

ORIGINAL

IN THE SUPREME COURT OF OHIO

DIANNE ADKINSON,

Plaintiff-Appellant,

Supreme Court
Case No. 09-0543

vs.

**SOUTHTOWN HEATING AND
COOLING, INC., et al.,**

Defendants-Appellees.

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

**MEMORANDUM OF APPELLEES, SOUTHTOWN HEATING AND COOLING,
INC., AND JOSEPH TRAME, IN RESPONSE TO MEMORANDUM IN
SUPPORT OF JURISDICTION OF APPELLANT**

Dianne Adkinson
Pro Se
3330 Martel Drive
Dayton, OH 45420
(937) 252-8833
diadkinson@yahoo.com

CHRISTOPHER B. EPLEY (0070981)
Tolliver & Epley
Suite 300
124 E. Third Street
Dayton, OH 45402
(937) 228-7511 -voice-
(937) 228-2314 -fax-
cepley@titlequestinc.com
Counsel for Appellees
Southtown Heating and Cooling, Inc.
and Joseph Trame

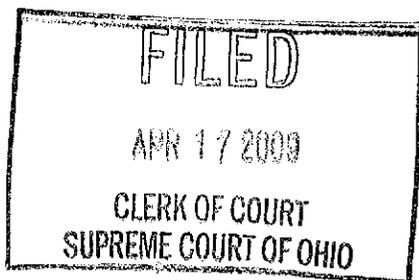


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I. THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

Adkinson v. Southtown Heating and Cooling, Inc., et al., does not involve an issue of public or great general interest. This is a discretionary appeal. The issue is whether a litigant, who fails to file a trial transcript pursuant to Ohio Civ. R. 53, is entitled to reversal when she implicates evidentiary matters, rulings, and judgments based on the transcript. [See Civ.R. 53 (D)(3)(b)(iii)] Failing to abide by a long-established Ohio Rule of Civil Procedure is not an issue of public or great general interest. Contrariwise, Appellant contends that “(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.”

This case was not resolved summarily because numerous questions of fact remained. Prior to trial, Appellant and Appellee Southtown were provided a consent form to have a jury trial heard by a Montgomery County Common Pleas Magistrate. The form also provided that both parties “retain the right to appeal to the Court of Appeals on the substance of any Magistrate’s ruling.” In addition to objecting to the Magistrate’s Decision and jury’s judgment in favor of Appellees, Appellant, through counsel, relied on the referenced clause to immediately appeal the decision to the Court of Appeals. The court of appeals dismissed the appeal for lack of a final order. *Adkinson v. Southtown Heating & Cooling, Inc.* (Feb. 7, 2008), Montgomery App. No. 22393.

Subsequently, the trial court rendered its decision confirming that the mandates of Civ. R. 53 were not followed; specifically, Appellant failed to file a trial transcript. Appellant appealed, and the Second District Court of Appeals affirmed the trial court’s

decision and also found that Appellant did not preserve certain issues for appeal. [*See* Civ.R. 53(D)(3)(b)(4)]. Appellant then filed a motion for reconsideration -- the Second District Court of Appeals found “no basis to reconsider our judgments affirming the trial court.”

Appellant’s explanation in her objection and reconsideration motion, and appeal and reconsideration motion, for not filing a trial transcript pursuant to Ohio Civ. R. 53 was that she was not raising factual issues, only questions of law. That explanation, however, does not comport with the arguments she has made and continues to make. Appellant concedes that “... the issues presented to the trial court were legal issues relating to the *sufficiency of the evidence*.” (Appellant’s Memorandum, p.6) Without a transcript, the trial court could not review the sufficiency of the evidence. The duly empanelled jury heard this case to conclusion and awarded damages to Southtown and against Appellant. Pursuant to Section 2(B)(2)(e), Article IV of the Ohio Constitution, the court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general matters. In this fact-specific case, Appellant was not prejudiced by twice filing in the Court of Appeals. Rather, she failed to follow the Ohio Rules of Civil Procedure by not providing a transcript of the proceedings to the trial judge and then arguing to the reviewing court questions of fact. Appellees Southtown and Joe Trame respectfully request that the Supreme Court of Ohio deny jurisdiction in this matter.

