

IN THE SUPREME COURT OF OHIO

DIANNE ADKINSON

Appellate Case No. CA 22668

Appellant,

09-0543

-vs-

SOUTHTOWN HEATING &  
COOLING, INC., et al.,

On appeal from Montgomery County  
Court of Appeals, Second Appellate  
District

Appellees.

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT DIANNE ADKINSON

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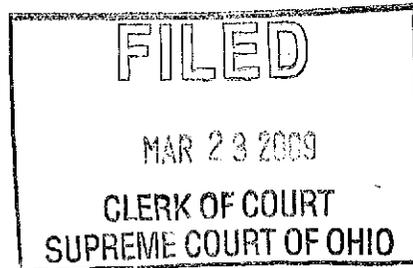


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST

This case concerns the public or great general interest in the right of the citizens of this state to receive justice and fairness from the courts of this state, in two specific respects: (1) if a litigant abides by the litigation procedure ordered by a trial court, the Court of Appeals should not penalize the litigant for doing so, and (2) litigants are entitled to rely upon interlocutory decisions rendered by trial courts during the course of a legal proceeding.

First, pursuant to the consent of the parties, the jury trial in this case was presided over by a Magistrate in Montgomery County. The consent form *supplied to the parties by trial court itself* stated:

The Magistrate shall have the same authority as a judge to make any and all rulings on procedure, motions, and evidence, including post trial motions pursuant to Civ. R. 53. The judge to whom this case is assigned shall sign the final judgment entry based on any verdict and/or rulings on motions by the Magistrate. The parties specifically waive any claimed error or objection to the fact of the Magistrate presiding at the trial, ***but specifically retain the right to appeal to the Court of Appeals on the substance of any Magistrate's ruling.*** (Emphasis added.)

In accordance with the dictates of the trial court as recited in the consent form, the Appellant appealed directly to the Second Appellate Court on the substance of rulings made by the Magistrate, listing the following assignments of error: the Magistrate improperly denied the admission into evidence of certain exhibits, resulting in prejudicial error; the Magistrate improperly denied Appellant's Motion for Directed Verdict, resulting in prejudicial error; and the Magistrate improperly excluded testimony of witnesses at trial, resulting in prejudicial error.

The Court of Appeals held that the Appellant had not preserved these issues for appeal because she had not raised them to the trial court judge in her objection to the Magistrate's decision; and accordingly, the Court of Appeals did not rule on the substance of any of the above referenced assignments of error.

The Appellant is being penalized by the Court of Appeals for complying with the litigation procedure dictated by the trial court. This flies in the face of all notions of fair play and justice in which citizens of this state have a public or great general interest in receiving from the courts of Ohio.

Secondly, in reaching its final judgment, the trial court failed to abide by its own interlocutory order. In deciding a motion for summary judgment filed prior to trial by the Appellees, the Magistrate issued this conclusion of law:

It is also a question of law whether a violation of the Consumer Sales Practices Act occurs when a supplier commences or continues work, with knowledge that it is not licensed to do such work.

In that same decision, the Magistrate had already determined:

There are some undisputed facts. It is undisputed that the Plaintiff is a consumer, that the Defendant is a supplier and that the transaction was for the Plaintiff's personal residence.

.....

It is undisputed that after the furnace was removed, scientific testing was done which detected the presence of asbestos. It is undisputed that Southtown was not licensed to remove asbestos, and did not have liability insurance to cover any negligence in connection with asbestos removal.

The Magistrate's decision on the summary judgment motion was adopted in full by the trial court judge.

As the consent form referenced above provided, the Magistrate was duly empowered to rule on any post-judgment motions. Accordingly, after the jury

entered its verdict, in all respects favorable to the Appellees, Appellant filed a post-trial motion for jnov and/or a new trial. In her prayer for relief, Appellant requested that the Magistrate:

Find that Defendants Southtown and Joseph Trame, in performing an unlicensed, unlawful dismantling of a furnace containing asbestos, violated the Consumer Sales Practices Act, and that Plaintiff be granted judgment on this issue as a matter of law.

Find that the Defendants have failed to prove all the necessary elements of fraud by concealment against the Plaintiff and that she be granted judgment on this issue as a matter of law.

When her motion was denied by the Magistrate, the Appellant filed her objection to the trial court. The trial court affirmed the Magistrate's decision.

On these issues, the Appellant listed the following assignment of errors: the trial court failed to independently review and consider Appellant's objections to the Magistrate's decision, resulting in prejudicial error; the jury verdict was contrary to law in that Appellees failed to sustain the burden of proof of fraud by concealment on the part of the Appellant; the jury verdict was contrary to law in that the Appellees committed an irrefutable violation of the Consumer Sales Practices Act; and the trial court improperly denied Appellant's Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial, resulting in prejudicial error.

