[Cite as *Marble Builder Direct Internatl., Inc. v. Hauxhurst,* 2012-Ohio-1674.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MARBLE BUILDER DIRECT INTERNATIONAL, INC., d.b.a. MARBLE BUILDER DIRECT,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-040**
- vs -	:	
JAMES HAUXHURST, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Painesville Municipal Court, Case No. CVF 1000443.

Judgment: Affirmed.

Joseph J. Straka, Morscher & Straka, L.L.P., The Brighton Building, Suite 56, 11711 Lorain Avenue, Cleveland, OH 44111 (For Plaintiff-Appellee).

James R. Dugan, 162 Main Street, Painesville, OH 44077 (For Defendants-Appellants).

MARY JANE TRAPP, J.

{¶1} Appellants, James and Susan Hauxhurst, appeal from the judgment of the Painesville Municipal Court, finding in favor of appellee, Marble Builder Direct International, Inc. ("Marble Builder"), in the amount of $7,170.60, on a breach of contract claim. The trial was held before a magistrate, whose findings were adopted by the trial court judge. The Hauxhursts raise issues related to the manner in which the magistrate conducted the hearing, as well as manifest weight of the evidence. For the following

reasons, we find the Hauxhursts' arguments without merit and affirm the decision of the trial court.

Substantive Facts and Procedural History

{¶2} On September 13, 2008, Susan Hauxhurst visited Marble Builder's warehouse in Cleveland, Ohio, and selected the following materials for installation in her Perry, Ohio home: "Sunrise" granite for fabrication into kitchen and bathroom countertops, a variety of travertine, three sinks, and a kitchen faucet. She signed a purchase invoice for the goods and services that day, and left Marble Builder with $188.37 worth of tumbled travertine; the rest was to be delivered and installed at a later date. Mrs. Hauxhurst provided a down-payment via fax on September 19, 2008.

{¶3} On September 29, 2008, Mrs. Hauxhurst called Marble Builder to change her order related to the kitchen countertops, ordering "Chronus" granite instead of "Sunrise" for that room. Marble Builder adjusted the invoice to reflect the increased cost for the "Chronus," and faxed Mrs. Hauxhurst a revised invoice. Mrs. Hauxhurst signed the revised invoice, and returned it to Marble Builder, via fax, along with a completed credit card authorization form. The final balance on the bill was paid that day. The sales agreement clearly indicated, in capital letters, that "ALL SALES ARE FINAL, ALL ITEMS ARE SOLD 'AS IS', 'WHERE IS', ABSOLUTELY NO WARRANTIES, GUARANTEES, REFUNDS, OR RETURNS." The sales agreement further stated that "[p]urchasers acknowledge that they are aware that materials purchased have certain properties and limitations that may result in scratching, shading, warping, cracking or other conditions. All sales are final. Purchasers acknowledge that no statement as to

the fitness for purchaser's intended use of the tile and marble has been made by the seller. * * * Variation of shade and color is inherent in marble and granite."

{¶4} Sometime in early October of 2008, Marble Builder sent Fernando Gonzalez to the Hauxhurst home in order to take measurements for the countertop fabrication. On October 29, 2008, two installers from Marble Builder arrived at the Hauxhurst home to install the custom fabricated countertops, and accompanying sinks and backsplashes. The plumbing was disconnected, and the installers removed the old countertops, placing the new ones in their proper locations. It is at this point that the parties disagree on the facts.

{¶5} Marble Builder asserts that while bringing in the new granite countertops, Mr. Hauxhurst noticed a patch on the underside of the island countertop. Marble Builder had patched the underside in order to reinforce a naturally occurring fissure in the stone. Mr. Hauxhurst was not satisfied with this, apparently thinking that the countertop had been damaged and then repaired, so he demanded that the installers refrain from completing the installation. The installers, at the direction of their boss and owner of Marble Builder, Farhad Mehdizadeh, left the home, leaving all of the materials in their places. The installers had sufficient time and tools to complete the installation, had they not been asked to leave.