II. STATEMENT OF THE CASE AND FACTS

On September 9, 2003 Appellant Dianne Adkinson filed a Complaint against Appellees Southtown Heating and Cooling, Inc. and Joseph Trame alleging a violation of the Ohio Consumer Sales Practices Act, fraud, breach of contract, Uniform Commercial Code, negligence, and breach of implied warranties. Appellees Answered the Complaint and Counterclaimed seeking damages for breach of contract, unjust enrichment, and fraudulent concealment on October 8, 2003. On November 20, 2003 Appellant Answered Appellees Counterclaim. Over two years later, on December 28, 2005 Appellant amended her Complaint sounding in violations of the Ohio Consumer Sales Practices Act.

On June 4, 2007 this matter proceeded to jury trial in front of a magistrate. The jury found in favor of Appellees and awarded them judgment in the amount of \$2,512.52. Appellees were also appropriately awarded both prejudgment and post judgment interest. On June 29, 2007 Appellant filed a Motion for Judgment Notwithstanding the Verdict, or alternatively, for a New Trial. On August 17, 2007 the Magistrate Overruled Appellant's new trial request. On August 31, 2007 Appellant filed Objections to the Magistrate's Decision Denying Appellant's Motion for Judgment Notwithstanding the Verdict, or alternatively, for a New Trial.

On September 17, 2007 Appellant filed a Notice of Appeal under case number CA 22393, which was dismissed, as improvidently filed, on February 7, 2008. On February 25, 2008 the trial judge overruled Plaintiff's Objections. On March 21, 2008 Appellant filed a second Notice of Appeal. On July 28, 2007 Appellant filed her Brief and supplemented her appendix on July 31, 2008. On February 6, 2009 the Second

District Court of Appeals, Montgomery County, overruled Appellant's assignment of error and affirmed the judgment of the trial court. Appellant filed an application for reconsideration which was denied on March 26, 2009. On March 23, 2009 Appellant filed memorandum in support of jurisdiction in the Supreme Court of Ohio.

Appellee Southtown Heating and Cooling, Inc. is a business located in Moraine, Ohio that performs residential heating and air conditioning installation and maintenance. Appellee Joseph Trame has been with the company since 1994. On March 22, 2002 Joseph Trame went to Appellant's house and gave her an estimate -- \$2,512.52 -- for a two stage high efficiency furnace. Southtown won the bid.

Appellees are not licensed to remove asbestos and do not remove asbestos as part of their trade. The state of Ohio and the city of Dayton do not require heating and air conditioning employees to be certified or trained in asbestos.

Prior to Southtown obtaining the job, Cal Schlemmer, owner of Cal's, told Appellant that she could make trouble for a company who removes asbestos without a license. Removing asbestos would have been an additional cost to Appellant because Appellant would have had to hire a licensed asbestos abatement company to remove the asbestos prior to Southtown's installation of a new furnace.

On the second day of installation Southtown was ordered off the job by Appellant. Appellant kept the furnace and had it installed by Butler Heating and Air Conditioning. Southtown was not compensated for the furnace and the work done by their employees; Appellant continues to use the furnace. Appellant did not dispute that the Appellees were entitled to the cost of the furnace and labor, which amounted to twenty five hundred and twelve dollars.

After hearing four days of testimony, the Jury returned a verdict in favor of Appellees Southtown Heating and Air Conditioning and Joseph Trame in the amount of \$2,512.52 – the original estimate for furnace installation.

III. ARGUMENT IN SUPPORT OF APPELLEES' POSITION

Appellant Dianne Adkinson is not entitled to review in the Ohio Supreme Court. Although these issues may be of interest to the involved parties, they are not to the bench and bar or of public or great general interest. The trial court held that Appellant's claims were meritless because she did not comply with the Ohio Rules of Civil Procedure when she failed to file a transcript. The Second District Court of Appeals affirmed the trial court's decision and added that Appellant waived certain arguments on appeal because she failed to specifically object to the magistrate's decision at the trial level. Moreover, the jury verdict was not contrary to law and Appellees sustained their burden of proof relative to fraud by concealment. Accordingly, Appellees request that the Ohio Supreme Court deny jurisdiction in this case.

A. Proposition of Law No. I: The jury verdict was not contrary to law relative to the consumer sales practices act.

Appellant waived this argument relative to the consumer sales practices act because she did not preserve this issue in her objection of the magistrate's decision. In the alternative, the jury correctly determined that Southtown and Joseph Trame did not violate the Consumer Sales Practices Act. To successfully prosecute a civil action under the Consumer Sales Practices Act, Appellant had to show that Southtown and Joseph Trame committed an act or engaged in a practice that was unfair, deceptive, or unconscionable. *See generally* ORC 1345.01 et seq. To examine these issues, however,

the reviewing trial court must be provided with the transcripts from the Magistrate's findings of fact. *See* Civ.R. 53(D)(3)(b)(iii).

