[Cite as *Carson v. Holmes*, 2010-Ohio-4199.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

SCOTT & SHERRY CARSON, d.b.a. TOTAL WATER SYSTEMS,	:	**O P I N I O N**
	:	**CASE NO. 2010-P-0007**
Plaintiffs-Appellants,	:	
- vs -		
CHRISTINE HOLMES,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Municipal Court, Kent Division, Case No. 2008 CVI 0658 K.

Judgment: Affirmed.

Scott Carson, pro se, and *Sherry Carson*, pro se, 3652 Albrecht Avenue, Akron, OH 44312 (Plaintiffs-Appellants).

James R. Russell, Jr., Goldman & Rosen, Ltd., 11 South Forge Street, Akron, OH 44304 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Scott and Sherry Carson, d.b.a. Total Water Systems, appeal from the judgment of the Portage County Municipal Court, Kent Division, overruling their objections to the magistrate's decision and awarding them judgment in the amount of $186.88 plus interest and costs.

{¶2} On April 15, 2008, appellants filed a small claims complaint against appellee, Christine Holmes, and her husband, Chris Holmes, in the amount of $1,286.88 plus interest and costs, alleging that appellants' company, Total Water Systems, provided materials, services, goods, and labor to appellee and her husband and had not been paid.[1]

{¶3} The trial court set a hearing for June 9, 2008. On that date, appellants failed to appear. However, appellants faxed a motion to continue which was granted by the trial court. On August 11, 2008, a hearing was held before the magistrate and appellants presented their case. The hearing, however, was continued to November 4, 2008, in order for appellee to complete her testimony and defense. Appellants failed to appear for the second part of the hearing.

{¶4} Pursuant to his November 10, 2008 decision, the magistrate indicated that appellants had not proven their case by a preponderance of the evidence and judgment should be rendered for appellee. The trial court approved and adopted the magistrate's decision on November 18, 2008.

{¶5} On December 2, 2008, appellants filed objections indicating that their testimony was not completed on the date of trial; the magistrate did not have all of their documents to support their claim; they did not have time to give their full testimony on the day of trial since it went past the court's business day; their witnesses were not given the opportunity to testify; they had no knowledge of the continued court date; appellee signed a work invoice and made partial payment; and the court's decision was not mailed to them until November 28, 2008.

1. Chris Holmes is not a named party to the instant appeal.

{¶6} Following a hearing, on January 16, 2009, the trial court found that appellants did not receive notice of the November 4, 2008 hearing. The trial court sustained appellants' objections and rescheduled another hearing to be held before the magistrate on February 17, 2009.

{¶7} At that hearing, appellants and appellee testified. The testimony revealed that appellant Sherry Carson and her husband, appellant Scott Carson, own Total Water Systems, a small plumbing and service company. Mrs. Carson is also a realtor, licensed by the state of Ohio. Appellee and her husband contacted Mrs. Carson in August of 2007 to assist them in finding an income property, which she did. Mrs. Carson arranged for Mr. Carson to inspect the plumbing and well at the home at issue. Appellants told appellee and her husband that the well and home would need some work. However, appellants indicated a replacement of the well was not needed; rather, the veins were simply frozen because the house was empty for a couple of years. Appellants did not give appellee and her husband copies of any inspections performed.

{¶8} Appellee and her husband closed on the property in October of 2007. They contacted appellants, who performed work to the property. Appellee and her husband were not billed for any of the services at that time. Appellants gave appellee and her husband an invoice in the amount of $2,286.88 in November of 2007. Appellee paid $1,000, which was the amount she believed was due for the actual plumbing and well work that was performed, and appellants cashed the check. The parties disputed the amount due. Ultimately, appellants placed a lien on the property.

{¶9} Following the hearing, the magistrate issued his decision on February 27, 2009, indicating that appellants should be awarded judgment for $186.88 plus interest

and costs, which represented the amount requested by appellants, less $300.00 charged for plumbing parts not proven by appellants, and also less $800.00 for four violations of the Ohio Consumer Sales Practices Act, namely Substantive Rules 109:4-3-05(A)(1), (3), (4) and (D)(12), with statutory damages of $200.00 per violation. The trial court approved and adopted the magistrate's decision on March 3, 2009. On March 13, 2009, appellants filed a motion for an extension of time to file objections to the magistrate's decision, which was granted by the trial court on March 17, 2009.

