

IN THE SUPREME COURT OF OHIO

ESTATE OF KATHERINE
TOMLINSON

APPELLEE,
OF

vs.

MEGA POOL WAREHOUSE, INC.
AND STEPHEN B. GOLD

APPELLANTS

CASE NO. 2023-0230

ON APPEAL FROM THE
DELAWARE COUNTY COURT

APPEALS, FIFTH APPELLATE
DISTRICT

COURT OF APPEALS
CASE NO. 22 CAE 03 0020

**MERIT BRIEF OF AMICI CURIAE OHIO ASSOCIATION OF CIVIL TRIAL
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INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

This is a dispute over whether installers of a deck and/or of residential in-ground swimming pool should be subject to penalties provided under Consumer Sales Practices Act (hereinafter referred to as "CSPA") when the CSPA provides an exemption with the following language "transactions involving a home construction service contract" making CSPA not applicable to them. The Fifth District Court of Appeals ignored the language of CSPA and Ohio Home Construction Service Supplier Act ("HCSSA") in affirming the award of damages under CSPA. The Fifth District Court of Appeals conducted little to no analysis regarding whether the installation of a residential deck or in-ground swimming pool met the definition of a "consumer transaction" in light of the exemption added by the Ohio legislature in 2012. Instead, Fifth District Court of Appeals followed the flawed analysis of *Beder, et al v. Cerha Kitchen and Bath Designs Studio, LLC*, et al, 11th Dist. Geauga No. 2022-G-0008, 2022-Ohio-4463, in concluding that the HCSSA does not apply to residential remodeling services, but only applies to new residential construction. The Fifth District Court of Appeals followed *Beder* who used antiquated definition of the term "construction" and refused to acknowledge the legislative history of the HCSSA which demonstrates that the Ohio legislature intended the HCSSA to apply to residential remodeling services.

This court needs to clarify whether Ohio will impose on pool installers or deck installers, which are small, and/or family owned businesses to treble damages and to large attorney's fees awards which could cause substantial financial difficulties for these companies. Causing a significant impact on the residential construction industry to increase the costs for installation of pools and decks to the consumers of Ohio if this decision is not overturned. All Ohioans will be

impacted every time that they seek to hire work done at their house if the changes with adoption of HCSSA in 2012 and changes to Ohio Consumer Sales Practices Act are ignored.

The Ohio Association of Civil Trial Attorneys (OACTA) is a statewide organization comprised of attorneys, corporate executives, and managers who defend civil lawsuits. OACTA has a strong interest in obtaining certainty and finality as to potential litigation for the construction industry, as well as business owners, whose members it represents. The Fifth District Court of Appeals' decision incorrectly held that CSPA applied to installation of a pool and removal and reinstallation of a new deck in *Estate of Katherine Tomlinson v. Mega Pool*; 22 CAE 030020 (January 26, 2023).

Subjecting pool installers and deck installers with treble damages and large attorney fees awards with the perpetual threat of litigation under CSPA will result in an adverse impact on their industry cannot be overstated. Indeed, under this constant threat of litigation, pool installers or deck installers may well choose to leave the business, which will negatively impact the costs and quality of construction in Ohio. New business owners will be reluctant to open operations here, which will cause the loss of economic growth and job opportunities for all Ohioans.

This case is of great public interest because it presents crucial questions for the future enforcement of HCSSA, as it applies to remodeling construction services throughout the State of Ohio. Does the HCSSA, rather than the CSPA, apply to a transaction involving the installation of residential pool or residential deck? Unless the decision below is reversed, the Court of Appeals' decision will undermine the adoption of the HCSSA for pool and deck installers, and remodeling industry, and adversely impact the entire statewide home construction industry. All home remodeling contracts will be governed by the CSPA, subjecting those contractors to all the provisions under the CSPA, including, but not limited to treble damages and large attorney's fees

awards. Therefore, and as outlined further below, Amici respectfully urges this Court to reverse the Fifth District Court of Appeals' decision on Consumer Sales Practices Act.

STATEMENT OF THE CASE

Amici hereby respectfully defers to and adopts the Statement of the Case presented by Appellants.

STATEMENT OF FACTS

Amici hereby respectfully defers to and adopts the Statement of Facts presented by Appellants.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW I

***Residential remodeling services are exempted from the definition of
"consumer transaction" under the Ohio Consumer Sales Practices Act.***

Before 2012 Amendments, in 2010, CSPA codified in R.C. 1345.01(A) defined "consumer transaction" to:

‘mean[]’ a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

But, R.C. 1345.01 further defined what "Consumer transaction" does not include:

“*** transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions between certified public accountants or public accountants and their clients; transactions between

attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.”

Thus, the Ohio legislature defined “consumer transaction” to include enumerated list of transactions, but at the same time was specifically limited by further enumerated exemptions.

In 2012, the Ohio legislature amended the statute to add to the enumerated list of exemptions—“consumer transaction” does not include * * * transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code.” *Accord* 2011 Ohio HB 383. As a result, transactions that *may* have met the definition of “consumer transaction” were now exempted from the CSPA if they constituted “transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code.”

