum of decision filed in the action prior to judgment * * * containing findings of fact and conclusions of law stated

separately' will suffice so long as they provided an adequate basis to decide the case." *Knoppe v. Applegate*, Delaware App. No. 08 CAG 08 0051, 2009-Ohio-2007, ¶26, quoting Civ.R. 52.

{¶21} As we previously determined, appellant failed to provide the court with a transcript of proceedings in support of his objections to the magistrate's decision. When an objecting party fails to file a transcript with the objections, the court is "free to adopt the magistrate's findings without further consideration of the objections." *Shimman v. Germano*, Lucas App. No. L-06-1358, 2008-Ohio-717, ¶14. In such a circumstance, the trial court has the discretion to adopt the factual findings of the magistrate, and is limited to examining only the magistrate's conclusions of law and recommendations. *Id.*; *Bartlett v. Sobetsky*, Clermont App. No. CA2007-07-085, 2008-Ohio-4432, ¶9. In this case, the trial court was incapable of conducting an independent review of the magistrate's decision and was permitted to accept the factual findings made by the magistrate. The trial court's review was therefore limited to whether the magistrate's factual findings were sufficient to support its legal conclusions.

{¶22} Although the court did not issue separate findings of fact and conclusions of law upon its adoption of the magistrate's decision, we find no error. Upon review, we conclude that the magistrate's decision was sufficiently thorough and provides this court with an adequate basis to review the arguments advanced by appellant. Appellant's fourth assignment of error is therefore overruled.

{¶23} Assignment of Error No. 1:

{¶24} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT MADE A FINDING THAT 'PLAINTIFF FAILED TO DEMONSTRATE THAT A FRAUD WAS

COMMITTED BY THE DEFENDANT'S AGENT.' WHILE DISREGARDING PLAINTIFF'S FIRST CLAIM FOR RELIEF BASED UPON A GUARANTY AND PROOF OF DAMAGES IN THE AMOUNT OF \$5,857.92 [SIC]."

{¶25} Assignment of Error No. 5:

{¶26} "THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS PRESUMED TO KNOW OF THE EXISTENCE OF A TEST TRACK FOR AUCTION VEHICLES, WHEN PLAINTIFF TESTIFIED THAT HE HAD NO KNOWLEDGE OF SUCH A FACILITY AND ADDITIONALLY HIS NEW DEALER ORIENTATION AND PAPERWORK MADE NO MENTION OF A TEST TRACK NOR A REQUIREMENT TO UTILIZE IT [SIC]."

{¶27} Assignment of Error No. 7:

{¶28} "THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE A FINDING OF PRE-JUDGMENT INTEREST PURSUANT TO PLAINTIFF'S FIRST CLAIM FOR RELIEF."

{¶29} Appellant's first, fifth and seventh assignments of error relate to his claim that the selling light guarantees provided by appellee fraudulently misrepresented the condition of the vehicle.

{¶30} As an initial matter, we note that the issues presented in appellant's fifth assignment of error regarding whether appellant had knowledge of the test track and whether he was required to utilize it, are clearly factual in nature and must be supported by a transcript of the proceedings. See Civ.R. 53(D)(3)(b)(iii). While the transcript is included in the record on appeal, as we previously discussed, it was not provided to the trial court prior to its ruling on appellant's objections. As an appellate court, we are precluded from considering evidence not before the trial court when

reviewing a magistrate's decision adopted by the court. *Finkelman v. Davis*, Butler App. No. CA2003-07-173, 2004-Ohio-3909, ¶6. "[A] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *Helmke v. Helmke*, Ottawa App. No. OT-04-029, 2005-Ohio-1388, ¶16, quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Because he failed to file a transcript of the proceedings below, appellant is precluded from challenging on appeal the trial court's adoption of the magistrate's factual findings.

{¶31} Appellant's first and seventh assignments of error involve the trial court's adoption of the magistrate's conclusion that appellant failed to establish fraud with regard to the selling light guarantees. Without the benefit of a transcript, the scope of our review is limited to determining whether any error of law or other defect is readily apparent on the face of the magistrate's decision. *Bodor v. Fontanella*, Trumbull App. No. 2005-T-0091, 2006-Ohio-3883, ¶19. As a result, the trial court's judgment will not be reversed absent a finding that the court abused its discretion in adopting the decision of the magistrate. See *Shimman*, 2008-Ohio-717 at ¶14. An abuse of discretion is more than an error of law or judgment; it implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶32} Upon review of the limited record before us, we conclude that the trial court did not abuse its discretion in adopting the decision of the magistrate. To prevail upon a claim of fraud, a plaintiff must show: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which 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. *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55.

{¶33} According to the magistrate's decision, an agent of appellee testified at trial that he had no knowledge regarding the actual condition of the vehicle prior to placing it on the auction block, and had relied upon information from another dealer that it was in good condition. The magistrate also noted the significance of appellant's failure to use the test track after purchasing the vehicle, and that appellant did not follow the required arbitration procedures to address any complaints he had regarding the vehicle. In light of these determinations, the magistrate concluded that appellant failed to satisfy the requisite elements of fraud. Given that this court must accept the factual findings of the magistrate, we conclude that the trial court did not abuse its discretion or otherwise err in adopting the magistrate's decision with respect to appellant's first claim for relief.

{¶34} Based on the foregoing, appellant's first, fifth and seventh assignments of error are overruled.

{¶35} Assignment of Error No. 2:

{¶36} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO FIND A FRAUD AND MISREPRESENTATION OF THE ACTUAL MILEAGE ON THE VEHICLE SOLD BY THE DEFENDANT."

{¶37} In his second assignment of error, appellant contends that the trial court erred in failing to find that appellee fraudulently misrepresented the actual mileage of

the vehicle at the auction.

{¶38} The magistrate's decision did not specifically address appellant's second claim for relief. As we previously discussed, although appellant included a transcript of the proceeding in the record on appeal, we are precluded from considering it. In the absence of a transcript, we are unable determine whether appellant presented evidence at trial regarding the mileage of the vehicle and are therefore unable to detect the presence of any error. We must therefore presume the regularity of the proceedings and conclude that the magistrate properly considered all available evidence before it in rendering its decision in this case. *In re J.M.*, Warren App. No. CA2008-01-004, 2008-Ohio-6763, ¶36; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶39} Appellant's second assignment of error is overruled.

{¶40} Assignment of Error No. 6:

{¶41} "THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE A FINDING OF PUNITIVE DAMAGES AND SET A HEARING FOR DETERMINATION OF ATTORNEY FEES."

{¶42} In his sixth assignment of error, appellant argues that the court erred in failing to award him punitive damages and attorney fees as a result of appellee's alleged fraudulent misrepresentations. However, in our disposition of appellant's previous assignments of error, we found that the trial court did not err by adopting the magistrate's conclusion that appellant was not entitled to judgment in this case. It follows that he would therefore not be entitled to punitive damages or attorney fees.

{¶43} Appellant's sixth assignment of error is overruled as moot.

{¶44} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.