{¶10} On March 31, 2009, appellee sent a letter to the trial judge stating, inter alia, the following: "The only reason [appellant Sherry Carson] is the plaintiff is because I filed a 'Notice to Commence Suit' against her to remove the lien she had placed on a home I purchased. She was my dishonest realtor who suggested her husband [appellant Scott Carson] do the inspection and check out the well at the property. She then billed me for services that were not done and the services that were performed had to be redone because they were done incorrectly and were not up to code. I respectfully ask that you uphold the Magistrate's decision, seeing that it was in her favor."

{¶11} On April 3, 2009, appellants filed objections to the magistrate's February 27, 2009 decision, alleging, inter alia, that they are entitled to a proper hearing and for judgment against appellee in the amount of $1,286.88 plus interest and costs.

{¶12} A hearing on appellants' objections was scheduled for May 8, 2009. Three days before the scheduled hearing, appellants filed a motion for a continuance, which was granted by the trial court and reset for May 29, 2009.

{¶13} Following the hearing and pursuant to its December 31, 2009 judgment entry, the trial court overruled appellants' objections, and approved and adopted the magistrate's decision. It is from that judgment that appellants filed a timely pro se appeal, asserting the following seven assignments of error for our review:[2]

{¶14} "[1.] THE COURT ERRED BY APPLYING THE WRONG STANDARD OF REVIEW TO THE MAGISTRATES'S (sic) DECISION[.]

{¶15} "[2.] The Court erred in reducing the Appellants (sic) recovery from Appellees for violations of the Consumer Sales Practices Act, since such defense was never claimed, or counterclaimed[.]

{¶16} "[3.] THE COURT ERRED IN ASSIGNING STATUTORY DAMAGES OF EIGHT HUNDRED DOLLARS ($800.00), FOR FOUR VIOLATIONS OF CSPA[.]

{¶17} "[4.] Court erred in allowing the Appellees to recover against Appellants under an unjust enrichment or contract theory[.]

{¶18} "[5.] THE COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE REGARDING RULE 109:4-3-05(A)(4)'FAILS, WHERE A CONSUMER REQUESTS A WRITTEN OR ORAL ESTIMATE, TO GIVE THE

2. On March 3, 2010, this court filed a judgment entry, indicating that in the trial court's December 31, 2009 judgment entry, the trial court overruled appellants' objections, and approved and adopted the magistrate's decision in the same entry. This court stated the following: "Ohio courts have held that a judgment entry of the court must be a separate and distinct instrument independent from the magistrate's decision. Merely adopting a magistrate's decision as 'an order of the court' is not sufficient for there to be a final appealable order. The separate order of the court must set forth the court's holding without reference to any other document." Thus, this court, sua sponte, remanded this case to the trial court for ten days from the date of the entry for the sole purpose of issuing a judgment that was a final appealable order that complied with the finality requirements. Pursuant to this court's remand, the trial court filed a judgment entry on March 10, 2010, overruling appellants' objections to the magistrate's decision, and ordering judgment in their favor for $186.88 plus interest and costs. On March 22, 2010, this court indicated that there now appeared to be a final appealable order and appellants' January 28, 2010 notice of appeal would be considered a premature appeal pursuant to App.R. 4(C), as of March 10, 2010, and would proceed according to the Ohio Rules of Appellate Procedure.

ESTIMATE TO THE CONSUMER BEFORE COMMENCING THE REPAIR OR SERVICE.' ***

{¶19} "[6.] THE TRIAL COURT ERRED IN VIOLATING THE APPELLANTS REGARDING SUBSTANTIVE RULE 109:4-3-05 (D)(12):FAIL TO PROVIDE THE CONSUMER WITH A WRITTEN ITEMIZED LIST OF REPAIRS PERFORMED OR SERVICES RENDERED, INCLUDING A LIST OF PARTS OR MATERIALS AND A STATEMENT OF WHETHER THEY ARE USED, REMANUFACTURED, OR REBUILT, IF NOT NEW, AND THE COST THEREOF TO THE CONSUMER, THE AMOUNT CHARGED FOR LABOR, AND THE IDENTITY OF THE INDIVIDUAL PERFORMING THE REPAIR OR SERVICE[.]