{¶6} The Hauxhursts, on the other hand, assert that the installers simply stopped the installation and left the premises without explanation, after placing a call to their boss. They argue that Mr. Hauxhurst never told the installers to leave.

{¶7} On October 30, 2008, the installers returned to the Hauxhurst home to retrieve the trailer they had used to deliver the materials. The trailer was blocked by Mr.

Hauxhurst's truck, and the Hauxhursts refused to release the trailer until the installers had removed all of the materials from their home. Ultimately, the installers were able to remove the trailer from the property. They left the materials behind, however, because they were custom-cut for the Hauxhursts, rendering them otherwise useless.

{¶8} On October 31, 2008, in response to calls from the Hauxhursts, Farhad Mehdizadeh visited the Hauxhurst home in an effort to remedy the situation. He inspected the granite, finding the island countertop to be in good condition despite the patch on the underside. Nevertheless, Mr. Mehdizadeh agreed to fabricate a new island countertop, if the Hauxhursts would then agree to allow the installation to be completed. Mr. Mehdizadeh also sent an employee to the home in order to drill holes, so that the water could be reconnected while they awaited fabrication of the new piece.

{¶9} On November 7, 2008, while Marble Builder was in the process of cutting and fabricating a new island countertop, Mrs. Hauxhurst called her credit card company and arranged for the entire $7,170.60 charge to Marble Builder be reversed. She did so despite having retained all of the granite, travertine, and sinks. The Hauxhursts billed Marble Builder for "storage" of the retained materials.

{¶10} Unable to secure payment, Marble Builder brought suit against the Hauxhursts in Painesville Municipal Court, alleging breach of a sales agreement. The Hauxhursts filed an answer pro se, denying the allegations, and asserted a breach-of-contract counterclaim. A trial was held before a magistrate, and, on February 28, 2011, the magistrate issued a decision in favor of Marble Builder on both the original complaint and on the counterclaim. This decision was adopted by the trial court judge the same day.

{¶11} On March 28, 2011, the Hauxhursts filed a "Motion for Extension of Time to File Objections to Magistrate's Decision and Request for Expedited Ruling," through newly retained counsel. Two days later, on March 30, 2011, the Hauxhursts filed a notice of appeal. On March 31, 2011, the trial court granted the Hauxhursts' motion for extension; they never did file objections, however.

{¶12} The Hauxhursts now bring three assignments of error:

{¶13} "[1.] The trial court erred when it granted judgment in favor of Plaintiff against Defendants when the Magistrate did not follow trial procedure set out in R.C. 2315.01 and provide Defendant James Hauxhurst the opportunity to cross-examine and re-cross any of Plaintiff's witnesses, cross-examine and re-cross Co-Defendant-Appellant Susan Hauxhurst's witnesses, call any of his own witnesses, or present a closing argument or rebuttal argument.

{¶14} "[2.] The trial court erred when it granted judgment in favor of Plaintiff against Defendants when the Magistrate did not follow trial procedure set out in R.C. 2315.01 and reversed the order of closing arguments and required Defendant Susan Hauxhurst to proceed first with closing argument and did not provide Defendant Susan Hauxhurst with rebuttal argument in support of her counterclaim.

{¶15} "[3.] The trial court erred in granting judgment in favor of Plaintiff against Defendants James and Susan Hauxhurst when the judgment was not sustained by the weight of the evidence."

Standard of Review

{¶16} "On appeal, a trial court's adoption of a magistrate's decision will not be overruled unless the trial court abused its discretion in adopting the decision." *Brown v. Gabram,* 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullet*, 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6 (July 29, 2001). As this court recently stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id*. at ¶67.

Preliminary Matter

{¶17} Civ.R. 53 governs proceedings before magistrates and, in particular, the manner and form in which magistrates must render their decisions. Civ.R. 53(D)(3)(a)(iii) requires that a "magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or

legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b)." This court has held, repeatedly, that a party is not barred from assigning errors on appeal related to the court's adoption of the magistrate's factual findings, if the magistrate failed to include the required language of Civ.R. 53(D)(3)(a)(iii). *See, e.g., Mix v. Mix*, 11th Dist. No. 2003-P-0124, 2005-Ohio-4207, ¶22. *Accord D.A.N. Joint Venture III, L.P. v. Armstrong*, 11th Dist. No. 2006-L-089, 2007-Ohio-898, ¶23; *Lepo v. Milik Insulating*, 11th Dist. No. 2007-T-0118, 2008-Ohio-3510, ¶13, fn. 1.