In this case, Appellant did not provide a transcript to the trial court. Nonetheless, the jury was presented with evidence that Joseph Trame and Southtown did not know the old furnace or duct work contained asbestos; but, that Appellant did. Mr. Trame testified about his experience in the industry. In addition, he acknowledged that if asbestos was in the house, he could not perform the installation. Appellant contracted with Southtown knowing that they were not licensed in asbestos removal. Because they are not licensed in that vocation and do not work in asbestos removal, they are not insured in it. Appellant was aware of this information, but, conceivably, did not want to pay the additional expense of asbestos removal. Southtown and Mr. Trame did not engage in a practice that was unfair, deceptive, or unconscionable.

Appellant implies that Southtown violated the Act by triggering Chapter 3710 (Asbestos Abatement). This issue was not raised either before or at trial; Plaintiff cannot now claim that the chapter applies to the case. Appellee's First Amended Complaint was filed on December 28, 2005. None of the nine claims for relief in that filing contained any reference to the statutory framework of Chapter 3710. Accordingly, the issue is waived. Because the jury did not lose its way in evaluating all the evidence and testimony provided at the trial level, the judgment of the trial court should be sustained. And, because this factual issue is not one of public or great general interest, Appellees respectfully request that this Court deny jurisdiction.

B. Proposition of Law No. II: The jury verdict was not contrary to law because Appellees sustained their burden of proof regarding fraud by concealment.

Appellant waived this argument relative to fraud by concealment because she did not preserve this issue in her objection of the magistrate's decision. In the alternative, the jury's verdict was correct. The agreed-upon jury instructions relative to the elements of fraud were: 1.) a false representation of fact that was made with the knowledge of its falsity or with utter disregard and recklessness about its falsity, 2.) the representation was material to the transaction, 3.) the representation was made with the intent of misleading the party into relying upon it, 4.) the party justifiably relied upon the representation, 5.) injury directly caused by reliance on the representation. To examine these issues, however, the reviewing trial court must be provided with the transcripts from the Magistrate's findings of fact. *See* Civ.R. 53(D)(3)(b)(iii). Additionally, parties who fail to object to any matter that the magistrate decided, waive the error for purposes of appeal. *See* Civ. R. 53(D)(3)(b)(4).

In the case at bar, Southtown and Joseph Trame met their burden of proof relative to fraud. Appellant had met with Cal Schlemmer, an HVAC worker, prior to her second meeting with Joseph Trame. Cal indicated to Appellant that he believed the tape surrounding Appellant's old duct work was asbestos. Appellant was also informed that she could make trouble for a company, and get a new furnace, if the company removed asbestos without a license; Appellant did not relay her knowledge to Mr. Trame. Appellant knew an additional expense would be required if Mr. Trame was aware of the asbestos – Southtown would not remove the asbestos; rather an abatement company would first work the site. Neither Southtown nor Cals is a licensed abatement removal

company. Joseph Trame's experience differed from Cals in that Mr. Trame typically worked in neighborhoods with newer houses and no asbestos. Cal's ken dealt with houses in older Dayton neighborhoods where he encountered asbestos more often. Appellant withheld this material information from Southtown and Trame to their detriment. They relied on this information up to the point where they were ordered off the job without their furnace or tools. Accordingly, because the jury did not lose its way when it rendered its verdict, the judgment of the trial court should be upheld. And, because this factual issue is not one of public or great general interest, Appellees respectfully request that this Court deny jurisdiction.

IV. CONCLUSION

Because this case is not one of public or great general interest, Appellees Southtown Heating and Cooling, Inc., and Joseph Trame, request this Honorable Court to deny jurisdiction of this case.

Respectfully submitted,



CHRISTOPHER B. EPLEY (0070981)

TOLLIVER & EPLEY

Suite 300

124 East Third Street

Dayton, OH 45402

(937) 228-7511 – voice

(937) 228-2314 - facsimile

cepley@titlequestinc.com

Counsel for Appellant Southtown

Heating and Cooling, Inc. and

Joseph Trame

V. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this document has been mailed by regular US Mail on this 16 day of April, 2009 to Dianne Adkinson, 3330 Martel Drive, Dayton, Ohio 45420.



CHRISTOPHER B. EPLEY