CSPA is not applicable to the underlying dispute regarding the installation of a deck and in-ground pool because the construction of a deck and swimming pool is specifically exempt from the definition of a consumer transaction under the CSPA. R.C. 1345.01(A) defines “consumer transaction,” in pertinent part, as:

A sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.

The second sentence states that:

"Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions involving **a home construction service contract as defined in**

section 4722.01 of the Revised Code; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services. (“emphasis added”).

With the adding of another exemption in 2012, the Appellants are seeking for the court to provide its analysis of “transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code.” *Id.* R.C. 4722.01(B) defines “home construction service” as “the construction of a residential building.” In turn, “residential building” is defined as “a one-, two-, or three-family dwelling and any accessory construction incidental to the dwelling.” R.C. 4722.01(F).

Since the CSPA does not define the term “accessory”, the courts should ““give[n its] plain and ordinary meaning * * *. *Anderson v. Barclay’s Capital Real Estate Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, ¶ 29. Ohio Supreme Court and multiple Ohio appellate districts have found “accessory” in the context of real property to mean a construction of a subordinate nature attached to or detached from the principal structure or use, including, fences, walls, sheds, garages, *decks*, *swimming pools*, billboards, hot tubs; gazebos, etc. (Emphasis added.) *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 156 (2000); *Baruk v. Heritage Club Homeowners’ Ass’n*, 12th Dist. Warren No. CA2013-09-086, 2014-Ohio-1585, 42; *Cleveland Clinic Found, v. Bd. of Zoning Appeals*, Cuyahoga C.P. No. CV-11-749791, 2014 Ohio Misc. LEXIS 3598, * 7 (Dec. 8, 2014). Multiple Ohio appellate courts have found that a swimming pool is an accessory use of a property. *Willow Grove, Ltd. v. Olmstead Twp. Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 109319, 2021-Ohio-2510 ¶ 34); *Bierlein v. Grandview Heights Bd. of Zoning Appeals Grandview Heights*, 10th Dist. Franklin No. 1-8AP-874, 2020-Ohio-1395, ¶ 30; *Homan v.*

Franklin Twp. Bd. of Zoning Appeals, 3d Dist. Mercer No. 10-18-04, 2018-Ohio-3717, f 29.

“[T]ransactions involving a home construction service contract as defined in [R.C.] 4722.01” was added to the CSPA definition, and the CSPA unambiguously provides that “consumer transaction” does not include transactions involving certain family dwellings and any accessory construction, such as decks or swimming pools. The CSPA has no application where a transaction does not constitute a “consumer transaction” within the meaning of R.C. 1345.01. *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 114-15. The language of the new amendment itself excludes residential decks and in-ground swimming pools because it now excludes “home construction service contract[s]” as defined by R.C. 4722.01. R.C. 4722.01 enacted in August of 2012, prohibits certain deceptive acts in home construction service and seeks to protect individual homeowners entering into such contracts. The installation of the pool and deck in this matter was not subject to the CSPA, but rather the HCSSC.

R.C. 4722.01(C) defines "home construction service contract" as "a contract between an owner and a supplier to perform home construction services, including services rendered based on a cost-plus contract, for an amount exceeding twenty-five thousand dollars." R.C. 4722.01(B) defines "home construction service" as "[T]he construction of a residential building." R.C. 4722.01(F) defines "residential building" as "a one-, two-, or three-family dwelling and any accessory construction incidental to the dwelling." The CSPA does not apply to this case, because a swimming pool is "an accessory construction incidental to the dwelling" and therefore covered by R.C. 4722.01(F).

In *Beder*, the court found the CSPA and not the HSCCA applies to a home remodeling contract as the CSPA applies to transactions involving an already-existing construction and the HSCCA applies to new constructions. In arriving at its decision, the court in *Beder* relied on:

The Supreme Court of Ohio has previously defined "construct" as "to *build*; put together; make ready for use" and "construction" as "[t]he *creation of something new*, as distinguished from the repair or improvement of something already existing." (Emphasis sic.) *State ex rel. Celebrezze v. Natl, Lime & Stone Co.*, 68 Ohio St.3d 377, 382 627 N.E.2d 538 (1994), quoting Black's Law Dictionary 312 (6th Ed.1990); see also *United States v. Narragansett Improvement Co.*, 571 F.Supp. 688, 693 (D.R.I. 1983) ("The uniform conclusion is that 'construction' imports the creation of something new and original that did not exist before").

The Fifth District Court of Appeals in this case relying on *Beder* improperly held that the addition of the swimming pool and improvement of the existing concrete deck at Tomlinson's home was an improvement to an already-existing home covered by the CSPA and not the HSCCA.

Addressing *Celebrezze* decision, the current definition of "construction" in Black's Law Dictionary no longer expressly distinguishes between "new" and "existing." Moreover, the *Celebrezze* court's focus was on "whether the replacement of [a particular] mill in 1987 with a virtually identical mill constituted the 'installation' of an air contaminant source, as that term is defined and set forth in relevant administrative rules." *Id.* at 381. The Court's definition of "construction" in *Celebrezze* was dicta and used 18 years prior to the enactment of the HCSSA. The definition of construction has changed and the legislative history of the HCSSA and modification of CSPA establish that.