{¶20} "[7.] THE TRIAL COURT ERRED IN FAILING TO REQUIRE APPELLEES TO ADHERE TO THE CIVIL RULES OF PROCEDURE, SPECIFICALLY CIVIL RULE 56 IN PERTINENT PART: 'PARTY MOVING FOR SUMMARY JUDGMENT DOES NOT BEAR THE INITIAL BURDEN OF NEGATING THE OPPOSING PARTY'S AFFIRMATIVE DEFENSES.'"

{¶21} **First Assignment of Error:**

{¶22} In their first assignment of error, appellants argue that the trial court erred by applying the wrong standard of review to the magistrate's decision.

{¶23} "We review the adoption of a magistrate's decision by a trial court for abuse of discretion." *Montecalvo v. Am. Family Ins. Co*., 11th Dist. No. 2006-T-0074, 2006-Ohio-6881, at ¶5, citing *Singer Steel Co. v. H&J Tool & Die Co., Inc.*, 11th Dist. No. 2002-P-0135, 2004-Ohio-5007, at ¶22. "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. See, e.g., *State*

v. Ferranto (1925), 112 Ohio St. 667, 676-678. Further, an abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at 15.

{¶24} Error, if any, committed by the trial court focuses not on the magistrate's findings or proposed decision, but rather on the trial court's actions. *W.R. Martin, Inc. v. Zukowski*, 11th Dist. Nos. 2006-L-028 and 2006-L-120, 2006-Ohio-6866, at ¶32, citing *In re Woodburn* (Jan. 2, 2002), 9th Dist. No. 20715, 2002 Ohio App. LEXIS 1, at 5.

{¶25} In the case at bar, the trial court indicated the following in its March 10, 2010 judgment entry:

{¶26} "This matter came on for hearing on Objections to the Magistrate's Decision. Both parties appeared pro se. The Court heard arguments on the Objections. A transcript of the hearing before the Magistrate was prepared and presented to the Court.

{¶27} "The Court considered the argument of the parties, reviewed the transcript of the trial and the Magistrate's Decision, and finds that the Decision is supported by competent and credible evidence. The Court, therefore, overrules the Objections to the Magistrate's Decision.

{¶28} "It is, therefore, Ordered that plaintiff be awarded judgment for $186.88, plus court costs and interest at the rate of 5% per annum from the date of judgment.

{¶29} "IT IS SO ORDERED."

{¶30} The record before this court establishes that the trial court applied the proper standard and did not abuse its discretion by adopting the magistrate's decision.

We determine that the magistrate's decision was supported by competent, credible evidence.

{¶31} Pursuant to its judgment entry, the trial court independently reviewed the magistrate's findings and decisions before overruling appellants' objections. See, e.g., *Homestead Real Estate LLC v. Shampay*, 11th Dist. No. 2007-L-006, 2007-Ohio-3202. The trial court appropriately fulfilled its obligations and did not act unreasonably, arbitrarily, or unconscionably in reviewing the magistrate's decision.

{¶32} Appellants' first assignment of error is without merit.

{¶33} **Second, Third, Fifth and Sixth Assignments of Error:**

{¶34} In their second assignment of error, appellants allege that the trial court erred in reducing their recovery for violations of the Consumer Sales Practice Act ("CSPA"), since such defense was never claimed or counterclaimed.

{¶35} In their third assignment of error, appellants contend that the trial court erred in assigning statutory damages of $800 for four violations of the CSPA.

{¶36} In their fifth assignment of error, appellants stress that the trial court's decision was against the manifest weight of the evidence regarding a written or oral estimate be given to the consumer before commencing the repair for service.

{¶37} In their sixth assignment of error, appellants argue that the trial court erred in violating their rights indicating the failure to provide the consumer with a written or itemized list of repairs performed or services rendered.