{¶18} The Hauxhursts failed to file objections to the magistrate's decision within the 14 day period allowed. The magistrate, however, failed to conspicuously include the required language of Civ.R. 53(D)(3)(a)(iii) in his decision. Therefore, we will entertain the Hauxhursts' assignments of error related to the trial court's adoption of the magistrate's factual findings.

Mr. Hauxhurst's Failure to Examine, Cross-Examine and Give Closing Arguments

{¶19} In their first assignment of error, the Hauxhursts argue that the magistrate erred to their prejudice when he did not provide Mr. Hauxhurst the opportunity to examine and cross-examine witnesses, or present a closing argument. Furthermore, they allege that the magistrate proceeded, in error, as if Mrs. Hauxhurst was the attorney for her husband, in effect countenancing the unauthorized practice of law.

{¶20} Initially, no evidence exists in the record to support a finding that the magistrate considered Mrs. Hauxhurst to be acting as an attorney on behalf of Mr. Hauxhurst. The claim against Mr. and Mrs. Hauxhurst was asserted jointly and

severally, and they elected to proceed pro se at trial. It is clear from the record that Mrs. Hauxhurst actively offered a defense to the claim asserted jointly and severally. The couple's interests were inextricably intertwined; their interests were neither different nor antagonistic.

{¶21} The manner in which they conducted themselves at trial and balanced the speaking between themselves were decisions only the Hauxhursts could make. Mr. Hauxhurst was never prevented from engaging more fully in the trial; the decision to refrain from being an active participant rested squarely on his shoulders. The magistrate carefully and patiently explained the trial process at each step, and at each step we find the Hauxhursts interjected no objections.

{¶22} As to Mr. Hauxhurst's assertion that he was denied the opportunity to examine witnesses, a thorough reading of the trial transcript indicates that Mr. Hauxhurst at no time requested the opportunity to examine witnesses.

{¶23} Even if Mr. Hauxhurst had requested the opportunity to examine witnesses, it is well within the province of the trial court to exercise control over the mode and order of interrogating witnesses and presenting evidence "to make them effective for the ascertainment of truth, to avoid needless consumption of time, and to protect witnesses from harassment or undue embarrassment." Markus, *Trial Handbook for Ohio Lawyers*, Section 2:17, at 76 (2010).

{¶24} At the beginning of trial, the magistrate inquired of the Hauxhursts as to who would be cross-examining the witnesses:

{¶25} "THE COURT: Mrs. Hauxhurst, are you going to be doing the questioning?

{¶26} "MRS. HAUXHURST: Yeah.

{¶27} "THE COURT: Okay, you may cross examine the witness."

{¶28} Later on, the magistrate told a witness to "[j]ust hold still, Mr. Mehdizadeh. They're going to ask questions. Thank you," indicating that the court would have permitted either of the Hauxhursts to cross-examine the witness. The record is also devoid of any explicit prohibition against Mr. Hauxhurst questioning witnesses, and there clearly was no such request made or denied. Mr. Hauxhurst was given the opportunity to testify, however, and he did. Further, during his wife's testimony, he was permitted to address a procedural issue, demonstrating the magistrate's willingness to entertain Mr. Hauxhurst's inquiries when he did actually speak up.

{¶29} The same is true as it relates to closing arguments. Mrs. Hauxhurst presented the defense's closing arguments. At no time did Mr. Hauxhurst ask to present his own, individual closing argument as well, nor was he denied that opportunity. In fact, just before the court adjourned, the magistrate asked the parties if they had any questions, providing Mr. Hauxhurst the opportunity to speak up if he so chose. Mr. Hauxhurst said nothing. The trial court was not obligated to serve up opportunities to Mr. Hauxhurst, rather, the burden rested with him to request them.

