

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

MARGO DIEHL

Appellant

v.

FROST TILE AND MARBLE, INC.

Appellee

C. A. No.    22700

APPEAL FROM JUDGMENT  
ENTERED IN THE  
BARBERTON MUNICIPAL  
COURT  
COUNTY OF SUMMIT, OHIO  
CASE No.    05 CIV 99

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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CARR, Judge.

{¶1} Appellant, Margo Diehl, appeals the judgment of the Barberton Municipal Court, which entered judgment for appellee, Frost Tile & Marble, Inc., and dismissed appellant’s claim. This Court affirms.

I.

{¶2} Appellant filed a small claims complaint, alleging that appellee failed to deliver all of the slate tile for which appellant had paid. The trial court summoned appellee to appear for trial. The matter proceeded to trial before the magistrate on February 24, 2005. At the conclusion of trial, the magistrate found

that appellant had not proved a cause of action against appellee by a preponderance of the evidence. The magistrate entered judgment in favor of appellee and dismissed appellant's claim. Appellant timely objected to the magistrate's decision. In lieu of a transcript of the trial, appellant filed an affidavit wherein she averred that she "has no knowledge of whether a recording of the small claims hearing was made or whether a transcript is available[.]" The trial court overruled appellant's objections and adopted the magistrate's decision. The trial court further entered judgment in favor of appellee and ordered that appellant's case be dismissed with prejudice. Appellant timely appealed, setting forth two assignments of error for review. This Court consolidates the assignments of error for ease of review.

## II.

### **ASSIGNMENT OF ERROR I**

"THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING THE MAGISTRATE, OVER THE OBJECTIONS BY APPELLANT, TO REFUSE TO APPLY THE OHIO CONSUMER SALES PRACTICES ACT TO PUNISH THE 'BAIT AND SWITCH' ACTS OF APPELLEE IN DELIVERING TILES OF LESSER QUALITY THAN THOSE PAID FOR BY APPELLANT[.]"

### **ASSIGNMENT OF ERROR II**

"THE TRIAL COURT PREJUDICIALLY ERRED IN IGNORING EVIDENCE PRESENTED BY APPELLANT WHICH SUPPORTED APPELLANT'S CLAIMS AGAINST APPELLEE[.]"

{¶3} In her first assignment of error, appellant argues that the trial court erred by failing to find that appellee violated provisions of the Ohio Consumer Sales Practices Act. In her second assignment of error, appellant argues that the trial court disregarded evidence in support of her claim.

{¶4} As an initial matter, this Court will address the issues regarding the record on appeal. App.R. 9(B) states in relevant part:

“At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. \*\*\* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.”

Pursuant to App.R. 12(A)(1)(b), this Court is limited to determining the appeal on the record as provided in App.R. 9.

{¶5} In this case, appellant failed to file a praecipe with the trial court requesting preparation of a transcript of the hearing. Appellant is responsible for providing this Court with a record of the facts, testimony, and evidentiary matters necessary to support the assignments of error. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314. Specifically, it is appellant’s duty to transmit the transcript of proceedings. App.R. 10(A); Loc.R. 5(A). “When portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has ‘no choice but to presume the

validity of the [trial] court's proceedings, and affirm.'" *Cuyahoga Falls v. James*, 9th Dist. No. 21119, 2003-Ohio-531, at ¶9, quoting *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Appellant failed to provide a transcript of the hearing. Rather, she merely averred that she did not know whether or not a transcript was available in support of her objections. She further failed to request and provide a transcript for purposes of her appeal.

{¶6} Because the transcript is necessary for a determination of appellant's assignments of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. See *Knapp*, 61 Ohio St.2d at 199. Appellant's assignments of error are overruled.

### III.

{¶7} Appellant's assignments of error are overruled. The judgment of the Barberton Municipal Court is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Exceptions.

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DONNA J. CARR  
FOR THE COURT

SLABY, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

MARGO DIEHL, pro se, 5490 Springlake Road, N. W., Canton, Ohio 44718,  
appellant.

FROST TILE AND MARBLE, INC., 3030 Houston Road, Norton, Ohio 44203,  
appellee.