{¶38} Because appellants' second, third, fifth, and sixth assignments of error are interrelated, and for ease of discussion, we will address them in a consolidated fashion.

{¶39} The Supreme Court of Ohio has held that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶40} "'(***) (T)he goal of small claims court is (***) to provide fast and fair adjudication as an alternative to the traditional judicial proceedings. For example, attorneys may appear, but are not required to appear, on behalf of any party in small claims matters. R.C. 1925.01(D). Jurisdiction of the small claims division is limited to $3,000 ***. *** There is no jury in small claims court. R.C. 1925.04(A). Since claims must be set for hearing within 15 to 40 days after the complaint is filed, cases move quickly. R.C. 1925.04(B). The hearings are simplified, as neither the Ohio Rules of Evidence nor the Ohio Rules of Civil Procedure apply. See Evid.R. 101(C)(8); Civ.R. 1(C)(4). Thus, by design, proceedings in small claims courts are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively. Pro se activity is assumed and encouraged. The process is an alternative to full-blown judicial dispute resolution.'" *Powers v. Gawry*, 11th Dist. No. 2009-G-2883, 2009-Ohio-5061, at ¶12, quoting *Cleveland Bar Ass'n v. Pearlman*, 106 Ohio St.3d 136, 2005-Ohio-4107, at ¶15.

{¶41} In the case sub judice, since the Ohio Rules of Civil Procedure did not strictly apply to these proceedings, appellee was not required to specifically set up affirmative defenses or plead with particularity every element of her defense. Appellants filed the instant matter as a small claims case. Thus, appellants cannot claim now that appellee had to file a formal answer to the complaint to preserve her

defenses, as an answer in small claims cases is not required. See *Gawry*, supra, at ¶15.

{¶42} Even assuming arguendo that the Ohio Rules of Civil Procedure did strictly apply here, appellants failed to object at either of the two evidentiary hearings. We note that a trial court "properly considers an affirmative defense that was not raised in accordance with Civ.R. 8(C) when the issue was tried with the implied consent of the parties ***." *Manor Park Apartments, LLC v. Delfosse*, 11th Dist. No. 2006-L-036, 2006-Ohio-6867, at ¶11, quoting *Oakwood Estates v. Crosby*, 8th Dist. No. 85047, 2005-Ohio-2457, at ¶11.

{¶43} In addition, the record reveals that appellee established at least four violations of the CSPA, which were utilized to deduct from the amount appellants claimed to be due. Appellee established a defense that was not in excess of the requested claim. Thus, appellee was entitled to a setoff, and the trial court properly reduced the total amount due. See *Auto-Owners Ins. Co. v. Wheatley*, 11th Dist. No. 2004-T-0043, 2005-Ohio-4650, at ¶34-36. The trial court's judgment was not against the manifest weight of the evidence.

{¶44} Appellants' second, third, fifth, and sixth assignments of error are without merit.

{¶45} **Fourth Assignment of Error:**

{¶46} In their fourth assignment of error, appellants maintain that the trial court erred by allowing appellee to recover under an unjust enrichment or contract theory.

{¶47} The record before us does not establish that the trial court permitted appellee to recover under a theory of unjust enrichment. Again, we stress that the trial

court found in favor of appellants, although it held that they did not prove the total amount of damages in which they were seeking. The manifest weight of the evidence establishes that $186.88 was the amount which appellants were entitled.

{¶48} Appellants' fourth assignment of error is without merit.

{¶49} **Seventh Assignment of Error:**

{¶50} Finally, in their seventh assignment of error, appellants argue that the trial court erred in failing to require appellee to adhere to the Ohio Rules of Civil Procedure, specifically Civ.R. 56.

{¶51} Again, as previously stated, the Ohio Rules of Civil Procedure do not apply to hearings in small claims court. Civ.R. 1(C)(4); *Gawry*, supra, at ¶12; *Pearlman*, supra, at ¶15. In addition, we stress that the record before us does not reveal that appellants ever filed a Civ.R. 56 motion for summary judgment.

{¶52} Appellants' seventh assignment of error is without merit.

{¶53} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Portage County Municipal Court, Kent Division, is affirmed. It is ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.