In ruling on these assignments of error, the Court of Appeal adopted the erroneous reasoning of the trial court, stating:

Both Mont. Loc. R. 2.31VI.A.3 and Civ. R. 53(D)(3)(b)(iii) require a transcript supporting objections to a magistrate's decision, and Adkinson failed to satisfy that requirement. That failure prevented the trial court from ruling on the merits of the objections Adkinson filed. The court did not abuse its discretion when it overruled Adkinson's objections for that reason.

In fact, Civ. R. 53(D)(3)(b)(iii) states:

**An objection to a factual finding**, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. (Emphasis added.)

The local trial rule referenced by the Appellate Court states:

**When necessary as provided in Rule 53 (D) (3) (b) (iii)**, a transcript of the hearing must be filed with the Court by the moving party within thirty (30) days after the filing of objections to the Magistrate's decision unless the Magistrate, in writing, extends the time for inability to complete the transcript of the testimony, or for other good cause. (Emphasis added.)

There was never any dispute that Appellees dismantled Appellant's furnace, that the furnace contained asbestos, and that the Appellees were not licensed to remove asbestos.

In this case, where the jury was the finder of fact and not the Magistrate, the issues presented to the trial court were legal issues relating to the sufficiency of the evidence. Legal issues clearly can be raised and considered by the trial court without a transcript where the underlying facts are not in dispute.

Indeed, the trial court, through its adoption of the Magistrate's decision on Appellees' motion for summary judgment, had already determined the salient facts concerning this issue, and had already ruled that the Appellees' unlicensed removal of asbestos presented a *question of law*. For the trial court to subsequently demand a transcript when ruling on the Appellant's objection to the Magistrate's decision, and to refuse to consider any legal arguments made by the Appellant because of the lack of a transcript, which the rules of civil procedure clearly require only when facts are in issue, contradicts the trial court's own interlocutory ruling that the issue presented a question of law – a ruling upon which the Appellant was entitled to rely.

The citizens of this state have a public or great general interest in seeing that litigants are entitled to rely upon interlocutory rulings made during the course of litigation. The citizens of this state have a right to expect that Ohio courts will abide by their own rulings, even as they expect litigants to do. Anything less will result in chaos.

The trial court also erred in its refusal, again citing the lack of a transcript, to consider Appellant's legal argument that the Appellees had failed to prove the required elements of fraud by concealment against her, and that the jury's verdict on this issue was legally insufficient. This argument was also based on uncontested fact, as will be discussed *infra*.

#### STATEMENT OF THE CASE AND FACTS

In March 2002 Appellant contracted with Appellee, Southtown, through its president, Appellee Joseph Trame, for the removal and replacement of her existing furnace and ductwork. It is uncontested that the parties discussed the possible existence of asbestos on the furnace/ductwork during their first meeting. After the dismantling of the furnace had commenced by the Appellees, it was confirmed via laboratory analysis that it did contain asbestos. By that time Appellee Southtown, at the direction of the Appellant, had ceased work and had left Appellant's home without finishing the job. Appellant hired an air testing company, which led to removal of the furnace and a whole house cleaning, both of which were performed by certified asbestos abatement companies. Another company ultimately installed the furnace left at the home by Appellees.

The case commenced on September 9, 2003 with the filing of Appellant's Complaint. Appellant alleged that the Appellees had violated the Consumer Sales

Practices Act (CSPA), R.C. 1345.01 et seq., that they had committed fraud and negligence, and that they were guilty of unworkmanlike performance.

Appellees filed their Answer and Counterclaim denying Appellant's claims and alleging breach of contract and fraud by concealment on the part of Appellant and further alleging that Appellant was unjustly enriched. Their claim of fraud by concealment was based upon an allegation that a second contractor who had bid on the furnace removal and replacement had indicated to the Appellant that in his opinion the furnace did indeed contain asbestos and that this opinion was not relayed to them by the Appellant. They asserted in their Counterclaim that:

Plaintiff had knowledge or information that led her to believe that the tape sealing the joints on her furnace ductwork included asbestos containing materials (ACM). Plaintiff intentionally withheld her knowledge and the facts upon which her belief was based from Defendants.