{¶30} "It is well established that pro se litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel." *State ex rel. Fuller v. Mengel*, 100 Ohio St.3d 352, 2003-Ohio-6448, ¶10 (citation omitted). Therefore, Mr. Hauxhurst was required to proffer evidence (which he did by way of photos), request the opportunity to examine a witness (which he did not), or ask to present a closing argument (which he did not).

{¶31} This situation can be somewhat analogized to that of parties seeking to increase allotted peremptory challenges. "Under statutes which allow a specific number of challenges to 'each party,' the majority view is that those who have identical interests or defenses are to be considered as one party and therefore only collectively entitled to the number of challenges allowed to one party by the statute. * * * However, if the interests of the parties defendant are essentially different or antagonistic, each litigant is ordinarily deemed a party within the contemplation of the statute and entitled to the full number of peremptory challenges." *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 125 (1987), quoting *Chakeres v. Merchants & Mechanics Fed. S. & L. Assn.*, 117 Ohio App. 351, 355 (1962).

{¶32} The logic and due process principles underlying the approach to peremptories equally apply here. First, a party must actually make a request and secondly, it is within the trial court's discretion to control the conduct of the trial and determine whether the parties' interests are so divergent that two separate examination of witnesses and two separate arguments are needed, and are not simply redundant or cumulative.

{¶33} Essentially, the Hauxhursts argue that the magistrate erred by not telling them how to try their case, and we can find no error in the magistrate maintaining his role as the neutral arbiter. The trial court did not abuse its discretion in affirming the magistrate's decision as a result, and the Hauxhursts' first assignment of error is without merit.

Reversal of the Order of Closing Arguments

{¶34} In their second assignment of error, the Hauxhursts argue that the magistrate erred to their prejudice by reversing the order of closing arguments as laid out in R.C. 2315.01. The record evinces that this is not the case. R.C. 2315.01 lays out the order in which a trial before a jury shall proceed, except for good cause shown. With respect to closing arguments, "[t]he party required first to produce that party's evidence shall have the opening and closing arguments." R.C. 2315.01(A)(6). The decision to alter the order of trial proceedings rests within the sound decision of the trial court, and "any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." *State v. Jenkins*, 15 Ohio St.3d 164, 215 (1984), quoting *State v. Bayless*, 48 Ohio St.2d 73 (1976), paragraph three of syllabus. *See also Montgomery v. Swindler*, 32 Ohio St. 224 (1877).

{¶35} This matter was tried to the court, not a jury, and it is fair to say that a magistrate has the ability to correctly follow the arguments and apply the appropriate burdens of proof to the evidence, regardless of the order in which the arguments are present.

{¶36} Moreover, the record in this case makes it abundantly clear that the magistrate used proper discretion in adjusting the trial order, given Marble Builder's choice to waive closing arguments. Marble Builder, in choosing to waive closing arguments, strategically altered the natural order of trial. The transcript illuminates just what happened:

{¶37} "MR. STRAKA: *** I'll waive opening subject to the right to give a reply if Mrs. Hauxhurst or Mr. Hauxhurst don't waive closing – closing.

{¶38} "THE COURT: Okay. Sure. Do you feel you need to do a closing argument?

{¶39} "MRS. HAUXHURST: I'd like –

{¶40} "THE COURT: What Mr. Straka is saying, he'll waive closing argument, because, in essence, the case has been made already; but you're more than – you have the right to make a closing argument; but if you do, he will make a reply to your closing argument. Just so you know what's going on.

{¶41} "MRS. HAUXHURST: Okay. Then could I make a reply to his closing argument. I mean, this can go on and on for ever and ever.

{¶42} "THE COURT: Right. So if you want to make a closing statement, you can make –

{¶43} "MRS. HAUXHURST: I would like to make a closing statement; but if he's waiving his right, then he's waiving it.

{¶44} "THE COURT: No, he's waived if you waive.

{¶45} "MRS. HAUXHURST: I'm just asking.