Initially, HCSSA defined "home construction service" as "the construction of a new residential building or the substantial rehabilitation of a residential building. 'Home construction service' does not include construction performed on a structure that contains four or more dwelling units, except for work on an individual dwelling unit within that structure, or construction performed on the common area of a condominium property." 2012 Am.Sub. H.B. No. 383. "Home

construction service" eliminated "new" and "substantial rehabilitation of a residential building" from its definition and this modification evidences an intention for the HCSSA to include work not only on new buildings but also existing structures. The inclusion of "work on an individual dwelling unit within that structure" in R.C. 4722.01 would effectively make the definition meaningless if limited to the construction of new structures, and not modifications of existing structures. Since "construction" is not defined by R.C. 4722.01, this court should use the definition the General Assembly has recently used in R.C. 4115.03(B)(2) to define construction to include new work and remodeling, that is consistent with the current common, ordinary, and accepted meaning of "construction".

Accordingly, Appellants request the trial court's judgment be vacated and a new jury trial ordered with the CSPA claims dismissed.

PROPOSITION OF LAW II

The Ohio Home Construction Service Supplier Act, rather than the Ohio Consumer Sales Practices Act, applies to a transaction involving the remodeling of an existing residential building.

The HCSSA applies to a transaction involving the remodeling of an existing residential dwelling and that not CSPA which only applies to "consumer transactions." See, e.g., R.C. 1345.02 and 1345.03. See also *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 653-58 (2016); *Dillon v. Farmers Ins. of Columbus, Inc.*, 145 Ohio 7St.3d 133, 137-38 (2015); *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, r-133-37 (2013). The term "consumer transaction" for purposes of the CSPA is expressly defined by R.C. 1345.01(A) and what is excluded as an exemption includes a "home construction service contract" under the

HCSSA. The HCSSA does not require that construction services be performed on a “new” structure, as opposed to on an existing structure, to qualify as “home construction services”. What constitutes a “new” structure considering if a new residential home is built, while the swimming pool contractor builds the swimming pool 10 months later, even though they were purchased at the same time. The Appellants ask many questions that could lead to inconsistent results which Ohio legislature had the foresight to craft the statute to eliminate these illogical scenarios but Fifth District Court of Appeals caused again with the issuance of its decision and reliance on *Beder* which this Court must clarify for Ohioans.

The initial version of House Bill 383 now known as HCSSA, when introduced on November 17, 2011, defined “home construction services” as follows: “Home construction service” means the construction of a new residential building or the substantial rehabilitation of a residential building. The term “new,” along with the phrase “the substantial rehabilitation of a residential building,” were ultimately removed from the final version when enacted into law. If the Ohio General Assembly intention was for HGSSA only apply to new construction then the term “new” in the final version of statute would not have been removed as well removing the phrase “the substantial rehabilitation of a residential building.” R.C. 2744.01(B) specifies that “[h]ome construction service” does not include construction performed on a structure that contains four or more dwelling units, except for work on an individual dwelling unit within that structure, or construction performed on the common area of a condominium property.” Construction services performed on certain existing residential structures are in fact subject to the HCSSA.

The “consumer transaction” definition explicitly incorporates the CSPA’s exemption of “home construction service contract.” and whether the contract in this case meets the parameters of the exemption, in R.C. 1345.01, is the question for this court. Here, Appellants were hired to construct a deck and in-ground swimming pool for Appellee, which are a subordinate structures to the principal residence, within the exemption set forth in CSPA’s definition of “consumer transaction” requiring the trial court’s judgment be vacated and a new jury trial ordered with the CSPA claims dismissed.

The Court of Appeals reliance on antiquated definition of ‘construction’ and lack of consideration for both the practical aspects of remodeling, and the legislature’s intent in adopting HCSSA was to include remodeling services under this statute. With the adoption of the HCSSA, transactions involving a “home construction service contract” under the HCSSA do not constitute a “consumer transaction” for purposes of CSPA.

Further, the explicit contemplation by R.C. 4722.01(C) of contracts “for an amount exceeding twenty-five thousand dollars” to be considered a “Home construction service contract” under the HCSSA, indicates the law is clear on the intention to apply to all home construction services contracted for a dollar amount from twenty- five thousand one dollar up to multi-million-dollar transactions. The legislature intended the HCSSA to apply to both new construction and remodeling and a finding to the contrary would be devastating to the residential construction industry creating an environment of chaos and crisis for the construction industry that will hurt **all** Ohioans.

Amici respectfully urges this Court to consider the Appellants' Merit Brief, in support of a reversal of the decision of the Fifth District Court of Appeals.

CONCLUSION

For all of the foregoing reasons, Amici respectfully urges this Court to reverse the decision of the Fifth District Court of Appeals' decision incorrectly held that Consumer Sales Practices Act applied to installation of a pool and removal and reinstallation of a new deck in *Estate of Katherine Tomlinson v. Mega Pool*; 22 CAE 030020 (January 26, 2023).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by email to the following counsel of record on the 13th day of March, 2023:

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