The matter proceeded to jury trial on June 4, 2007. The Appellant moved for a directed verdict on both the irrefutable violation of the CSPA and the clear lack of fraudulent concealment by the Appellant. Although neither of these issues should have gone to the jury, the Magistrate denied the motion. Due to the many prejudicial errors committed by the Magistrate during the course of the trial, the jury returned a wholly unsupported verdict. It found that (1) Appellees did not violate the CSPA, (2) Appellees did not commit fraud, (3) Appellees did not commit negligence, (4) Appellant breached the contract, (5) Appellant was unjustly enriched, and (6) Appellant committed fraud. The jury awarded Appellees the contract amount of \$2,512.52, specifically excluding punitive damages. No attorney fees were assessed.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The performance of home improvement services without the proper license or permit is a specific act or practice that has been adjudged and decreed to be an unfair or deceptive act or practice under the CSPA by the courts of this state. Those judicial decisions were filed in the public inspection file maintained by the Ohio Attorney General prior to the events at bar. It is uncontroverted that Appellee Southtown dismantled Appellant's furnace. There is no dispute that this furnace contained asbestos. Appellee Southtown admits that they were not licensed for asbestos abatement. Intent is irrelevant under R.C. 1345.02; indeed, even innocent mistake does not prevent the violation. The mere doing of the act is the violation. The jury verdict is contrary to law in that the jury failed to find a clear violation of the CSPA on the part of Appellees. This verdict should have been vacated.

The jury verdict of fraud against the Appellant also should have been vacated by the trial court. The elements of fraud by concealment against her were not met.

As Appellant previously stated in her motion for jnov and/or new trial:

Nondisclosure of a fact will become the equivalent of fraudulent concealment only where there exists a duty to disclose. A person has no duty to disclose facts which are readily observable or discoverable by the other person. This is not a situation where there was a latent defect, easily hidden or a defect that would have necessitated exhaustive investigation by the Defendants in order to protect their interests. Further, Defendant Trame was the expert in the HVAC industry, not the Plaintiff. Plaintiff had already alerted the Defendants to the possible presence of asbestos in her furnace during her first meeting with Defendant Trame, information that the Defendants chose to ignore.

Ohio law could not be any clearer on this tort. Appellees' claim that Appellant did not disclose the opinion of another contractor that the furnace

contained asbestos cannot support fraud by concealment where Appellees also admit that Appellant had already discussed the possibility of asbestos with them. There is nothing latent or hidden in this situation.

### CONCLUSION

The Magistrate in the trial of this case committed numerous, substantial errors, to the extreme detriment and prejudice of the Appellant. Those errors permitted the jury to reach a verdict that resulted in an extreme miscarriage of justice. The litigation procedure dictated by the trial court provided that those errors would be addressed not by itself but by the Court of Appeals. The Court of Appeals then refused to consider those errors stating that they should have been addressed by the trial court. The substantial substantive issues raised by the Appellant subsequent to the jury's verdict have never been addressed. The Appellant has been left with no means of remedying the miscarriage of justice in this case.

Further, the trial court has failed to abide by its own interlocutory ruling. When considering a pretrial motion, the trial court initially ruled that the Appellees' unlicensed removal of asbestos presented a *question of law*.

The trial court subsequently refused to consider this issue when ruling on the Appellant's objection to the Magistrate's denial of her motion for jnov/new trial, stating that it could not rule on this

issue without a transcript. A transcript is only required where factual issues are contested, which is not the case here.

For the reasons discussed herein, this case involves matters of public and great general interest. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,

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Dianne Adkinson  
Pro Se

#### Certificate of Service

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Christopher Epley, at Tolliver & Epley, 131 N. Ludlow Street, Suite 1000, Dayton, Ohio 45402 on March 23, 2009.

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Dianne Adkinson

APPENDIX

Opinion of the Montgomery County Court of Appeals  
(February 6, 2009)

Judgment Entry of the Montgomery County Court of Appeals  
(February 6, 2009)



FILED  
COURT OF APPEALS

2009 FEB -6 AM 8:34

GREGORY A. BRUSH  
CLERK OF COURTS  
MONTGOMERY, OHIO  
39

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

DIANNE ADKINSON :

Plaintiff-Appellant : C.A. CASE NO: 22668

vs. : T.C. CASE NO. 03CV6425

SOUTHTOWN HEATING AND : (Civil Appeal from  
COOLING, INC., et al. Common Pleas Court)

Defendants-Appellees :

.....  
O P I N I O N

Rendered on the 6<sup>th</sup> day of February, 2009.

.....  
Patrick K. Adkinson, Atty. Reg. No.0016980, 4244 Indian Ripple  
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Attorney for Plaintiff-Appellant

Christopher Epley, Atty. Reg. No.0070981, Suite 1000, 131 N.  
Ludlow Street, Dayton, OH 45402  
Attorney for Defendants-Appellees

.....  
GRADY, J.:

This is an appeal from an order of the court of common  
pleas overruling objections to a magistrate's denial of  
motions for a new trial or for a judgment notwithstanding a  
jury's verdict.

The underlying litigation arose from dealings between a

furnace contractor, Southtown Heating & Cooling, Inc. ("Southtown"), and a homeowner, Dianne Adkinson. Southtown abandoned its promised work to remove an existing furnace system from Adkinson's home in order to install a new furnace after Southtown encountered asbestos products in the existing system that Southtown is not licensed to remove. Adkinson then had another contractor complete the work, using a new furnace unit Southtown had left at the job site.