{¶46} "THE COURT: What he's offered to do is –

{¶47} "MRS. HAUXHURST: No; I understand that, but –

{¶48} "THE COURT: – waive if you waive. But if you don't waive, then he's going to make –

{¶49} "MRS. HAUXHURST: But if he's going to waive his right to a closing argument and I'm going to speak, then that should be final.

{¶50} "THE COURT: No.

{¶51} "MRS. HAUXHURST: No?

{¶52} "THE COURT: Okay. Let me be clear.

{¶53} "MRS. HAUXHURST: No, I know he can rebut or –

{¶54} "THE COURT: No. No. Please listen. He said he would waive closing argument if you did. There would be no closing from either party.

{¶55} "MRS. HAUXHURST: Okay. I'm not going to waive my right to give a closing argument.

{¶56} "THE COURT: That's fine. That's all we needed to hear."

{¶57} Marble Builder waived closing arguments but reserved the right for rebuttal. Mrs. Hauxhurst desired to present closing arguments but did not want Marble Builder to rebut, which they had a right to do given their reservation. The magistrate did not err in allowing Marble Builder to briefly respond to Mrs. Hauxhurst's closing argument.

{¶58} Mrs. Hauxhurst also argues that the court erred in denying her the opportunity to rebut Marble Builder's statement. A review of the transcript reveals that the record is devoid of any express request by Mrs. Hauxhurst to present a rebuttal argument and any express denial by the magistrate. Mrs. Hauxhurst was obligated to request the opportunity to present a rebuttal argument, and object on the record if the magistrate denied her request. She did neither.

{¶59} The magistrate adjusted the order of trial appropriately in the face of Marble Builder's waiver of closing arguments, and did not err in doing so. The trial court did not abuse its discretion in adopting the magistrate's decision, and thus the Hauxhurst's second assignment of error is without merit.

Trial Court's Judgment is Not Against the Weight of the Evidence

{¶60} In their third assignment of error, the Hauxhursts argue that the trial court's determination was against the weight of the evidence.

Standard of Review

{¶61} A court of appeals, in reviewing a trial court's judgment, will give considerable deference to a trial court's findings of fact and conclusions of law. "Judgments 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 Constr. Co.*, 54 Ohio St.2d 279 (1978), at syllabus. Deference is extended to the trial court's determination because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc., v. City of Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." *Id*.

No Request for Findings of Fact & Conclusions of Law

{¶62} Initially, we note that the Hauxhursts never requested findings of fact or conclusions of law, pursuant to Civ.R. 53(D)(3)(a)(ii). Civ.R. 53(D)(3)(a)(ii) states that "[s]ubject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely

made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law."

{¶63} "In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment. * * * As the court explained in *Pettet v. Pettet*, 55 Ohio App.3d 128, 130 (1988): '[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.

{¶64} "'The message is clear: If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law.'" *McClead v. McClead*, 4th Dist. No. 06CA67, 2007-Ohio-4624, ¶25.

The Evidence Before the Court

{¶65} A review of the trial transcript reveals that Marble Builder presented ample evidence to support a finding in its favor. Marble Builder presented three witnesses and two physical exhibits. These witnesses all provided competent and credible testimony in support of Marble Builder's claims and the trial court's ultimate judgment. Evidence was presented that: 1) the Hauxhursts had signed a sales contract which specifically contained certain disclaimers and/or limitations of warranties, 2) the materials had been

custom fabricated for the Hauxhurst home, 3) the installers had arrived with the materials and began the installation process, 4) the installers were asked to leave by Mr. Hauxhurst, 5) Mr. Mehdizadeh offered to fabricate a new island countertop, 6) Mrs. Hauxhurst reversed the charged on her credit card, 7) the Hauxhursts retained all of the materials, and 8) as of the date of the trial, Marble Builder had yet to receive any payment and no materials had been returned.

{¶66} Competent and credible evidence exists to support the magistrate's findings in favor of Marble Builder. The trial court independently reviewed the decision and found no obvious errors; we see no abuse of discretion by the trial judge in adopting the magistrate's decision. Therefore, the Hauxhursts' third assignment of error is without merit. For the foregoing reasons, we find the Hauxhursts' appeal without merit and affirm the judgment of the Painesville Municipal Court.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.