Adkinson commenced an action against Southtown on claims for relief alleging violations of the Consumer Sales Practices Act ("CSPA"), negligence, and other related causes. Her theory was that Southtown, as an experienced furnace contractor, should have known that Adkinson's existing system contained asbestos products that would prevent Southtown from performing as it had promised.

Southtown counterclaimed, alleging fraud. Southtown's theory was that Adkinson knew her existing furnace system likely contained asbestos products, and that she concealed her knowledge of that fact from Southtown, knowing that Southtown could not perform the work required.

Adkinson filed a jury demand with her complaint. By agreement of the parties, the case was referred to a magistrate to preside over the jury trial pursuant to Civ.R.

53(C) (1) (c) .

Southtown offered evidence at trial showing that after Southtown had told Adkinson that it was not licensed to remove asbestos products, another contractor told her that if a contractor lacking the required license performed the work, Adkinson could probably get a new furnace free of charge.

The jury returned verdicts for Southtown on all of Adkinson's claims for relief. The jury returned a verdict for Southtown in the amount of \$2,512.52 on its fraud claim, an amount corresponding to the value of Southtown's furnace that Adkinson had installed by another contractor.

Adkinson filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial. (App. Case No. 22393, Dkt.161). After the magistrate filed a judgment on the jury's verdict (Dkt 168), the magistrate overruled both of Adkinson's alternative motions. (Dkt 170). Adkinson filed objections to the magistrate's decision denying her motions. (Dkt. 172).

The magistrate had erroneously endorsed the judgment he filed on the jury's verdicts as a final, appealable order, and because of that Adkinson filed an App.R. 3 notice of appeal to this court from the judgment the magistrate filed. We dismissed that appeal for lack of a final order. *Adkinson v.*

*Southtown Heating & Cooling, Inc* (Feb. 7, 2008), Montgomery App. No. 22393.

Following our dismissal, the trial court overruled Adkinson's objections to the magistrate's decision denying her alternative motions, and the court adopted the judgment on the jury's verdict the magistrate had filed. (Appeal No. 22668, Dkt 7). The trial court explained that it could not review the basis for those objections because Adkinson failed to file a transcript of the proceedings before the magistrate.

Adkinson filed a timely notice of appeal.

Adkinson's brief sets out seven assignments of error. She attacks several of the magistrate's evidentiary rulings, the verdicts the jury returned, the magistrate's denial of Adkinson's motion for directed verdict, and the court's denial of Adkinson's objections to the magistrate's decision denying her alternative motions for a judgment notwithstanding the verdict or for a new trial. Except for the last of those grounds, the error assigned was waived and not preserved for appeal because Adkinson failed to file objections to the magistrate's rulings and decisions in those other respects. Civ.R. 53(D)(3)(b)(iv).

With respect to the trial court's rulings on the objections Adkinson did file, concerning the magistrate's

denial of her alternative motions for judgment n.o.v. or for a new trial, we find no basis to reverse. Both Mont.Loc.R. 2.31VI.A.3. and Civ.R. 53(D)(3)(b)(iii) require a transcript supporting objections to a magistrate's decision, and Adkinson failed to satisfy that requirement. That failure prevented the trial court from ruling on the merits of the objections Adkinson filed. The court did not abuse its discretion when it overruled Adkinson's objections for that reason.

The assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

Patrick K. Adkinson, Esq.  
Christopher B. Epley, Esq.  
Hon. Mary Lynn Wiseman



FILED  
COURT OF APPEALS

2009 FEB -6 AM 10:34

GREGORY A. BRUSH  
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO  
MONTGOMERY CO. OHIO  
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|---|---|------------------------|
| DIANNE ADKINSON                             | : |                        |
| Plaintiff-Appellant                         | : | C.A. CASE NO. 22668    |
| vs.   | : | T.C. CASE NO. 03CV6425 |
| SOUTHTOWN HEATING AND COOLING, INC., et al. | : | <u>FINAL ENTRY</u>     |
| Defendants-Appellees                        | : |                        |

Pursuant to the opinion of this court rendered on the 6<sup>th</sup> day of February, 2009, the judgment of the trial court is Affirmed. Costs are to be paid as provided in App.R. 24.

*James A. Brogan*  
 \_\_\_\_\_  
 JAMES A. BROGAN, JUDGE

*Mike Fain*  
 \_\_\_\_\_  
 MIKE FAIN, JUDGE

*Thomas J. Grady*  
 \_\_\_\_\_  
 THOMAS J. GRADY, JUDGE

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Hon. Mary Lynn Wiseman